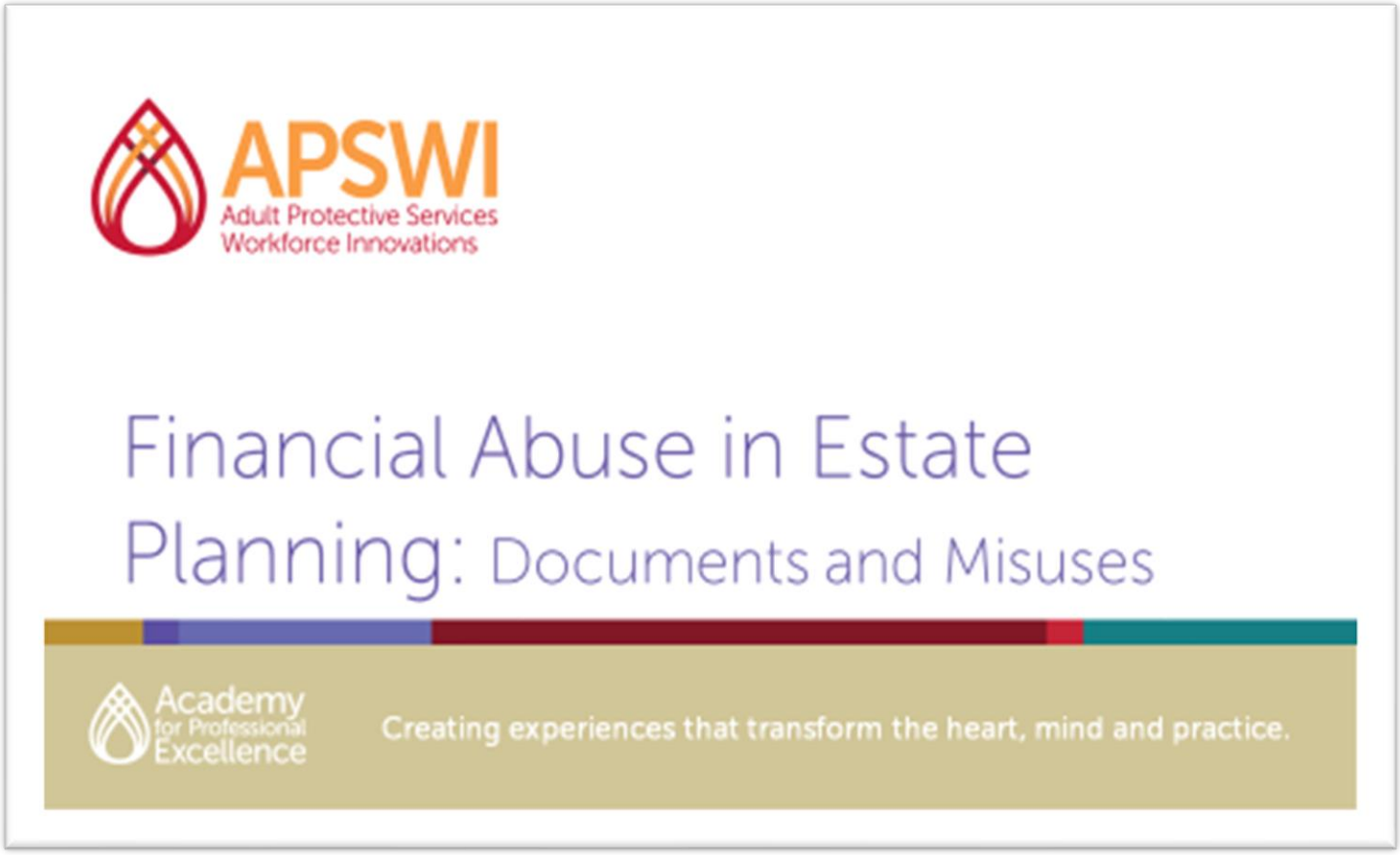
TRAINER MANUAL



This training was developed by the Academy for Professional Excellence, with funding from the California Department of Social Services, Adult Programs Division.

Curriculum Developer, 2019
Kira Wattenburg King, JD

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INTRODUCTION

THE ACADEMY FOR PROFESSIONAL EXCELLENCE

We are pleased to welcome you to the Financial Abuse in Estate Planning: Documents and Misuses, Trainer Manual, developed by APSWI, a program of the Academy for Professional Excellence under a grant from the California Department of Social Services, Adult Programs Division.

The Academy for Professional Excellence, a project of San Diego State University School of Social Work, was established in 1996 to provide exceptional workforce development and organizational support to the health and human services community by providing training, technical assistance, organizational development, research, and evaluation. Serving over 20,000 people annually, the Academy continues to grow with new programs and a diversity of training focused on serving the health and human services community in Southern California and beyond.

The Academy is a project of San Diego State University School of Social Work (founded in 1963), which offers both a bachelor's and master's degree in Social Work. The School of Social Work at San Diego State University was founded in 1963 and has been continuously accredited by the Council of Social Work Education since 1966.

APSWI (Adult Protective Services Workforce Innovation) is a program of the Academy for Professional Excellence. APSWI is designed to provide competency-based, multidisciplinary training to Adult Protective Services professionals and their partners. APSWI's overarching goal is the professionalization of Adult Protective Services professionals to ensure that abused and vulnerable older adults and adults with disabilities receive high quality, effective interventions and services. In partnership with state and national organizations, APSWI has developed a nationally recognized Core Competency Training Curriculum for Adult Protective Services professionals. This curriculum is reviewed and approved by experts in the elder and dependent adult abuse fields.

APSWI's partners include:

- National Adult Protective Services Association (NAPSA) Education Committee
- California Department of Social Services (CDSS), Adult Programs Division
- County Welfare Directors Association of California (CWDA), Protective Services Operations Committee (PSOC)

PARTNER ORGANIZATIONS

Dawn Gibbons-McWayne
Program Manager, APSWI
Academy for Professional Excellence
https://theacademy.sdsu.edu/programs/

Kat Preston-Wager
Curriculum Development Specialist, APSWI
Academy for Professional Excellence
https://theacademy.sdsu.edu/programs/

Lori Delagrammatikas
Executive Director
National Adult Protective Services Association (NAPSA)
napsa-now.org

Paul Needham
Chair
NAPSA Education Committee
napsa-now.org

Lori Delagrammatikas
Adult Protective Services Liaison (former)
Adult Protective Services Division
California Dept. of Public Social Services
cdss.ca.gov/Adult-Protective-Services

Valerie Smith and Allison Yant
Co-Chair Co-Chair
Protective Services Operations Committee of
the County Welfare Director's Association
cwda.org/about-cwda

THE ACADEMY FOR PROFESSIONAL EXCELLENCE

6505 Alvarado Road, Suite 107, San Diego, CA 92120

Tel: (619)594-3546 – Fax: (619)594-1118 – http://theacademy.sdsu.edu/programs/

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Agencies

California Department of Social Services, Adult Programs Division
County of Los Angeles Workforce Development, Aging and Community Services
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Riverside County Department of Public Social Services
San Bernardino County Department of Aging and Adult Services
County of San Diego Aging & Independence Services

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Ralph Pascual, Human Services Administrator I, Los Angeles County
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San Bernardino County
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Curriculum Developer 2019

Kira Wattenburg King, JD

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HOW TO USE THIS MANUAL

- Training topics are in **bold** with expected time.
- Actions which the trainer takes during the training are written in **bold.**

Trainer Notes are entirely written in bold text box and are provided as helpful hints, based on feedback from the pilot.

- The Trainer Manual and Participant Manual differ in page numbers. It's suggested you make note of activities and handout page numbers from the Participant Manual for ease.

Use of language: Throughout the manual, client is used most to describe the individual at the center of the APS investigation. However, if concept or material was directly quoted from copyrighted material, the term victim is used. Also, alleged perpetrator is used to describe the person alleged to have committed the abuse or neglect. However, if concept or material was directly quoted from copyrighted material, the term abuser is used.

He and she has been replaced with the gender-neutral they throughout this manual, unless quoted from copyrighted material. This should not be thought of as plural persons, but rather a gender-neutral term describing all humans.

Customizing the Power Point:
This manual is set up so that the trainer script/ background material is on the same page as the accompanying Power Point slide.

Hide a slide instructions:

1. On the **Slides** tab in normal view, select the slide you want to hide.
2. On the **Slide Show** menu, click **Hide Slide**.

The slide number will have line through it to show you have hidden it.

NOTE: The slide remains in your file even though it is hidden when you run the presentation.

The course outline, provided in the next section of this manual, is the class schedule used during the piloting of this training. It can be used to help determine how much time is needed to present each section. However, times will vary based on the experience and engagement of the audience.

Total content of material is 5.5 hours, with two 15-min breaks and one hour lunch built in for a 7 hour day.

TRAINER GUIDELINES

This advance training must be facilitated by someone with considerable experience working with Estate Planning, preferably an Attorney. It may also be helpful to have an APS Trainer co-facilitate as well.

Teaching Strategies	**The following instructional strategies are used:** ♦ Lecture segments ♦ Interactive exercises (e.g. Table Top Activities, experiential exercises, role plays) ♦ Question/answer periods ♦ Slides ♦ Participant Manual (encourages self-questioning and interaction with the content information)
Materials and Equipment	**The following materials are provided and/or recommended:** ♦ Computer with LCD (digital projector) ♦ USB or other storage device with the slide presentations ♦ Easel/Flipchart paper/markers/highlighters ♦ Printed Copies of Handout #7-Revocable Living Trust Sample (found in Course Materials at https://theacademy.sdsu.edu/programs/apswi/advanced-training/) ♦ Trainer Manual: This manual includes the course overview, introductory and instructional activities, and reference materials. ♦ Participant Manual: This manual includes a table of contents, course introduction, and all training activities/handouts, with the exception of Handout #7. ♦ Name tags/names tents ♦ Water access/snacks/restroom access/lunch plans

EXECUTIVE SUMMARY

Course Title: *Financial Abuse in Estate Planning: Documents and Misuses*

In this interactive and thought-provoking advance training, participants learn the foundations of estate planning and its relation to financial abuse. They learn how to identify estate planning documents to enhance their investigations into financial abuse allegations including specific areas of actual and potential abuse. Participants will gain insight into the use and role of conservatorships for their clients and learn investigation and interviewing techniques including how to document their investigations so that they are more likely to be accepted for prosecution.

The following instructional strategies are used: lecture segments; interactive activities/exercises (e.g. small group discussion and document identification); question/answer periods; PowerPoint slides; participant manual (encourages self-questioning and interaction with the content information);

Course Requirements: It is suggested that participants have a year of experience investigating financial abuse allegations and understanding of interview techniques.

Outcome Objectives for Participants:

By the end of this training, participants will be able to:

1. Identify all relevant estate planning documents
2. Recognize the role and list options for Conservatorships in relation to financial abuse
3. Understand mental capacity as it relates to estate planning
4. Identify how to access and use estate planning documents for investigations into financial abuse
5. Demonstrate important documentation skills for investigations for maximum potential of prosecution of financial abuse.

After this course, APS professionals will have gained increased confidence and knowledge in navigating estate planning concerns and areas for potential abuse.

Target Audience: This course is designed for experienced APS professionals as well as Aging & Adult Service partners (e.g. In-Home Supportive Services, Long-Term Care Ombudsman).

Course Outline

CONTENT	MATERIALS	TIME
WELCOME, INTRODUCTIONS, COURSE OVERVIEW	*Handout #1-Terms and Their Meanings*	**TOTAL: 20 minutes**
ESTATE PLANNING OVERVIEW		**TOTAL: 15 minutes**
Lecturette: Estate Planning Overview	*Shout Out: What does Estate Planning Mean to you?*	**5 minutes**
Lecturette: Who Needs an Estate Plan?		**5 minutes**
Lecturette: California Small Estates	*Shout-Out: Size of Estates- Handout #2-Small Affidavit*	**5 minutes**
ESTATE PLANNING DOCUMENTS		**TOTAL: 215 minutes**
Pre and Post Death Estate Planning Documents Overview		**10 minutes**
Class Discussion: Financial Abuse Risk	*PowerPoint Slide #10*	**10 minutes**
Lecturette: Financial Powers of Attorney	*Shout-Out: Clients with POAs*	**5 minutes**
BREAK		**15 minutes**
Activity #2: Verifying POAs with client (Large Group)	*Nathan and Jamal Case Scenario*	**15 minutes**
Activity #3: Understanding the Forms (Table Groups)	*Sample Financial POA: Short and Long Forms- Handouts #3 &#4*	**30 minutes**
Lecturette: Powers Granted by Financial POA		**5 minutes**

Lecturette: Conservatorships		**10 minutes**
Lecturette: Medical Powers of Attorney	*Handout #5- Standard CA Health Care POA*	**15 minutes**
LUNCH		**60 Minutes**
Class Discussion: Witness or Notarize?		**5 minutes**
Activity #4: Reviewing a client's POA (Table Groups)		**15 minutes**
Class Discussion: HIPPA	*Handout #6- HIPPA Authorization* *Shout-Out: Post-Death Documents; Trust or Will?*	**5 minutes**
Lecturette: Revocable Living Trust	*Handout #7- Revocable Living Trust Sample (NOT IN THIS MANUAL, see Trainer Guidelines for link)*	**15 minutes**
Lecturette: Funding: Titling Assets in the Name of your Living Trust		**10 minutes**
Class Discussion: Transferring Assets After Death		**5 minutes**
BREAK		**15 minutes**
Lecturette: Prudent/Reasonable/Conservative	*Shout-Out: Removing an Agent/Trustee*	**5 minutes**
Activity #5: Reviewing a Trust (table groups)	*Handout #7* *Shout-Out: Other Type of Trust*	**15 minutes**
Activity #6: Concerns and Remedies for Clients	*Richard, Georgette and Doug case scenario*	**10 minutes**
Lecturette: Wills	*Handouts #8, #9, #10*	**15 minutes**
Activity #7: Wrap-up-Estate Planning Red-Flags	*Case scenario*	**15 minutes**

INVESTIGATING AND DOCUMENTING		**60 minutes**
Lecturette: Financial Abuse Investigations	*Handout #11- APS Financial Abuse Checklist*	**10 minutes**
Lecturette: Financial Abuse Jury Instruction	*CalCrim Jury Instruction 1807*	**5 minutes**
Activity #8: Theft from an Elder	*PowerPoint Slide #44*	**15 minutes**
Lecturette: Locating Trusts, FPOAs, HCPOAs, & Grand Deeds		**5 minutes**
Lecturette: Executing Financial Documents: Legal Capacity		**10 minutes**
WRAP-UP & EVALUATIONS		**TOTAL:** **20 minutes**
TOTAL (INCLUDING LUNCH AND BREAKS)		**7 hours**

Prior to Commencement of the Class

Activity #1: TERMS AND THEIR MEANING

Trainer Note:
On chart paper ask participants to review Handout #1- Terms and Their Meaning as they are settling in. Write down that these will be used throughout the training and this review will help explain some terminology.

TERMS AND THEIR MEANINGS

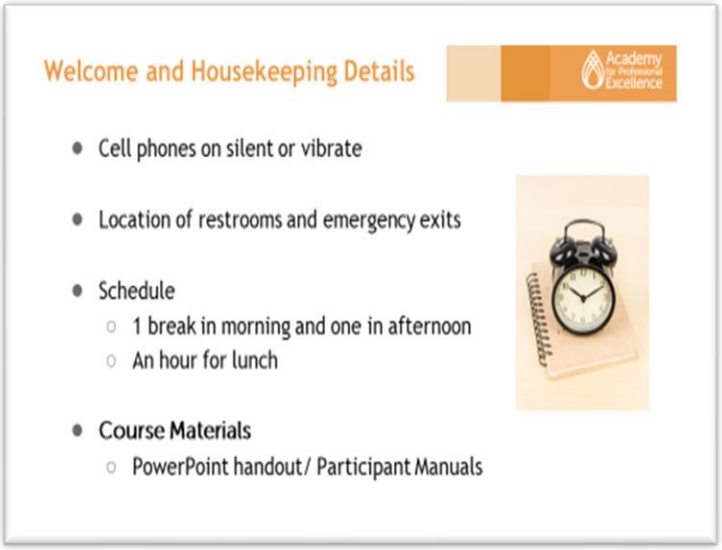
HANDOUT #1

TERM	DEFINITION
Administrator	The administrator of a persons estate who has no will or trust appointed by the probate court
Agent	The person who is appointed by and acts on behalf of the Principal under a Power of Attorney
Decisional Capacity	The ability to receive and evaluate information and meet essential needs for personal health and safety
Durable Power of Attorney	Remains effective even if you become disabled or lack the mental competence to understand and handle your financial and personal affairs.
Executive/Legal Capacity	The ability to manage ones finances, home, personal needs, medications, enter into contracts
Executor	The administrator of a persons estate designated in a Will and appointed by the probate court
Financial Power of Attorney	A document that designates an individual to act on your behalf with regard to your financial, business and legal matters while you are alive
General Conservatorship	Conservatorship over all of an adult's legal rights – personal and/or financial
Health Care Power of Attorney	A document that designates an individual to make medical decision on your behalf while you are incapacitated
HIPAA Authorization	A document authorizing individuals to access your private health care information
Intestate	When someone dies with no will or trust
Living Trust	Legal document which names someone to manage your estate and designates where your assets will go if you are incapacitated and after death and does not require probate to administer

LPS Conservatorship	Conservatorship for an adult who is unable to provide for their own needs for food, clothing or shelter as a result of a mental disorder or chronic alcoholism
Principal	The person who creates a Power of Attorney
Springing Power of Attorney	"Springs" into action when you become incapacitated.
Trustee	The administrator of a person estate designated in a Trust
Will	Legal document which names someone to manage your estate and designates where your assets will go after death and requires probate to administer

WELCOME AND INTRODUCTIONS
Time Allotted: 20 minutes

Slide #1: Welcome and Housekeeping



Welcome participants and briefly **introduce** self (selves if more than one trainer) with particular emphasis on experience working with or within the older/vulnerable adult and estate planning realm.

Ask participants to introduce selves by name, agency or assignment, and time working with older and vulnerable adults.

Review Housekeeping announcements:

- Turn off phones or place on silent.
- Location of restrooms and emergency exits
- Number and length of breaks in training day and lunch duration (on own)
- Other...

Slide #3: Experience with Estate Planning



Ask participants to write in their participant manuals on a scale from 1-10 (1 being very little, 10 being a lot) their exposure to and knowledge with Estate Planning either personally or professionally. **Encourge** them to write down their successes and challenges with Estate Planning.

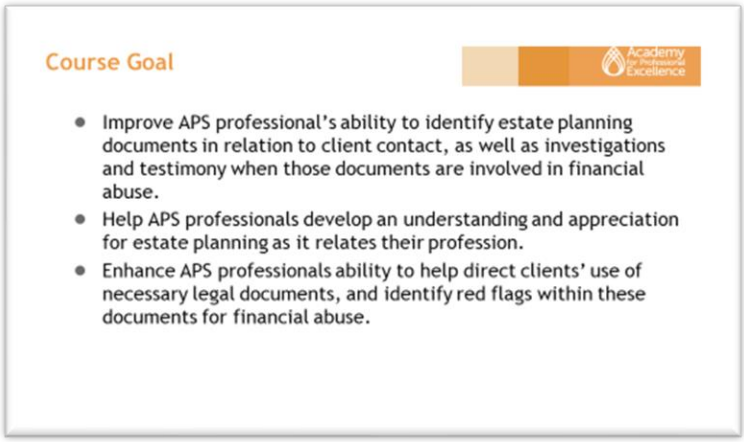
After they've done this individually**, ask** by a show of hands, how many have investigated Estate Planning financial abuse allegations

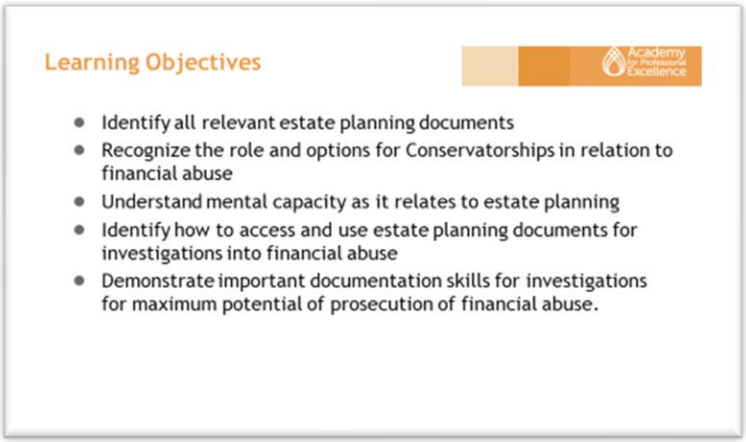
- **Solicit** a few responses on their experiences and their fears or concerns.

Ask by a show of hands, how many have testified in these cases.

- **Solicit** a few responses on their experiences and their fears or concerns.

Slides #4 & #5: Course Goal & Learning Objectives





Review course goal and learning objectives:

Explain:
The purpose of this training day is to improve your ability to identify estate planning documents in relation to your client contact, as well investigations and testimony when those documents are involved in Financial Abuse. This module is designed to help APS professionals develop an understanding and appreciation for estate planning as it relates to your jobs supporting our adult population, but NOT to make them a detective, attorney or an estate planner.

APS will remain client focused but understanding the nature and uses of Estate Planning documents that you will inevitably come in contact with, will advance your ability to help direct your clients' use of necessary legal documents, and will help you identify red flags within these documents for financial abuse.

Learning Objectives:

1. Identify all relevant estate planning documents
2. Recognize the role and list options for Conservatorships in relation to financial abuse
3. Understand mental capacity as it relates to estate planning
4. Identify how to access and use estate planning documents for investigations into financial abuse
5. Demonstrate important documentation skills for investigations for maximum potential of prosecution of financial abuse.

ESTATE PLANNING OVERVIEW
Time Allotted: 15 minutes

Slide #6: What is Estate Planning (5 minutes)



Discuss - we are going to talk about Estate Planning and briefly about other options to help clients financially, such as Conservatorships. Keep in mind there are various options for clients depending on their circumstances.

Shout Out:

Ask: "What does Estate Planning mean to you?"

Possible answers might include:
Creating a will, choosing a beneficiary, assigning a FPOA, choosing minor guardianship

Lecturette: Estate Planning Overview

Explain: *Estate planning is a process*. It involves:

- People—your family, other individuals and, in many cases, charitable organizations of your choice.
- Your assets (your property) and the various forms of ownership and title that those assets may take.
- Addresses your future needs in case you ever become incapacitated - mentally or physically unable to care for yourself.

Continued

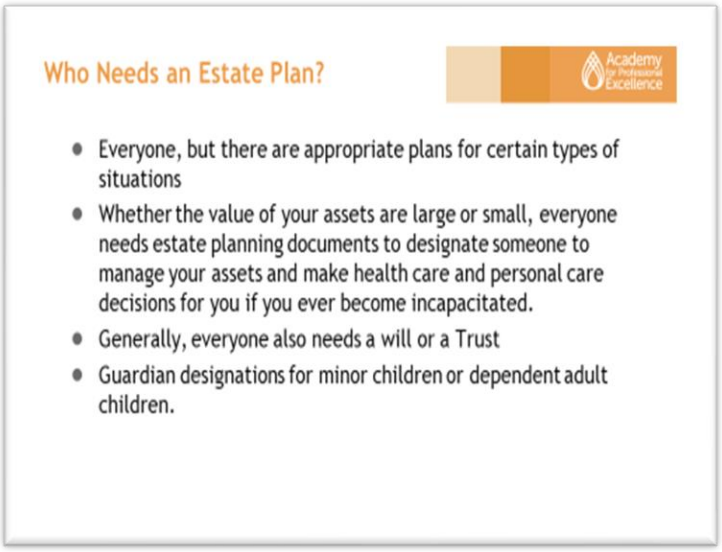
Acknowledge: Many people mistakenly think that estate planning only involves the writing of a will or is only needed if you are wealthy. Estate planning, however, can also involve financial, tax, medical and business planning. A will is part of the planning process, but you will need other documents as well to fully address your estate planning needs. We will be discussing all of the relevant and necessary documents but first consider what is involved in estate planning.

Explain: There are many life issues to consider in creating an estate plan: Estate planning includes:

- What are your assets and what is their value
- Whom do I want to receive those assets—and when, during life or after
- Who should manage those assets if I am incapacitated and after my death
- Who will be responsible for taking care of my minor children/dependent adults if I am incapacitated or die
- Who will make my medical and financial decisions if I am incapacitated
- After death authority for autopsy/burial and what are your wishes

Explain: There are generally different courts for civil and criminal cases. There is also generally a separate division that covers Family (lide divorce) and Probate matters.

Slide #7: Who Needs an Estate Plan?



Ask: Who Needs an Estate Plan?
Answer: Everyone, but there are appropriate plans for certain types of situations

Whether the value of your assets are large or small, everyone needs estate planning documents to designate someone to manage your assets and make health care and personal care decisions for you if you ever become incapacitated. Generally, everyone also needs a Will or a Trust but this may not be appropriate in all cases. At a minimum, health care and financial powers of attorney as well as guardian designations for minor children or dependent adult children.

Explain: Today's training contains information that every participant can use personally, not just as knowledge for their employment. An additional benefit of this training today is that participants receive individual knowledge for their personal lives

Slide #8: Legal Description of Small Estate in California (5 minutes)



Trainer Note: Ask the Shout Out before advancing the slide.

Shout out: What do you think qualifies as a small estate or large estate?

Possible answers may include:
Small: 10-100k, Less than 150k, no ownership in real estate,
Large: 100k-Million or over, Over 150k, ownership in real estate.

Explain: Just as mentioned above, no matter your estate value, everyone should have pre-death planning documents such as health and financial powers of attorney. The dividing line is death - These documents die with you, then some people, depending on the value of your estate need further estate planning documents like a Will or Trust after death to distribute their assets to their heirs.

Why: In California (can be different in different states), if you die without any estate planning documents, your heirs can get ahold of your estate by signing an affidavit, (a declaration by the person signing that what they are stating is true, under the penalty of perjury), that they are the only living heirs to your estate, the value of your estate is less than $150,000 and that 40 days have passed since your death. "Small Estate Affidavit"

Refer participants to – **Handout #2 Small Estate Affidavit** and **encourage** them to look over as you explain the document.

Explain: Think about the nature of your assets. Some are bank accounts, some have a title document like a Deed for a house or a title for a car, and many of our assets these days are in retirement accounts.

Continued

Ask: How and under what legal authority will your heirs be able to sign and transfer those documents and thus ownership after your death?

Possible Answers:
Co-ownership such as Joint Tenants or Community Property for a house deed or co-owner (not just a co-signer) on a bank account. In these cases, the co-owner will own the asset solely upon the other's death.

Explain other legal possible ways are through the court probate process when someone receives authority by the court to transfer assets, or by Trusts.

Retirement accounts and life insurance pay out to who is listed on the beneficiary forms.

Small Estate Affidavit
California Probate Code Section 13101

HANDOUT #2

The undersigned state(s) as follows:

1. _____ died on _____(date), in the County of _____, State of California.

2. At least 40 days have elapsed since the death of the decedent, as shown by the attached certified copy of the decedent's death certificate. (Attach certified death certificate)

3. Either:

☐ No proceeding is now being or has been conducted in California for administration of the decedent's estate.

☐ The decedent's personal representative has consented in writing to the payment, transfer, or delivery to the affiant or declarant of the property described in the affidavit or declaration.

4. The current gross fair market value of the decedent's real and personal property in California, excluding the property described in Section 13050 of the California Probate Code, does not exceed one hundred fifty thousand dollars ($150,000).

5. The following property to be paid, transferred, or delivered to the affiant(s) under the provisions of California Probate Code section 13101:
(***Describe property – i.e., Bank XYZ account #:…)***

6. The successor(s) of the decedent, as defined in Probate Code Section 13006 is/are:
(***List all heirs by law***)

7. Either:

☐ The undersigned are the successors of the decedent (as defined in Section 13006 of the California Probate Code) to the decedent's interest in the described property.

☐ The affiant or declarant is authorized under Section 13051 of the California Probate Code to act on behalf of the successor of the decedent (as defined in Section 13006 of the California Probate Code) with respect to the decedent's interest in the described property.

8. No other person has a superior right to the interest of the decedent in the described property.

9. The affiant or declarant requests that the described property be paid, delivered, or transferred to the affiant or declarant.

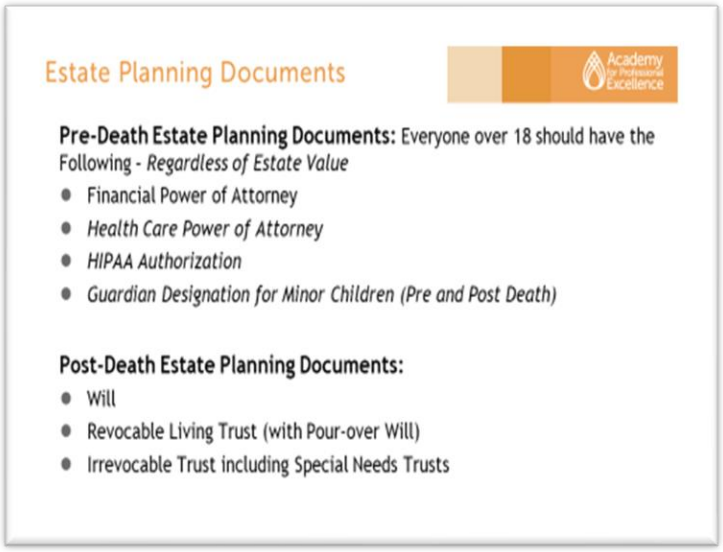
I/we affirm or declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

Dated: _____

ESTATE PLANNING DOCUMENTS
Time Allotted: 215 Minutes

Slide #9: Estate Planning Documents



Pre-Death Estate Planning Documents: (10 Minutes)

Everyone over 18 should have the Following – *Regardless of Estate Value*

- Financial Power of Attorney
- Health Care Power of Attorney
- HIPAA Authorization
- Guardian Designation for Minor Children (Pre and Post Death)

Post-Death Estate Planning Documents:

- Will
- Revocable Living Trust (with Pour-over Will)
- Irrevocable Trust including Special Needs Trusts

Discuss: Let's talk now about the specific estate planning documents that you might come in contact with as an APS professional.

Precautionary self-help: Estate Planning documents can be done alone through a legal self-help like LegalZoom or Suze Orrman but generally and it's advisable to use a licensed professional attorney specializing in Estate Planning.

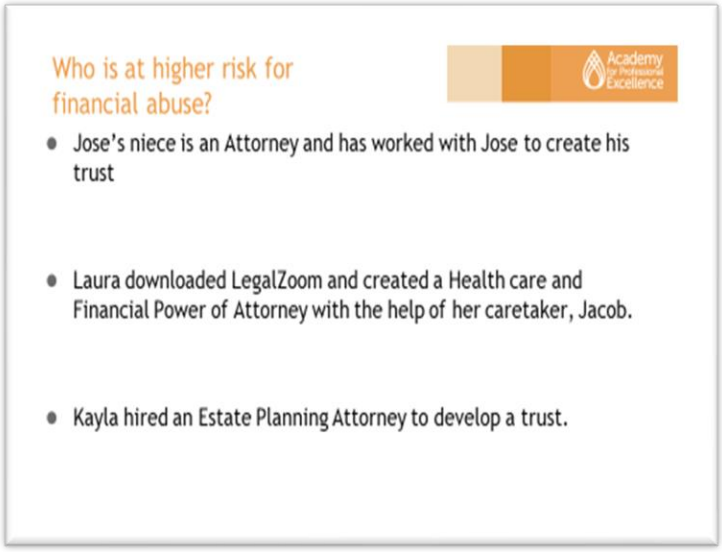
Continued

If you individually have capacity (which will be discussed briefly later) you can easily access various estate planning templates on-line, such as health care and financial powers of attorney (again explained in more detail next) and can/should prepare them for yourselves if you do not want to hire an attorney!

Discuss: Keep in mind as we discuss each of these estate planning documents, where you can see the potential for abuse.

- It is not often (but possible) for a professional preparer of estate planning documents to be involved directly with the abuse, but it does happen.
- Most often, the abuse happens with the undue influence of a caretaker or family member or when your client lacked capacity to prepare the documents that the caretaker or family member helped them prepare.

Slide #10: Who is at higher risk for financial abuse?



To start getting you thinking in terms of potential abuse, let's look at three estate planning preparation hypos: **(10 Minutes)**

a.) Jose's niece is an Attorney and has worked with Jose to create his trust
b.) Laura downloaded LegalZoom and created a Health care and Financial Power of Attorney with the help of her caretaker, Jacob.
c.) Kayla hired an Estate Planning Attorney to develop a trust.

Ask participants: "Out of these three, who do you believe might be most at risk for financial abuse and WHY? (**capture** their responses on a flip chart).

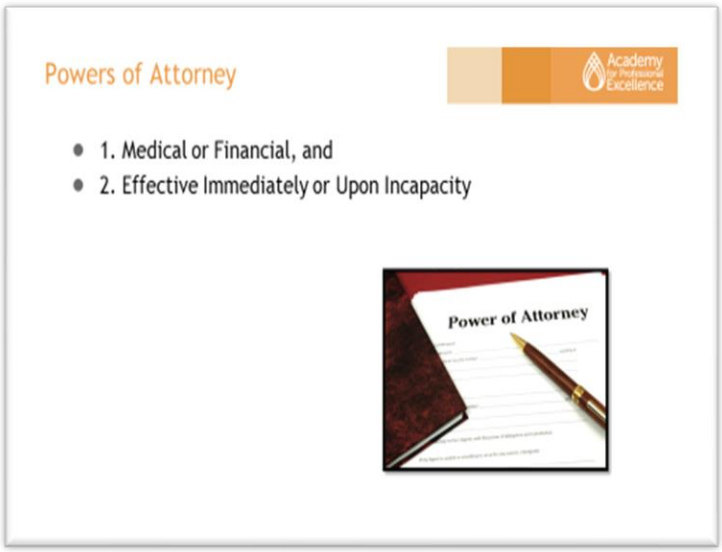
It's helpful to note that each of these situations could have positive outcomes as well. Not all nieces are going to take advantage of their uncles, Jacob might be truly helping the client, etc.

Acknowledge that anyone can be at risk for financial abuse, but when a client has used a self-help or non-attorney system for preparing their estate plan there is more availability for abuse by family members and care givers because they could more easily exude undue influence and abuse in the completion of the documents. Think about all of the possible additional information from the scenarios above that could lead to abuse.

However, generally speaking (with an ethical attorney) - When an attorney is involved, the attorney acts as an independent witness to the client's capacity and self-reliance in the process and documents prepared, so that undue influence and capacity are not at issue.

Trainer Note: Likely that the least possible for abuse was c. Kayla – but even then, she could have been unduly influenced by a caregiver or family member who facilitated the preparation. If the attorney was less than ethical, they could have been taking direction from the caregiver.

Slide #11: Powers of Attorney

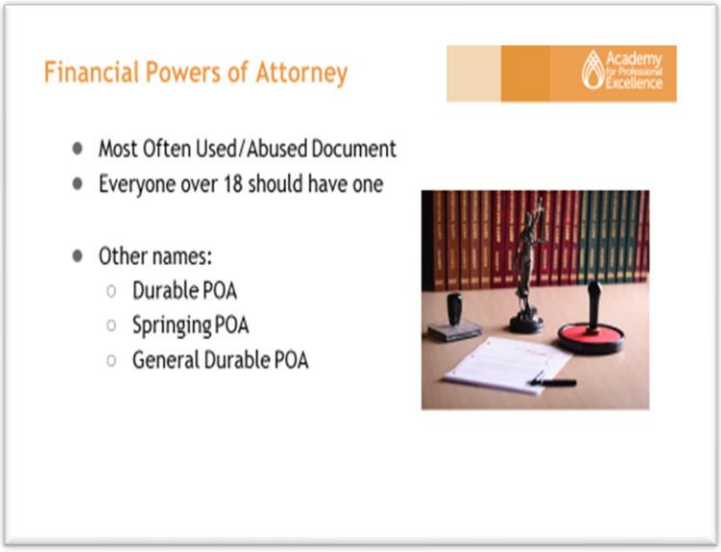


Explain that we will now take a look at the specific Estate Planning documents. (5 minutes)

1. Medical or Financial, and
2. Effective Immediately or upon incapacity.

Explain that in this next section, we'll be covering both in depth.

Slide #12: Financial Powers of Attorney



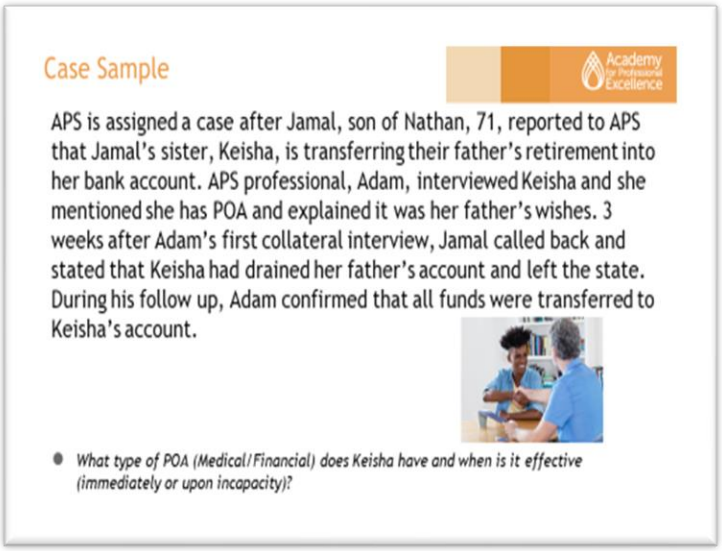
Inform participants this is the most often used/abused document and that everyone over 18 should have one.

Shout out: By a show of hands, how many have you heard: "I have Power of Attorney or POA" when speaking with collaterals or alleged perpetrators during your investigations?

Ask: How have you responded to this, what are some of the questions you might ask to ascertain what they mean?

Verbally take note of their answers, but don't give suggestions.

Slide #13: Case Sample - APS Professional was told daughter "has POA"



Let's take a look at a Case Sample to discuss this a bit more in depth:

Activity #2: Verifying POAs with Clients (15 min)

APS is assigned a case after Jamal, son of Nathan, 71, reported to APS that Jamal's sister, Keisha, is transferring their father's retirement into her bank account. APS professional, Adam, interviewed Keisha and she mentioned she has POA and explained it was her father's wishes. 3 weeks after Adam's first collateral interview, Jamal called back and stated that Keisha had drained her father's account and left the state. During his follow up, Adam confirmed that all funds were transferred to Keisha's account.

Ask: What could Adam improve on from the start in a future case with similar dynamics? What questions might he have asked up front?

Capture participant's answers on flip chart.

Possible Answers:
What type of POA does she have? Was she a co-owner, signer, did she have his ATM card and pin, can he see a copy of the POA, did Nathan have mental capacity at the time he executed the POA, does Nathan have a mental capacity diagnosis?

Trainer Note: Slide is animated to first display the scenario and then a helpful tip for APS for after participants share their response: If Keisha had POA, what type and when was it effective? – financial or medical, immediate or upon incapacity?!

Continued

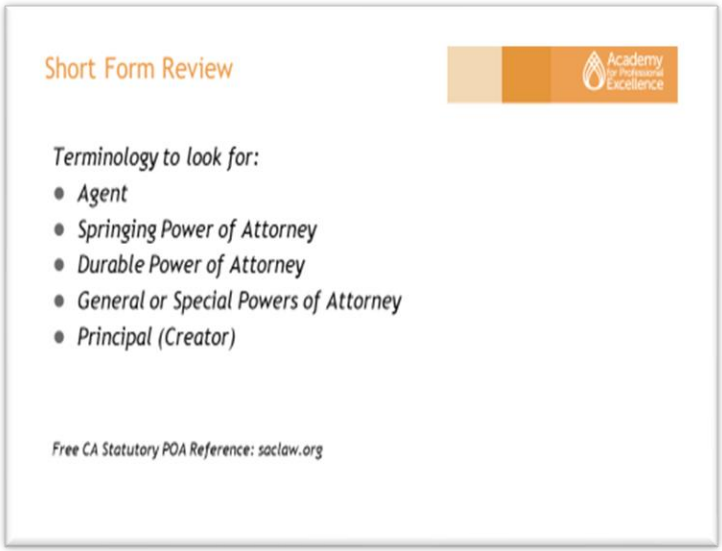
Discuss: Many caretakers or family members say they have authority under a "power of attorney" but what matters is the actual document that they are talking about and what the document actually says about their authority. If you can see a copy of the "power of attorney" they are talking about, you will be able to know if they have medical or financial power of attorney and when and under what circumstances that document becomes effective.

Discuss: Generally speaking, a Power of Attorney is a legal document authorizing someone as your Agent to make decisions for you if you are incapacitated or unavailable. A Power of Attorney for Financial Affairs designates an individual to act on your behalf with regard to your financial, business and legal matters, to the extent that you decide to allow that power. Your Agent literally "steps into your shoes" with full authority to sign your name but with the legal responsibility to act only in your best interests.

Every person over age 18 with any assets or financial responsibility should have a Power of Attorney for Financial Affairs.

Financial Power of Attorney - Goes by various names: Financial Power of Attorney, Durable Power of Attorney, Springing Power of Attorney, General Durable Power of Attorney

Slide #14: Short Form Review



It is very easy to complete a Financial Power of Attorney. Let's take a look at a standard short form of a Financial Power of Attorney, and then the long form.

Refer participants to **Handout #3-Short Version of a standard California Financial Powers of Attorney**

(Free Reference: Saclaw.org – California Statutory Power of Attorney)
Note: I add this free reference in because the Statutory short form is very easy to download and execute – Remember, everyone over the age of 18 should have one – including your adult children!

As participants look over the short form, **discuss**: Some terminology they may see:

- Principal – The person who creates a Power of Attorney
- Agent – The person who is nominated to handle your financial and personal affairs
- Springing Power of Attorney – "Springs" to action when you becomes incapacitated. The Agent will be able to act only when the "principal" (the signor of the power of attorney), becomes incapacitated.
- "Durable" Power of Attorney – It is "Durable" because it remains effective even if you become disabled or lack the mental competence to understand and handle your financial and personal affairs – ***it must be executed while you have capacity – ALWAYS*** – then will stay in effect or be "Durable" after you lack capacity.
- "General" or "Special" Powers of Attorney – General is for all things financial, and Special is for a specific reason, for example, to buy a house if your spouse is out of the country. Both may be limited by a period of time.

Uniform Statutory Form Power of Attorney

HANDOUT #3

(California Probate Code Section 4401)

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT (CALIFORNIA PROBATE CODE SECTIONS 4400–4465). THE POWERS LISTED IN THIS DOCUMENT DO NOT INCLUDE ALL POWERS THAT ARE AVAILABLE UNDER THE PROBATE CODE. ADDITIONAL POWERS AVAILABLE UNDER THE PROBATE CODE MAY BE ADDED BY SPECIFICALLY LISTING THEM UNDER THE SPECIAL INSTRUCTIONS SECTION OF THIS DOCUMENT. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTHCARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I, _____ (your name and address) appoint _____ _____ (name and address of the person appointed, or of each person appointed if you want to designate more than one) as my agent (attorney-in-fact) to act for me in any lawful way with respect to the following initialed subjects:

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS.

TO GRANT ONE OR MORE, BUT FEWER THAN ALL, OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF EACH POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF IT. YOU MAY, BUT NEED NOT, CROSS OUT EACH POWER WITHHELD.

_____	(A)	Real property transactions.
_____	(B)	Tangible personal property transactions.
_____	(C)	Stock and bond transactions.
_____	(D)	Commodity and option transactions.
_____	(E)	Banking and other financial institution transactions.
_____	(F)	Business operating transactions.
_____	(G)	Insurance and annuity transactions.
_____	(H)	Estate, trust, and other beneficiary transactions.
_____	(I)	Claims and litigation.
_____	(J)	Personal and family maintenance.
_____	(K)	Benefits from social security, medicare, medicaid, or other governmental programs, or civil or military service.
_____	(L)	Retirement plan transactions.
_____	(M)	Tax matters.
_____	(N)	ALL OF THE POWERS LISTED ABOVE.

YOU NEED NOT INITIAL ANY OTHER LINES IF YOU INITIAL LINE (N).

SPECIAL INSTRUCTIONS:

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

_____
_____
_____
_____
_____

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND

WILL CONTINUE UNTIL IT IS REVOKED.

This power of attorney will continue to be effective even though I become incapacitated.

STRIKE THE PRECEDING SENTENCE IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO CONTINUE IF YOU BECOME INCAPACITATED.

EXERCISE OF POWER OF ATTORNEY WHERE MORE THAN ONE AGENT DESIGNATED

If I have designated more than one agent, the agents are to act _____.

IF YOU APPOINTED MORE THAN ONE AGENT AND YOU WANT EACH AGENT TO BE ABLE TO ACT ALONE WITHOUT THE OTHER AGENT JOINING, WRITE THE WORD "SEPARATELY" IN THE BLANK SPACE ABOVE. IF YOU DO NOT INSERT ANY WORD IN THE BLANK SPACE, OR IF YOU INSERT THE WORD "JOINTLY," THEN ALL OF YOUR AGENTS MUST ACT OR SIGN TOGETHER.

I agree that any third party who receives a copy of this document may act under it. Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

Signed this _____ day of _____, _____.

_____
(your signature)

State of _____, County of _____,

BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, THE AGENT ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

State of California
County of _____

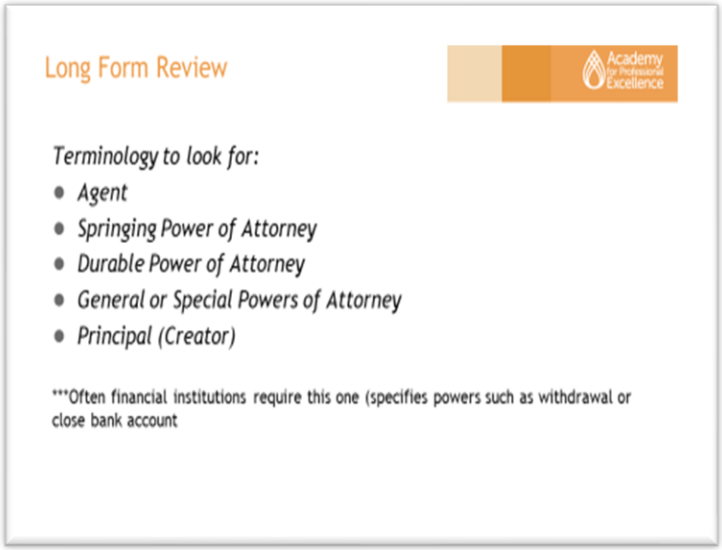
On_____before me, _____, personally appeared_____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)

Slide #15: Long Form Review



Explain:

The short form is legally sufficient, but sometimes financial institutions such as banks will not take the short form because it does not specify specific powers such as withdrawal or close a bank account. Let's take a look at the Long form of a Financial Power of Attorney.

Refer participants to **Handout #4 Sample long form Financial Power of Attorney.**

General Durable Power of Attorney of First Name Last Name

HANDOUT #4

I, First Name Last Name of City, California, am creating a Durable Power of Attorney under the laws of the State of California. I revoke all Powers of Attorney previously granted by me as Principal and terminate all agency relationships created by me except:

powers granted by me under any Advance Health Care Directive;

powers granted by me on forms provided by financial institutions granting the right to write checks on, deposit funds to, and withdraw funds from accounts to which I am a signatory; and

powers granting access to a safe-deposit box.

MY AGENT MAY NOT EXERCISE THE AUTHORITY GRANTED UNDER THIS POWER OF ATTORNEY UNTIL THE EVENTS DESCRIBED IN ARTICLE TWO HAVE OCCURRED.

Article One
Appointment of Agent

Section 1.01 Initial Agent

I appoint Agent #1 to serve as my Agent.

Section 1.02 Successor Agent

If Agent #1 fails to serve, I appoint Agent #2 to serve as successor Agent.

Section 1.03 No Person under 21 Years of Age May Serve as Agent

No person named as my Agent or successor Agent may serve until that person has reached 21 years of age.

Section 1.04 Prior or Joint Agent Unable to Act

A successor Agent or an Agent serving jointly with another Agent may establish that the acting Agent or joint Agent is no longer able to serve as Agent by signing an affidavit that states that the Agent is not available or is incapable of acting. The affidavit may be supported by a death certificate of the Agent, a certificate showing that a guardian or conservator has been appointed for the Agent, a physician's letter stating that the Agent is incapable of managing his or her own affairs, or a letter from the Agent stating his or her unwillingness to act or delegating his or her power to the successor Agent.

Article Two
Effectiveness of Appointment - Durability Provision

Section 2.01 Effectiveness

The authority granted to my Agent under this power of attorney will only become effective if I am incapacitated.

For all purposes of this power of attorney, I am incapacitated in any one of the following circumstances:

(a) The Opinion of Two Licensed Physicians

I am incapacitated whenever two licensed physicians provide written opinions that I cannot effectively manage my property or financial affairs due to age; illness; use of prescription medications, drugs or other substances; or any other cause.

I am restored to capacity whenever my personal or attending physician provides a written opinion that I can effectively manage my property and financial affairs.

I voluntarily waive any physician-patient privilege or psychiatrist-patient privilege that may exist in my favor and I authorize physicians and psychiatrists to examine me and disclose my physical or mental condition to my Agent for purposes of this power of attorney.

(b) Court Determination

I am incapacitated if a court of competent jurisdiction declares me disabled, incompetent, or legally incapacitated.

(c) Detention, Disappearance or Absence

I am incapacitated whenever I cannot effectively manage my property or financial affairs because I have disappeared for more than 30 days or whenever I am detained under duress.

My Agent may establish that I have disappeared or that I am detained under duress by an affidavit. The affidavit must describe the circumstances of my disappearance, absence, or detention. Any third party dealing in good faith with my Agent may rely upon the affidavit.

Section 2.02 Durability

The authority granted to my Agent under this power of attorney will not be affected by my subsequent disability, incompetency, incapacity, or lapse of time.

If this power of attorney becomes operative because of my disability or incapacity and if the authority granted to my Agent becomes effective because of my incapacity and I am restored to capacity as evidenced in the manner provided above, this power of attorney is not revoked but my Agent's power is no longer effective. My Agent's power will become effective again only upon my subsequent incapacity as provided above.

Section 2.03 Term of Durable Power of Attorney

This Durable Power of Attorney expires at the earliest of:

my death (except for post-death matters allowed under California law); or

my revocation of this power of attorney.

Article Three
Powers Granted to My Agent

I grant my Agent the powers described in this Article so that my Agent may act on my behalf. In addition, my Agent may do everything necessary to exercise the powers listed below.

Section 3.01 Power to Fund

My Agent may transfer any of my assets or any interest I have in any property, tangible or intangible, real or personal, to the trustee of any revocable living trust created by me before or after the execution of this power of attorney, and including any trust that may extend beyond my incapacity or beyond my lifetime.

I grant my Agent the following general powers for the specific purpose of transferring property to my trusts under this Section:

> My Agent may transfer any interest I have in real or personal property, tangible or intangible, to my trusts.
>
> My Agent may assign any rights I have to receive income from any source to my trusts.
>
> My Agent may execute all legal instruments and other documents necessary or convenient to transfer property to my trusts.
>
> My Agent may terminate savings, checking, safekeeping, brokerage, investment advisory, and custodial accounts in my name (alone or jointly with others) at any bank, broker, or financial institution and transfer all or any part of my interest in the cash, stocks, bonds, and securities of the accounts to my trusts.
>
> My Agent may enter and remove my property from any safe-deposit box registered in my name (alone or jointly with others) and transfer the removed property to my trusts.
>
> My Agent may designate the trust as beneficiary to receive any property, benefit, or contract right on my death, or to change any existing designation to the trust as beneficiary.

Section 3.02 Power to Sell

Unless specifically limited by the other provisions of this power of attorney, my Agent may sell any interest I own in any kind of property, real or personal, tangible or intangible, including any contingent or expectant interest, any marital right, and any right of survivorship incident to joint tenancy or tenancy by the entirety. My Agent may determine the terms of sale and may grant sales options.

My Agent may dispose of sales proceeds on my behalf as my Agent determines is appropriate.

Section 3.03 Power to Buy

Unless specifically limited by the other provisions of this power of attorney, my Agent may buy any kind of property. My Agent may determine the terms for buying property and may obtain options to buy property. In addition, my Agent may insure the purchased property, and otherwise arrange for its safekeeping.

I authorize my Agent to borrow money for the purposes described in this Section and to secure the loan in any manner my Agent determines is appropriate.

I authorize my Agent to use my funds to repay any money borrowed by me or on my behalf and to pay for any purchases made or cash advanced using my credit cards.

Section 3.04 Power to Invest

My Agent may invest and reinvest all or any part of my property in any other property of whatever type: real or personal, tangible or intangible, and whether located inside or outside the geographic borders of the United States and its possession or territories. Unless specifically limited by the other provisions of this power of attorney, my Agent may:

invest in securities of all kinds, limited partnership interests, real estate or interest in real estate whether or not productive at the time of investment, commodities contracts of all kinds, or interests in trusts including investment trusts;

participate in common, collective, or pooled trust funds or annuity contracts;

sell or otherwise terminate any investment made by me or on my behalf, and establish and terminate savings and money market accounts at banks and other financial institutions;

establish and terminate accounts with securities brokers and use brokerage accounts to make short sales, and pledge any securities held or purchased in brokerage accounts as security for loans and advances made to the account;

establish and terminate agency accounts with corporate fiduciaries; and

hire and fire financial and investment advisors.

Section 3.05 Power to Contract

My Agent may enter into contracts of any type and for any purpose. Unless specifically limited by the other provisions of this power of attorney and the law, my Agent may modify and cancel any existing or any new contracts to which I am a party.

Section 3.06 Power to Manage Real Property

My Agent may manage any real property I now own or may acquire in the future including my personal residence. Unless specifically limited by the other provisions of this power of attorney, my Agent may:

lease and sublease property for any period, and grant options to lease or subdivide property, even if the term of the lease, sublease, or option extends beyond the term of this power of attorney;

eject and remove tenants or other persons from property, and recover the property by all lawful means;

collect and sue for rents;

pay, compromise, or contest tax assessments and apply for tax assessment refunds;

subdivide, partition, develop, dedicate property to public use without consideration, or grant or release easements over my real property;

maintain, protect, repair, preserve, insure, build upon, improve, demolish, abandon, and alter all or any part of my real property;

employ laborers;

obtain or vacate plats and adjust boundaries;

adjust differences in the property's value on exchange or partition by giving or receiving consideration;

release or partially release real property from a lien;

enter into any contracts, covenants, and warranty agreements regarding my real property that my Agent considers appropriate; and

encumber property by mortgage or deed of trust.

I authorize my Agent to accept real property as a gift or as security for a loan.

Section 3.07 Power to Manage Tangible Personal Property

My Agent may manage any tangible personal property I now own or may acquire in the future. Unless specifically limited by the other provisions of this power of attorney, my Agent may:

lease and sublease property for any period, and grant options to lease or subdivide property, even if the term of the lease, sublease, or option extends beyond the term of this power of attorney;

recover my property by all lawful means;

collect and sue for rents;

pay, compromise, or contest tax assessments and apply for tax assessment refunds;

maintain, protect, repair, preserve, insure, improve, destroy, and abandon all or any part of my property; and

grant security interests in my property.

I authorize my Agent to accept tangible personal property as a gift or as security for a loan.

Section 3.08 Power to Manage Digital Assets

My Agent may access, modify, control, archive, transfer, and delete my digital assets. Digital assets include my sent and received emails, email accounts, digital music, digital photographs, digital videos, gaming accounts, software licenses, social-network accounts, file-sharing accounts, financial accounts, domain registrations, Domain Name System (DNS) service accounts, blogs, listservs, web-hosting accounts, tax-preparation service accounts, online stores and auction sites, online accounts, and any similar digital asset that currently exists or may be developed as technology advances.

My digital assets may be stored in the cloud or on my own digital devices. My Agent may access, use, and control my digital devices in order to access, modify, control, archive, transfer, and delete my digital assets—this power is essential for access to my digital assets that are only accessible through my digital devices. Digital devices include desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar hardware that currently exists or may be developed as technology advances.

Section 3.09 Other Powers (*Detail redacted*)

(a) Power to Manage Partnership and Limited Liability Company Interests

(b) Power Regarding Securities

(c) Power to Collect and Settle My Obligations.

(d) Power Regarding Governmental Benefits

(e) Power Regarding My Retirement Plans and Other Employee Benefits

Section 3.10 Power Regarding Bank Accounts

My Agent may establish bank accounts of any type in one or more bank institutions that my Agent may choose. My Agent may modify, terminate, make deposits to, write checks on, make withdrawals from, and grant security interests in any account in my name or to which I am an authorized signatory, except accounts held by me in a fiduciary capacity. This authority may be exercised whether the account was established by me or for me by my Agent. My Agent is authorized to negotiate, endorse, or transfer any check or other instrument with respect to any account; to contract for any services rendered by any bank or financial institution; and to execute, on my

behalf as principal, any agency or power of attorney forms furnished by a bank with respect to accounts with the bank that appoints the bank or any person as my agent.

If more than one Agent is serving concurrently under this power of attorney, the signature of any one of them is sufficient to endorse checks or drafts and to draw checks or drafts on my financial accounts.

Section 3.11 Power Regarding Safe-Deposit Boxes

My Agent may contract with any institution to rent a safe-deposit box in my name. My Agent may have access to any safe-deposit box in my name or for which I am an authorized signer. This Section will apply whether the contract for the safe-deposit box was executed by me alone, jointly with others, or by my Agent in my name. My Agent may also add contents to or remove contents from a safe-deposit box, or terminate any rental contract for a safe-deposit box.

Section 3.12 Other Powers (*Detail redacted*)

(a) Power to Prosecute and Defend Legal Actions

(b) Power to Loan and Borrow

(c) Power to Renounce or Resign from Fiduciary Positions

(d) Power to Disclaim or Release Property Interests

(e) Power Regarding Insurance

(f) Power Regarding Taxes

(g) Power to Deal with My Spouse

Article Four
Care and Control of Principal

My Agent may exercise the following powers and pay the associated costs from my assets with respect to the control and management of my person.

Section 4.01 Other Powers (*Detail redacted*)

(a) Power to Provide for My Support

(b) Power to Provide for Support of Dependents

(c) Power to Protect or Dispose of Property

(d) Power to Provide for My Recreation and Travel

(e) Power to Provide for Religious and Spiritual Needs

(f) Power to Provide for Companionship

(g) Power to Make Advance Funeral Arrangements

Article Five
Incidental Powers

My Agent may perform these acts and execute and deliver the legal documents necessary or appropriate to exercise the powers set forth in this power of attorney, including the following incidental powers.

Section 5.01 Other Powers (*Detail redacted*)

(a) Power to Commence Court Proceedings

(b) Power to Employ and Discharge Personnel

(c) Power to Sign Documents

(d) Power to Execute Power of Attorney of Financial Institutions

(e) Power to Submit Costs for Payment

(f) Power Regarding My Mail

(g) Power Regarding Memberships

(h) Power Regarding Custody of Documents

(i) Power to Care for My Pets

Article Six
Limitation on Powers

All powers granted to my Agent under this power of attorney are subject to the limitations set forth in this Article.

Section 6.01 Tax Sensitive Powers

No individual serving as my Agent may exercise any fiduciary power or discretion if the exercise of that power or discretion would:

cause any income generated by my property to be attributed to my Agent for federal income tax purposes;

cause the value of any property subject to this power of attorney to be included in my Agent's gross estate for federal estate tax purposes;

cause any distribution made or allowed to be made by my Agent to be treated as a gift from my Agent; or

discharge a legal obligation of my Agent.

If the exercise of a power by my Agent under this power of attorney would cause any of the foregoing results, a Special Agent appointed under the provisions of Section 7.04 may exercise the power or discretion.

Section 6.02 Life Insurance on the Life of My Agent

No individual Agent may exercise any powers or rights in a policy owned by me that insures the life of that Agent. Any powers and rights regarding the policy will be exercised solely by another Agent serving under this power of attorney.

Section 6.03 My Agent to Avoid Disrupting My Estate Plan

If it becomes necessary for my Agent to liquidate or reinvest any of my assets to provide support for me, I direct that my Agent, to the extent that it is reasonably possible, avoid disrupting the dispositive provisions of my estate plan as established by me prior to my incapacity.

If it is necessary to disrupt the dispositive provisions of my estate plan, my Agent will use his or her best efforts to restore my plan as soon as possible. My Agent will make reasonable efforts to obtain and review my estate plan. I authorize any person with knowledge of my estate plan or possession of my estate planning documents to disclose information to my Agent and to provide copies of documents to my Agent.

Article Seven
Administrative Powers and Provisions

This Article contains certain administrative powers and provisions that facilitate the use of the power of attorney and that protect my Agent and those who rely upon my Agent.

Section 7.01 Release of Information

Section 7.02 Nomination of Conservator of My Person and My Estate

If appointment proceedings are ever initiated for Conservator of my person and my estate, I concurrently nominate the person then serving or named to serve as my Agent under this power of attorney.

If any person I have nominated is appointed Conservator of my person and my estate, I request that the court grant powers permitting my Conservator of my person and my estate to administer my estate unsupervised and without adjudication, order, or direction of any court.

Section 7.03 Nomination of Guardian for Minor Children

If I am incapacitated and no longer able to adequately care for my children, I nominate Guardian #1 as temporary guardian of my minor children.

If I regain the ability to adequately care for my children, I may terminate the guardianship by written notice to the guardian, and my children will return to my care.

Section 7.04 Other Powers (*Detail redacted*)

(a) Appointment of a Special or Ancillary Agent

(b) Agent Authorized to Employ My Attorney

(c) Fiduciary Eligibility of Agent

(d) Reimbursement for Expenses

(e) Liability of Agent

(f) Amendment and Revocation

(g) Resignation

Section 7.05 Signature of Agent

I suggest my Agent use the following form when signing documents on my behalf pursuant to this power:

First Name Last Name by [enter Agent's name], his Agent.

Section 7.06 Interpretation

This power of attorney is a general power of attorney and should be interpreted as granting my Agent all general powers permitted under the laws of State of California. The description of specific powers is not intended to limit or restrict any of the general powers granted to my Agent.

Section 7.07 Use of *Agent* Nomenclature

The word *Agent* and any modifying or equivalent word or substituted pronoun includes the singular and the plural cases, as well as the masculine, feminine, and neuter genders.

Section 7.08 Effect of Duplicate Originals or Copies

If this power of attorney has been executed in multiple counterparts, each counterpart original will have equal force and effect. My Agent may make photocopies (photocopies includes facsimiles and digital or other reproductions, referred to collectively as *photocopy*) of this power of attorney and each photocopy will have the same force and effect as the original.

Section 7.09 Governing Law

This power of attorney's validity and interpretation will be governed by the laws of the State of California. To the extent permitted by law, this power of attorney is applicable to all my property, whether real, personal, intangible, or mixed; wherever located; and whether or not I now or in the future own the property.

Section 7.10 Severability

If any provision of this power of attorney is declared invalid for any reason, the remaining provisions will remain in full force and effect.

Article Eight
Declarations of the Principal

I understand that this power of attorney is an important legal document. Before executing this power of attorney, my attorney explained the following information to me.

The power of attorney provides my Agent with broad powers to dispose of, sell, convey, and encumber my real and personal property.

The powers will exist for an indefinite period unless I revoke the power of attorney or I have limited their duration by specific provisions in the power of attorney.

This Durable Power of Attorney will continue to exist during my subsequent disability or incapacity.

I have the power to revoke or terminate this Durable Power of Attorney at any time.

Dated: October 27, 2018

_____

First Name Last Name, Principal

CALIFORNIA ALL-PURPOSE CERTIFICATE OF ACKNOWLEDGEMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)

County of _____)

On October 27, 2018 before me, _____, a Notary Public, personally appeared First Name Last Name, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

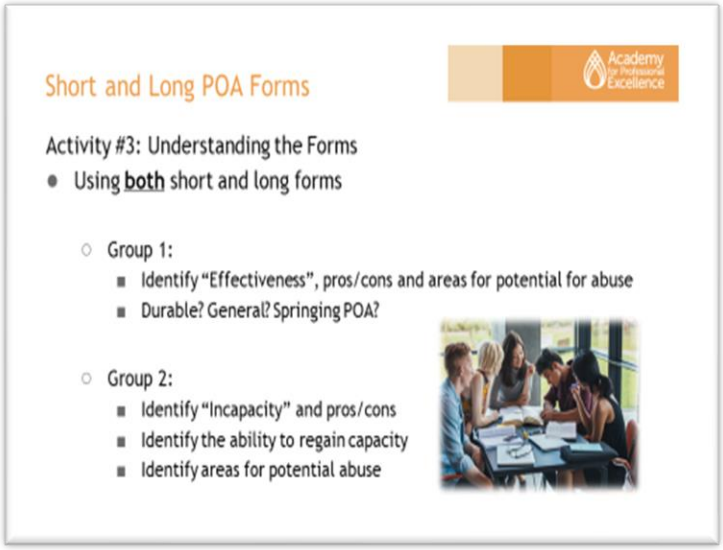
I certify under PENALTY of PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)

11 of 11

Slide #16: Short and Long Forms



Activity #3: Understanding the Forms (30 min)

Divide class in half (or ¼)

Ask groups to take some time to read through both the short and long forms as we will be doing some activities with these. **Give** the class about 10 minutes to read through the documents. Then explain they have 10-15 minutes to discuss the following, together, in their groups:

Group 1: ½ of class (or two groups of ¼)

1. Find and identify the definition of "Effectiveness" in both documents and note the pros/cons of effectiveness immediate or only upon incapacity and where you might be able to spot areas of abuse.
2. Discuss if the Long form is a Durable, General, or Springing POA?
3. Discuss and identify any other areas of concern or possible areas of abuse.

Group 2: ½ of class (or two groups of ¼)

1. Find and identify the definition of "Incapacity" in both documents and note various options for the definition that are foreseeable with the pros/cons of each, including regaining capacity.
2. Discuss and identify any other areas of concern or possible areas of abuse.

Continued

Report Out (5 min): Effectiveness and Type of POA:
Solicit 2-3 comments on what Group 1 discussed with Effectiveness.

Cover the following if not mentioned:

- Immediate or upon incapacity.
- Discuss that there is always a red flag when a family member or caregiver has helped an elder prepare an immediately effective financial power of attorney. This is an enormous power for an individual to give away.
- An estate planning attorney will almost always counsel a client to make this important document effective upon the incapacity of the client so that the client retains their own financial power for as long as possible.
- Exceptions for when someone is terminally ill or very frail but still has capacity, then they may choose execute a financial power of attorney that is immediately effective because they intentionally want to give that power presently to someone else.

Type of POA Answer:

- All - because it stays in effect while the maker is incapacitated "durable," is "general" because it covers all possible financial areas and "springs into action" by becoming effective when the maker is incapacitated.

Report Out: (5 min) Incapacity and Concern for Abuse:
Solicit 2-3 comments on what Group 2 discussed with Incapacity.

Cover the following if not mentioned:

- Each document generally defines "incapacity" within the document itself, so that language is what we have to go off of for the determination.
- At the end of this training we will talk a bit more about capacity.
- If the document does not identify a definition, the agent will need to defer to the institution where he/she is trying to use the document and see what they require, or defer to a doctor's determination.
- Possible options for language determining incapacity may include:
  - 2 independent doctors, 1 primary care doctor, an "incapacity panel" consisting of 1 doctor and 1 family member, or just a family member or named individual.
  - A red flag certainly should go up when the determination of incapacity is defined by having the family member, caregiver or agent be the person responsible for determining the incapacity rather than 1 or 2 licensed physicians.

Discuss that generally it is a good idea to include language that revokes all prior Powers of Attorney as with the beginning of the Long Form.

Ask: Do both the short and long form contain this language? What are some of the issues you can foresee if the document does not have this language.

Possible Answer: Multiple Powers of Attorney simultanously effective with different Agents listed.

Continued

Report Out: (5 min) Areas of concern or possible areas of Abuse:

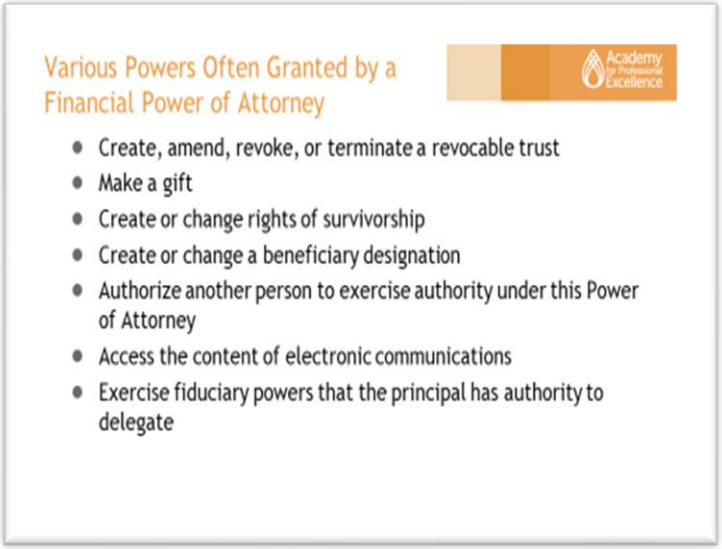
1. Multiple Documents and different Agents – The document may state that all prior Powers of Attorney are revoked, then the most recent document will be effective. Although, it is possible that multiple documents give specific authority over different areas and can be simultanously active.
    a. Helpful hint for APS: ask client about any other POAs and documents they may recall filling out.

2. Designating Co-Agents: Designating Co-agents can provide for more oversight, i.e., two or more people all having to agree but a single agent, with others listed in order consecutively, can make decision making much easier but allows for easier abuse.

3. Compensation – Generally an agent is entitled to compensation and repayment of actual out of pocket expenses. There is typically language in the document that specifies this, but if not, the law would likely find "reasonable" compensation to be allowed. Alternatively, compensation may be up to 1% of the assets. However, note, the Agent MUST keep proper documentation of any and all compensation specific to time spent and hourly rate, and receipts available for out of pocket reimbursement and MUST maintain separate accounting for their own personal finances (spouse agents excluded). This is the same for Trusts.

   Compensation can be an area of abuse where an agent claims they are taking XYZ income or assets as "compensation."

Slide #17: Various Powers often granted by a Financial Power of Attorney – 5 minutes



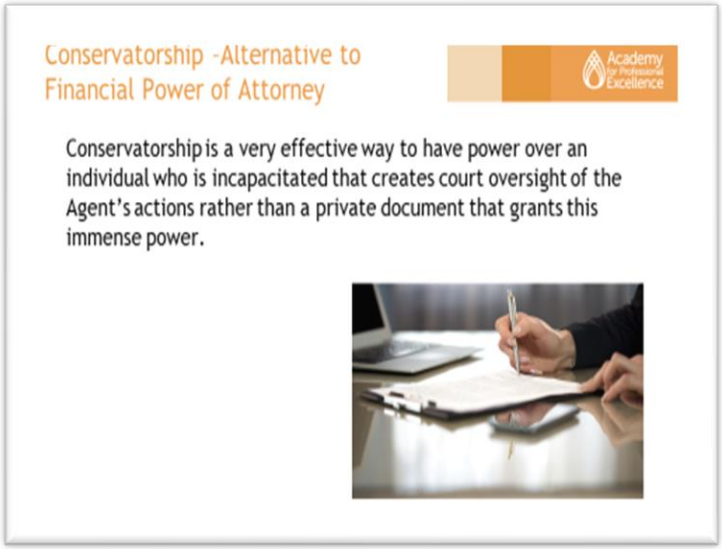
Discuss:

1. Giving the power to create, amend, revoke or terminate a revocable living trust for another person is a very huge power to give someone in a Financial POA Imagine a scenario, where Grandma has created a trust, and Grandson, now that she is incapacitated and he is acting as her agent under the POA, has the power to change her trust and change where the money goes when she dies?!
2. Making gifts of assets or money while acting as the agent under a financial power of attorney can be allowed under the POA document, but in most cases would be looked upon as an abuse of power, i.e., in the above scenario, Grandson gives $10,000 to each of his children while Grandma is alive but incapacitated. In other limited cases, it could be appropriate, i.e., if Grandson continued to give $1,000/year to Grandma's church because that is what she traditionally has done throughout her life.
3. Creating or changing rights of survivorship in legal documents, such as changing a real estate grant deed from Grandma and Son as Joint Tenants (this is where the property will automatically go to the survivor when one dies) to Grandma and Grandson as Joint Tenants. Certainly, this would be seen as an abuse of power even though the "power" is allowed in the POA.
4. Like changing rights if survivorships, a POA agent can have the "power" to change beneficiary designations for financial assets such as retirement plans like IRA's. This is generally not a power that anyone should give to their POA agent because of the very easy access to abusing this power. Unfortunately, changes to beneficiary designations can be done easily without the POA in this electronic age. Quite often, you can change beneficiaries right on-line without any additional documentation, and in most other cases, simply mailing in a new form will do the trick – no need for Grandma's capacity or knowledge to be confirmed by anyone. Also, consider the fact that quite often the bulk of people's savings are held in retirement accounts such as IRAs and 401k – all of which fall under this topic.

Continued

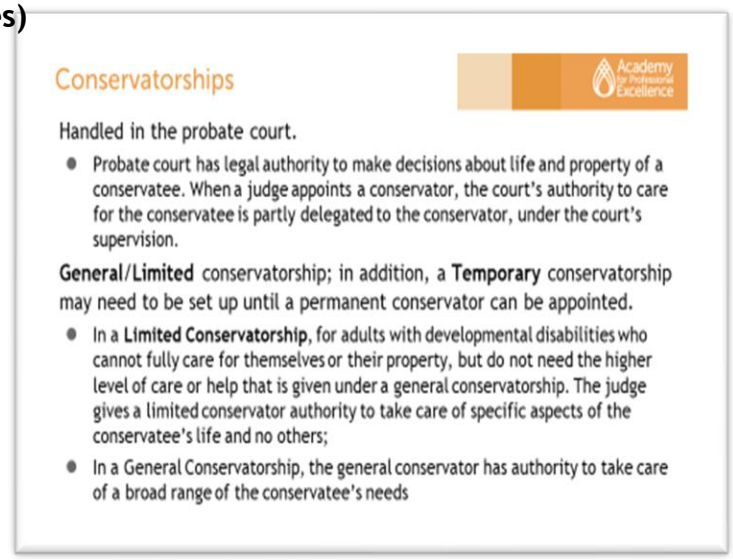
5. Authorizing another person to exercise authority under the POA is an often-given power. Generally, this will be necessary to allow the POA agent to hire people such as bookkeepers and accountants for the POA's benefit.
6. Access and content to Electronic Communications is also an often-given power, and for obvious reasons, fairly necessary in this day and age. Unfortunately, because this power is given, it can also be the gateway into vast control over a POA's access to accounts and things like beneficiary designations. Again, as with the changing of beneficiary designations, the power can be easily abused without even accessing the POA. As we all know, if someone has access to a person's email and some personally identifying information, to answer security questions, an unethical family member or caretaker could easily access their ward's accounts.
7. Delegating Fiduciary powers is also an often-given and necessary power in a POA. This is most generally given to a POA Agent to authorize the hiring of financial advisors on behalf of the POA to help manage their assets.

Slide #18: Conservatorship – Alternative to Financial Power of Attorney



Discuss: We will discuss conservatorships in detail but it's helpful to know that Conservatorship is a very effective way to have power over an individual who is incapacitated that creates court oversight of the Agent's actions rather than a private document that grants this immense power.

Slide #19: Conservatorship Overview (10 Minutes)



Poll participants for their knowledge with this first.

- E.g. **Ask**: "Who can tell me a bit about Conservatorships?"
- **Ask:** How many of you have current or recent cases involving issues with Conservatorships?
- What seems to cause you the most fear or stress with these cases?

Lecturette: Conservatorship Overview: (7-10 min)

1. Conservatorship are handled in the probate court.
2. The probate court has the legal authority to make decisions about the life and property of a conservatee. When a judge appoints a conservator, the court's authority to care for the conservatee is partly delegated to the conservator, under the court's supervision.
3. A probate conservatorship may be a **General** or a **Limited** conservatorship; in addition, a **Temporary** conservatorship may need to be set up until a permanent conservator can be appointed.
4. Whether General, Limited, or Temporary, the conservatorship can be either over the Person or over the Estate of the Person or both.
5. In a **Limited Conservatorship**, for adults with developmental disabilities who cannot fully care for themselves or their property, but who do not need the higher level of care or help that is given under a general conservatorship. The judge gives a limited conservator authority to take care of specific aspects of the conservatee's life and no others;
6. In a General Conservatorship, the general conservator has authority to take care of a broad range of the conservatee's needs
7. An LPS Conservatorshiop (named from Lanterman-Petris-Short Act) is meant to provide for certain kinds of very restrictive living arrangements and extended mental health treatment for people unable to provide for their own needs for food, clothing, or shelter as a result of a mental health disorder or chronic alcoholism, and who cannot or will not agree to the arrangement or treatment voluntarily.

Continued

Ask: Who can/should be the Conservator?

Possible Answers:
Family, trusted friend, stranger, Public Guardian.

Explain that APS often recommends a private fiduciary.

Ask participants to think back to earlier in training and ask "Why is that?"

Answer:
Independent from the client.

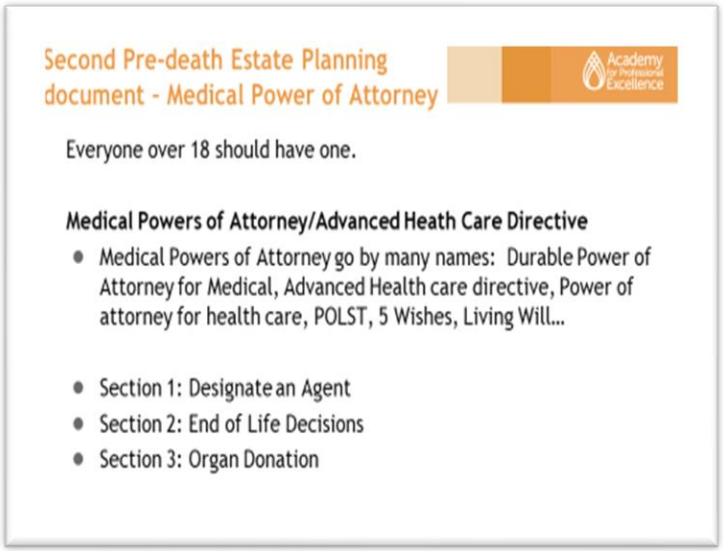
Encourage participants to check if their agency has a preferred list of private fiduciaries in your area, or search the internet for "private fiduciary" to get a list.

Trainer Note: A private fiduciary, for a Conservatorship can be a valuable option for a client who may not have family or friends who could be in charge.

Ask: Why is there generally less abuse with conserved clients?

Answer:
Because the court is involved! At least every 2 years there is an investigator to oversee the conservatorship, and for financial conservatorships, all of the assets have to be accounted for to the court.

Slide #20: Second Pre-death estate planning document – Medical Power of Attorney



Lecturette: Medical Powers of Attorney/Advanced Heath Care Directive (15 minutes)

Explain: Everyone over 18 should have one.

Medical Powers of Attorney go by many names: Durable Power of Attorney for Medical, Advanced Health Care Directive, Power of Attorney for Health Care, POLST, 5 Wishes, Living Will

A Health Care Power of Attorney allows you to:

- Appoint a person you trust as your health care agent, who is then authorized to make medical decisions on your behalf upon your incapacity.
- Your agent is authorized to make all general health care decisions for you when the time comes that you are not able to on your own.
- Within your Health Care Power of Attorney, you will provide specific instructions concerning life support measures at the end of your life and organ donation.

Refer participants to **Handout #5: Standard California Health Care Power of Attorney**

Trainer Note: If training outside of CA, please use your State's form. Otherwise, you may use CA form, to teach the skill, but remind participants that it is only valid in CA.

Discuss the following:

1. Effectiveness – generally upon incapacity "immediately if and when I am unable to make my own health care decisions."
2. Revocation – Medical and Financial POA's generally state "you may revoke this power of attorney if you later wish to do so." Often, there is some additional language that states that the revocation must be done in writing, and may require a physician's letter –
3. Remember – as with most legal documents, you must have capacity to revoke the power of attorney.

Continued

Explain: Any of the forms from doctors' offices, Kaiser, POLST are fine – as long as it ***AT LEAST*** designates an agent to make your health care decisions.

Discuss that as with any document, the maker must have capacity to revoke the POA. If he/she does not have capacity and there is concern about abuse by the person named as the POA agent, there is no mechanism other than prosecution or a civil probate court proceeding to remove the abuser from being the agent. This is where the importance of your APS investigations and referral to the district attorney's office is essential for a criminal remedy.

If there are other family members and assets available to pay for a probate court proceeding to remove the abuser, this is a civil remedy. This civil remedy can also be started by the public guardian if your client is under their jurisdiction.

Point out the following sections in Handout #5
Section 1 – Designates an agent and gives them authority to be your agent

Section 2 – End of life decisions – the "pull the plug" decision and can add other wishes

Section 3 – Organ Donation

Discuss: Medical POA should not to be confused with a Do Not Resuscitate order "DNR"

This is a separate document for very elderly or terminally ill clients who DO NOT WANT EMERGENCY PERSONNEL SUCH AS EMT'S TO REVIVE THEM, even at home

HANDOUT #5

_____ ADVANCE HEALTH CARE DIRECTIVE

(California Probate Code Section 4701)

PART 1 - POWER OF ATTORNEY FOR HEALTH CARE

(1.1) DESIGNATION OF HEALTH CARE AGENT: I, _____, designate the individuals named below to serve as my Health Care Agents to make decisions with regard to my health care if and when I am unable to make my own health care decisions.

Name: _____

If _____ is unable or not reasonably available to make health care decisions for me, I designate the individual listed below as my Successor Health Care Agent, consecutively in the order listed. A Successor Agent shall serve if any preceding designated Agent is unable or reasonably unavailable to serve as my Health Care Agent:

Name: _____

Name: _____

(1.2) AGENT'S AUTHORITY: My Agent designated in this instrument, including any successor Agent, if available and willing to make health care decisions on my behalf, shall have priority over any other person to act for me in all matters of health care decisions where I am unable to give informed consent with respect to such decisions. Nothing in this Directive shall affect any right my Agent may have, apart from this Directive, to make or participate in the making of health care decisions on my behalf. Moreover, this Directive does not affect the right any person may have to make health care decisions on my behalf if my Agent and any successor Agent are unavailable, unwilling, or unable to make health care decisions on my behalf. (This Directive also does not affect the law governing health care treatment in an emergency.) I desire that my wishes as expressed in this Directive, especially my wishes as to the withholding and withdrawal of life-sustaining treatment, be carried out through the authority given to my Agent in this Directive despite any contrary feelings, beliefs, or opinions of members of my family, relatives, friends, or conservator. My Agent shall have authority over my health care decisions even if someone else is appointed by a court to act as conservator of my person or estate. My agent is authorized to make all health care decisions for me, including decisions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care to keep me alive, in accordance with my instructions herein.

(**1.3) WHEN AGENT'S AUTHORITY BECOMES EFFECTIVE:** My agent's authority to make health care decisions for me takes effect immediately if and when I am unable to make my own health care decisions. By signing this document, I intend to create an advance health care directive under the Health Care Decisions Law, Sections 4600 through 4805 of the California Probate Code. I hereby revoke any and all prior advance health care directives or powers of attorney for health care signed by me.

(1.4) AGENT'S DUTY TO FOLLOW MY WISHES OR ACT IN BEST INTEREST: If I am unable to communicate instructions and my wishes are otherwise unknown or unclear, my Agent should make health care decisions for me guided by any preferences that I may have previously expressed and the information given by the physicians treating me as to my medical diagnosis and prognosis. My Agent should make health care decisions for me in accordance with my best interest,

to be determined by my Agent after considering the benefits, burdens, and risks that might result from a given course of treatment, and in accordance with and any instructions I give in Part 2 of this form. In determining my best interest, my Agent shall consider my personal values to the extent known to my Agent. To the extent my wishes are unknown, my agent shall make health care decisions for me in accordance with what my agent determines to be in my best interest.

(1.5) AGENT'S POST-DEATH AUTHORITY: My agent is authorized to make anatomical gifts, authorize an autopsy, and direct disposition of my remains, except as I state here or in Part 3 of this form: [*If you want to limit the authority of your agent to consent to an autopsy, make an anatomical gift, or direct the disposition of your remains, you must state the limitations here.*]

_____ *(Attach additional sheets if necessary)*

(1.6) NOMINATION OF CONSERVATOR: If a conservator of my person needs to be appointed for me by a court, I nominate the agent designated in this form. If that agent is not willing, able, or reasonably available to act as conservator, I nominate the alternate agents whom I have named, in the order designated.

PART 2 - INSTRUCTIONS FOR HEALTH CARE

Sign your name or initials by your choice. You may strike any wording you do not want

(2.1) END-OF-LIFE DECISIONS: I direct that my health care providers and others involved in my care provide, withhold, or withdraw treatment in accordance with the choice I have made below:

_____ **(a) Choice Not To Prolong Life.** *(If the statement below reflects your desires, sign your name or initials here.)* I wish to live and enjoy life as long as possible, but I do not wish to receive medical treatment that will provide minimal or no benefit to me and will only secure a precarious prolongation of my life which is burdensome to me. I do not want my life to be prolonged if (1) I have an incurable and irreversible condition that will result in my death within a relatively short time, (2) I become unconscious and, to a reasonable degree of medical certainty, I will not regain consciousness, or (3) the likely risks and burdens of treatment would outweigh the expected benefits.

OR

_____ **(b) Choice To Prolong Life.** *(If the statement below reflects your desires, sign your name or initials here.)*

I want my life to be prolonged as long as possible within the limits of generally accepted health care standards.

OR

____ **(c) No Decision at this Time.** *(If the statement below reflects your desires, sign your name or initials here.)*

I have intentionally not made any end-of-life decisions at this time. I realize that under Part 1 of this form my agent has the authority to determine what is best for me in making end-of-life decisions if I have not made specific instructions in Part 2 of this form.

(2.2) RELIEF FROM PAIN: Except as I state in the following space, I direct that treatment for alleviation of pain or discomfort be provided at all times, even if it hastens my death:

_____

_____(*Add additional sheets if needed*)

(2.3) OTHER WISHES: *(You may wish to add specific instructions regarding your care should you suffer a serious disease, injury or illness, such as your desires for treatment at home, visits by family members and friends, religious instructions, and related matters.)*

_____

_____

_____

_____*(Add additional sheets if needed)*

PART 3 - DONATION OF ORGANS AT DEATH

(Sign your name or initials at your applicable choice):

(3.1) ORGAN DONOR. Upon my death

_____ (a) I give any needed organs, tissues, or parts.

OR

_____ (b) I give the following organs, tissues, or parts only:

_____

My gift is for the following purposes:
[*Gift will be for all purposes. Strike any of the following you do not want*]

(1) Transplant
(2) Therapy
(3) Research
(4) Education

OR

NO ORGAN DONATIONS

_____ (c) I do not want to donate organs, tissues, or parts.

PART 4 – GENERAL AUTHORITY

(4.1) ACCESS TO INFORMATION AND RECORDS: Any third party from whom my Agent may request information, records, or other documents regarding my physical, mental, or emotional health, including medical and hospital records, is authorized and directed to release and deliver all such information, records, or documents to my Agent. As to my Agent, I hereby waive any and all privileges that may apply to the release of such information, records, or other documents, and to any communication pertaining to me and made in the course of a lawyer-client, physician-patient, psychiatrist-patient, clergyman-penitent, or other similar relationship.

All physicians, nurses, therapists, dentist, or any other health care providers or institutions, and all health care insurance plan providers, are expressly requested to abide by any and all decisions and instructions of my Agent and to release to my Agent any and all information that my Agent may request concerning my health and medical care and treatment and my general welfare and well-being.

My Agent is authorized to request and receive all information and records regarding my physical, mental, or emotional health or care and treatment, including medical and hospital records. My Agent is authorized to execute any releases or other documents that may be required in order to obtain information or records regarding my physical, mental, or emotional health or care and treatment. My Agent is authorized to consent of the disclosure of information and records obtained as my Agent regarding my physical, mental, or emotional health or care and treatment. I acknowledge that, in accordance with the law, the information authorized for release may include information regarding communicable or venereal diseases. It may also include behavioral conditions, including alcohol and substance abuse and/or genetic marker information.

I understand that the information used or disclosed pursuant to an authorization may be subject to redisclosure by my Agent and no longer protected by the federal health information privacy regulations.

This authorization for use or disclosure of medical information is intended to comply with the terms of any applicable State and Federal law including the Confidentiality of Medical Information Act, Civil Code Section 56 et seq; Health and Safety Code Sections 11812 and 11977; 42 U.S.C. Section 290 dd-2; 42 C.F.R. Section 2.1 et seq.; federal HIPAA regulations, 45 C.F.R. Section 164.508; and the Lanterman-Petris-Short Act; and Welfare and Institutions Code Section 5328 et seq. as applicable.

(4.2) EFFECT OF COPY: A copy of this form has the same effect as the original.

(4.3) DECLARATIONS BY PRINCIPAL: I declare that my lawyer has explained to me my rights in connection with this Directive and the consequences of signing it and not signing it. I authorize my lawyer to provide the original or a copy of

this Directive to my Agent or successor Agent or my health care provider, and I waive any duty of confidentiality my lawyer otherwise might have as to this document.

I declare that I have read this Directive and understand its importance. I recognize that my health care Agent is granted broad power and authority to make health care decisions affecting me. I also recognize that this Directive will remain in full force and effect during my incapacity and continue until revoked or terminated by my death. By signing below, I further declare that I am emotionally and mentally competent to execute this Directive and understand its purpose and effect.

(4.4) SIGNATURE:_____ Dated: _____
PRINTED NAME*:* _____

CALIFORNIA ALL-PURPOSE CERTIFICATE OF ACKNOWLEDGEMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)

County of _____)

On _____ before me,_____, a Notary Public, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her authorized capacity, and that by her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

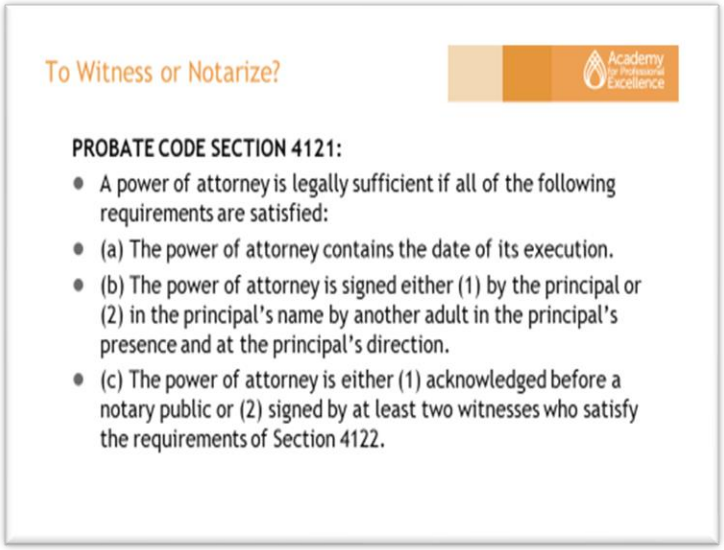
I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature_____ (Seal)

Notary Public

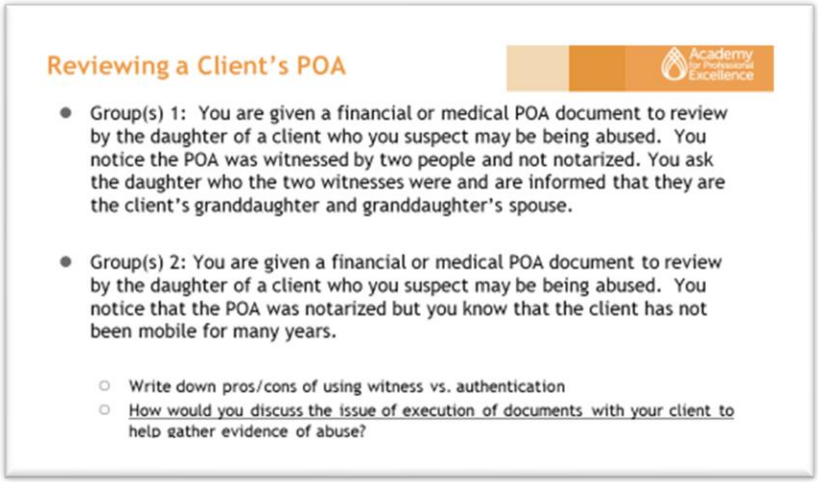
Slide #21: To Witness or Notarize? – 5 minutes



Discuss the following slide:

PROBATE CODE SECTION 4121:
A power of attorney is legally sufficient if all of the following requirements are satisfied:
(a) The power of attorney contains the date of its execution.
(b) The power of attorney is signed either (1) by the principal or (2) in the principal's name by another adult in the principal's presence and at the principal's direction.
(c) The power of attorney is either (1) acknowledged before a notary public or (2) signed by at least two witnesses who satisfy the requirements of Section 4122.

Slide #22: Reviewing a Client's POA



Activity #4: Reviewing a client's POA (15 min) – Get back into the same groups as with the Financial Power of Attorney Activity earlier.

Group(s) 1: You are given a financial or medical power of attorney document to review by the daughter of a client who you suspect may be being abused. You notice the POA was witnessed by two people and not notarized. You ask the daughter who the two witnesses were and are informed that they are the client's granddaughter and her spouse.

Group(s) 2: You are given a financial or medical power of attorney document to review by the daughter of a client who you suspect may be being abused. You notice that the POA was notarized but you know that the client has not been mobile for many years.

Instructions:

1. Both groups to discuss the situation in 2-3 mins.
2. Jot down the possible pros/cons of using witnesses vs. notary as authentication
3. How might they discuss the issue of the execution of the documents with your client to help gather evidence of abuse?
    a. NOTE: This is important for APS professionals to grasp

Possible Answers:
Both the use of witnesses and notary can be abused.

Continued

Discuss – Who are the two witnesses, are the "interested" witnesses, what about if they did not even know the client, or are they too close and the possible abusers?

By the same token, a notary does not know the client either, he/she simply is attesting that the client stated he/she was the person who signed the document, and abusing family members/caregivers can hire a "mobile notary" to come right to the bed-side.

Questions you may ask a client can include:

- Who are the people who witnessed your document?
- Are they your caregiver/family?
- Did someone arrange for a notary to come to your home or did you go see a notary?

Address the following:

- Is the document still legal if not notarized or if not witnessed by 2 family members?
- What if it's witnessed by one of the Agents?
- What would APS's next steps be in this situation?
- What would be a good practice in this situation?

Slide #23: Additional Pre-death documents



Inform participants of these additional Estate Planning Documents:

- HIPAA Authorization
- Guardian Nomination for Minor children

Refer participants to **Handout #6 Sample HIPAA Authorization- 5 Minutes**

HIPAA - A document that authorizes listed individuals to access to your private health care information and access to talking to doctors/hospitals, but no decision making so the order and number of people listed is not important.

- Effective regardless of incapacity
- Everyone over 18 should have one.

Discuss: If you in the capacity of your job wanted to access private health information, you might possibly need a HIPAA Authorization by the client. As you know, this can be a touchy area for APS, given if you are investigating an alleged penal code violation, you may not need one.

> **Trainer Note: Agencies have various consent forms and relationships with Medical and Financial personnel. You may want to discuss what type of consent forms (if any) are used during their investigations. Refer Participants to Handout #12- NAPSRC Technical Assistance Brief on HIPAA: Implications for APS, located at the end of their Participant Manuals for more information on this topic. (http://www.napsa-now.org/wp-content/uploads/2015/07/TA-Brief-HIPAA.pdf)**

Discuss: Guardian nominations are pretty self-explanatory. It is a simple document whereby you designate who will have physical custody of your minor children if you are incapacitated or die. This can be a very hotly debated issue if you have dueling sides of families both thinking they are the appropriate guardians, so I highly recommend putting this in writing if you have minor children.

HANDOUT #6

Authorization for Release of Protected Health Information

(Valid Authorization Under 45 CFR Chapter 164 and California Civil Code Section 56)

Statement of Intent: It is my understanding that Congress passed a law entitled the Health Insurance Portability and Accountability Act ("HIPAA") that limits use, disclosure or release of my health information (or, sometimes herein, "protected medical information"). I am signing this Authorization because it is crucial that my health care providers readily use, release or disclose my protected medical information to, or as directed by, that person or those persons designated in this Authorization to allow them to discuss with, and obtain advice from, others or to facilitate decisions regarding my health care when I otherwise may not be able to do so without regard to whether any health care provider has certified in writing that I am "incompetent" for purposes of California Probate Code Sections 4235, 4682 and 4690.

1. Appointment of Authorized Recipients

I, _____, an individual, hereby appoint the following persons, or any of them, as my Authorized Recipients for health care disclosure under the Standards for Privacy of Individually Identifiable Health Care Information (45 CFR Parts 160 and 164) under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), and as that term is defined by California Civil Code § 56.05(b)(referred to as my "Authorized Recipient"):

1. _____
2. _____

3. Grant of Authority:

Therefore, I authorize a health care provider (a "covered entity" as defined by HIPAA) to use, release and disclose my individually identifiable health information in accordance with and as authorized by 45 CFR Sec(s). 164.502(a)(1)(i) and (iv), 164.502(a)(2)(i), 164.524 and 164.528 and California Civil Code Section 56 Confidentiality of Medical Information Act (CMIA).

I specifically authorize all covered persons and entities as defined in HIPAA and CMIA, including but not limited to doctors (including but not limited to physicians, podiatrists, chiropractors, or osteopaths), psychiatrists, psychologists, dentists, therapists, nurses, hospitals, clinics, pharmacies, laboratories, ambulance services, assisted living facilities, residential care

facilities, bed and board facilities, nursing homes, medical insurance companies or any other health care providers or affiliates:

a. to use, release and disclose any of my protected medical information, including but not limited to, reports and/or records concerning my medical and psychiatric history, condition, diagnosis, testing, prognosis, treatment, billing information and identity of health care providers, whether past, present or future and any other information which is in any way related to my health care. Additionally, this disclosure shall include the ability to ask questions and discuss this protected medical information with the person or entity who has possession of the protected medical information even if I am fully competent to ask questions and discuss this matter at the time. It is my intention to give a full authorization for access to, disclosure and release of ANY protected medical information by or to the persons named in this Authorization as if each person were me;

b. to, or as requested by, an Authorized Recipient.

4. Termination:

This Authorization is not affected by, and shall not terminate by reason of, my subsequent disability or incapacity. This Authorization shall terminate upon my death or my written revocation expressly referring to this Authorization and the date it is actually received by the covered entity. Proof of receipt of my written revocation may be by certified mail, registered mail, facsimile, or any other receipt evidencing actual receipt by the covered entity. Such revocation shall be effective upon the actual receipt of the notice by the covered entity except to the extent that the covered entity has taken action in reliance on it.

5. Re-disclosure:

By signing this Authorization, I acknowledge that the information used, disclosed or released pursuant to this Authorization may be subject to re-disclosure by the Authorized Recipients whose names are written in paragraph 1 of this Authorization and the information once disclosed will no longer be protected by the rules created in HIPAA and CMIA. No covered entity shall require my Authorized Recipients to indemnify the covered entity or agree to perform any act in order for the covered entity to comply with this Authorization.

6. Instructions to my Authorized Recipients:

My Authorized Recipients shall have the right to bring a legal action in any applicable forum against any covered entity that refuses to recognize and accept this Authorization for the purposes that I have expressed. Additionally, my Authorized Recipients are authorized to sign any documents that the Authorized Recipients deem appropriate to obtain use, disclosure or release of the protected medical information.

7. Valid Document:

A copy or facsimile of this original Authorization shall be accepted as though it was an original document.

8. My Waiver and Release:

I hereby release any covered entity that acts in reliance on this Authorization from any liability that may accrue from the use, release or disclosure of my protected medical information in reliance upon this Authorization and for any actions taken by my Authorized Recipients.

9. Severability:

I intend that this authorization conform to United States and California law. In the event that any provision of this document is invalid, the remaining provisions shall nonetheless remain in full force and effect.

I understand that I have the right to receive a copy of this authorization. I also understand that I have the right to revoke this authorization and that any revocation of this authorization must be in writing.

Dated: ____ _____, Principal

DOB: _____

CALIFORNIA ALL-PURPOSE CERTIFICATE OF ACKNOWLEDGEMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA

COUNTY OF _____

On _____ before me, _____, a Notary Public, personally appeared _____ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument to be the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

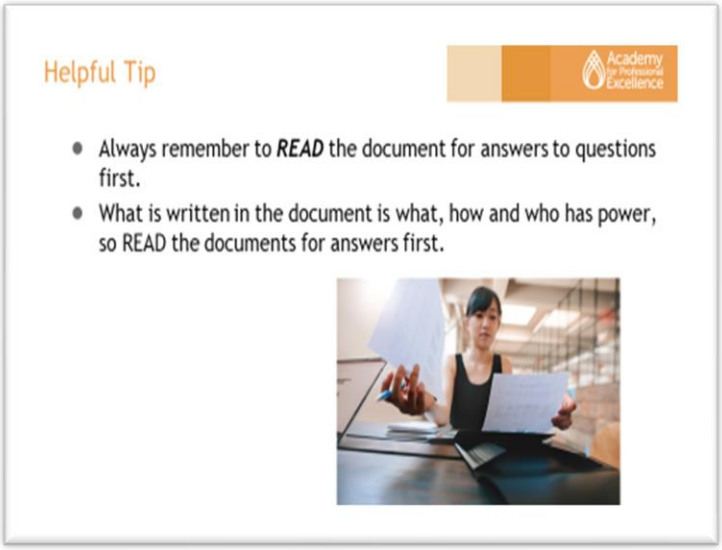
I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

_____

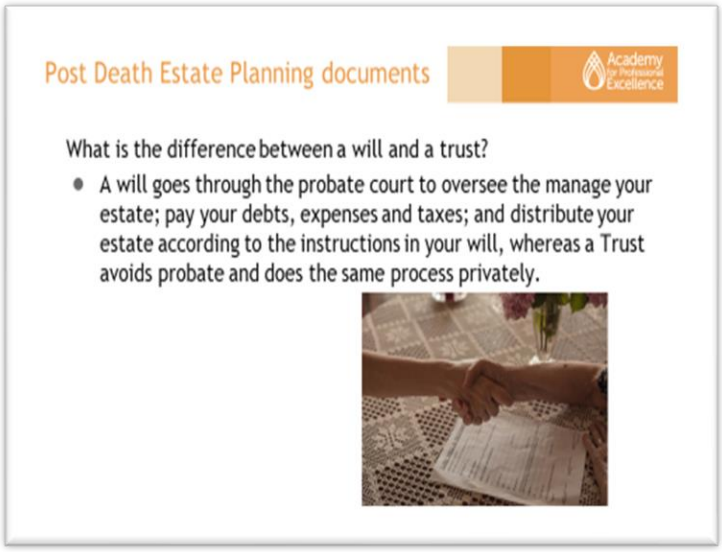
NOTARY PUBLIC

Slide #24: Helpful Tip:



Explain that before we move on to Post Death Estate Planning documents and issues, the most helpful tip for APS to remember is what was in our discussion of Financial and Medical Powers of attorney documents – What is written in the document is what, how and who has power, so READ the documents for answers first.

Slide #25: Post Death Estate Planning Documents



Shout-out – What is it difference between a will and a trust?

Possible Answers: Both Name someone who will receive your assets after your death and both Nominate a person to handle your affairs after death but:
A will goes through the probate court to oversee the manage your estate; pay your debts, expenses and taxes; and distribute your estate according to the instructions in your will, whereas a Trust avoids probate and does the same process privately.

Review the following Terminology:

- Probate –Court supervised process of transferring your assets to your heirs after death.
- Executor is the 'manager' for a will
- Trustee is the 'manager' for a Trust
- Administrator is the 'manager' for an Estate with no Will or Trust
- Intestate – Dying without a will or trust, therefore someone must step up and volunteer to become your estate "administrator" through the Probate court. The county has a Public Guardian or Administrator if the descendant has no one else.
- A Holographic Will – Hand written, signed and dated Will that anyone in California can execute. Valid in California (not all states).

Ask: Why do we want to avoid Probate and use a Trust?

- Probate causes long delays in Asset Distribution, very costly and must be supervised by the court.

Slide #26: Revocable Living Trusts



Lecturette: Revocable Trusts (15 min)

Revocable Living Trust is a legally enforceable contract, which can be made by an individual or couple. A Revocable Living Trust agreement allows property to be owned by the Trust itself.

Various names such as Living Trust, Revocable Living Trust, Grantor Trust, Intervivos (during life) Trust

The Trust agreement has three parties:

1. The Trustmaker/Settlor/Grantor - the one who makes the trust
2. the Trustee - the one who has legal authority to manage and control the property owned by the Trust (usually you while you are alive)
3. The Beneficiary - the person(s) who has the right to the Trust property.

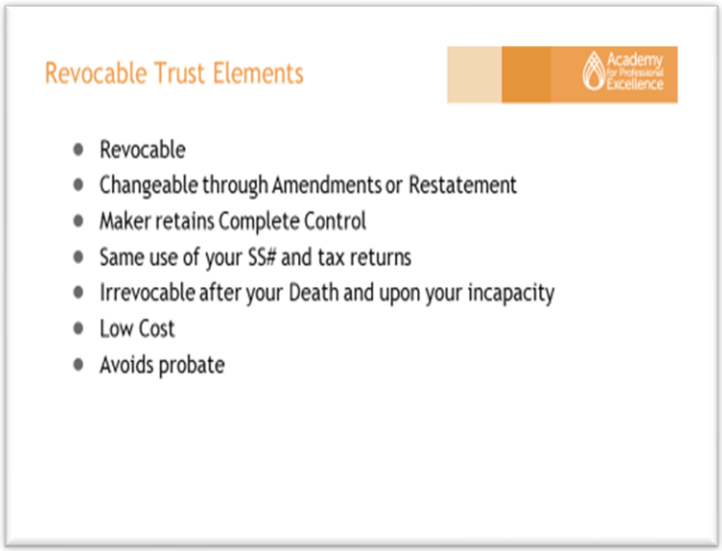
Remember our discussion earlier regarding a small estate affidavit?

Note: if your estate is worth less than $150,000 and you do not own real estate, neither a will nor trust may be necessary.

Your heirs can gain access to your estate after 40 days of your death with the Small Estate Affidavit, co-owned assets or beneficiary designations.

Also Banks now have beneficiary designations for regular bank accounts called POD (Pay on Death) or TOD (Transfer of Death) designations.

Slide #27: Revocable Trust Elements



Cover the following elements:

- Revocable
- Changeable through Amendments or Restatement
- Maker retains Complete Control
- Same use of your SS# and tax returns
- Irrevocable after your Death and upon your incapacity
- Low Cost
- Avoids probate

Refer participants to **Handout #7: Revocable Living Trust Sample on their tables** (note: this is NOT in their Participant Manual)

Ask participants to please pass them among yourselves as we discuss various parts of the trust and look over as you explain how trusts work:

In Revocable Living Trusts, generally the Trustmaker, the Trustee and the Beneficiary are the same person (or persons in a joint trust). The Trustmaker creates the Trust, manages the Trust assets, and has the right to use all Trust assets. Since the person creating the Trust has complete and unrestricted access to the Trust assets, there is no loss of control when assets are transferred into the Living Trust. For example, after executing your Living Trust, your attorney will transfer the title of your house into the name of your Trust. From that time on, your house is owned by your Living Trust. You will do the same transfer for most of your other assets and you remain the owner of all of your assets, with complete control.

Continued

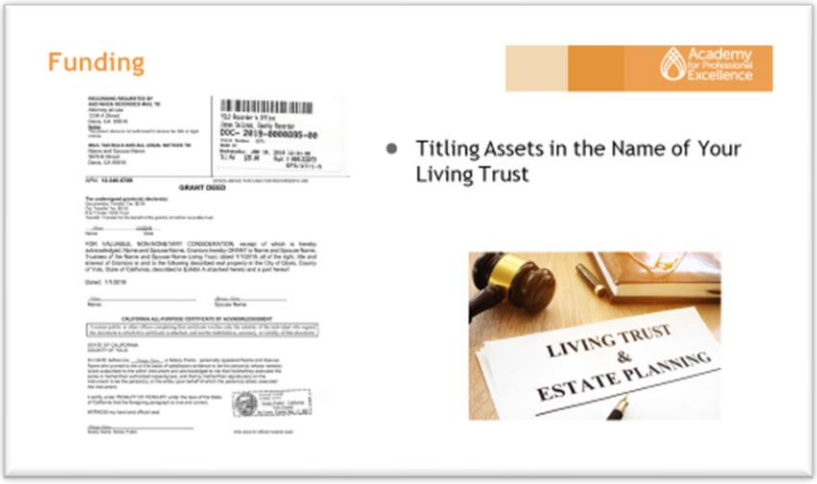
In other words: It is a legal document that can, in some cases, partially substitute for a will. With a revocable living trust, your assets are put into the trust, administered for your benefit during your lifetime and transferred to your beneficiaries when you die—all without the need for court involvement.

Most people name themselves as the trustee in charge of managing their living trust's assets. By naming yourself as trustee, you can remain in control of the assets during your lifetime. In addition, you can revoke or change any terms of the trust at any time as long as you are still competent. (The terms of the trust become irrevocable when you die.

The Living Trust agreement designates someone to act as a Successor Trustee after the death of the Trustmaker. Thus, when the Trustmaker dies, another person steps into the role of Trustee. That person then has legal authority over all of the Trust assets. The Successor Trustee is legally obligated to follow the deceased Trustmaker's instructions set forth in the Living Trust for distribution of the trust assets.

Trainer Note: There are no Trust police running around to monitor the Trustees actions. The beneficiaries of the Trust are the ones who need to keep tabs on what and how things are done to be sure there is no abuse.

Slide #28: Funding = Titling Assets in the Name of Your Living Trust – 10 Minutes



Ask: Have any of you had a client with a trust but no assets have been put in the trust name?

- What if the successor agent is acting on the client's behalf because your client is incapacitated, and therefore, the successor agent has no authority over those assets?

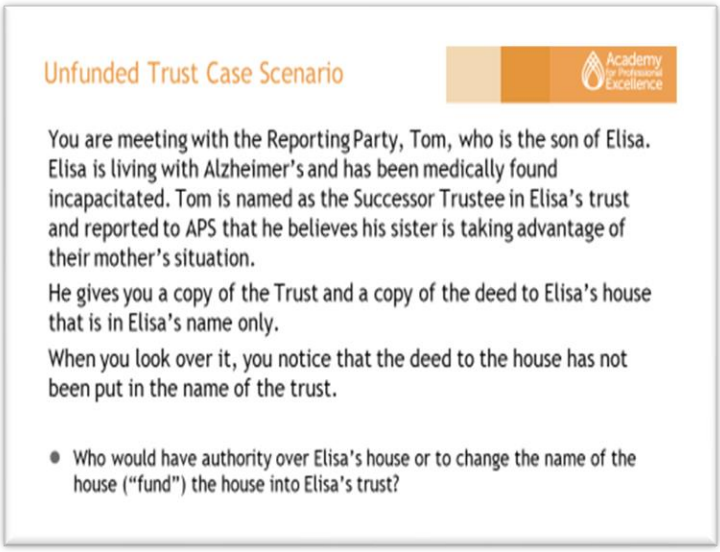
Discuss: Deeds to real estate are typically put into the name of a living trust. Some county websites allow access to view recorded documents, others you may need to request a copy. You can typically find the deed by referencing the APN (Assessor's Parcel Number), the address of the property or the property owner's name. Whether it is a 'Grant Deed' or 'Quitclaim Deed' does not matter for our purposes, but accessing a copy of the Deed can be a good place to start to investigate if a client has a trust.

Typically the attorney who prepared the trust will be noted at the top of the deed and often will also be the notary. Of course you will need your client's authorization for the attorney to talk to you and/or request copies of their estate planning documents.

Show participants the graphic on slide of where attorney who prepared trust can be found.

Inform participants that signed and notarized Deeds are legal without being recorded at the county recorder's office.

Slide #29: Unfunded Trust



Let's look at how this plays out in a scenario.

You are meeting with Tom, son of Elisa who is living with Alzheimer's and has been medically found incapacitated. Tom is named as the Successor Trustee in Elisa's trust and is the reporting party and reported to APS that he believes his sister is taking advantage of their mother's situation. He gives you a copy of the Trust and a copy of the deed to Elisa's house that is in Elisa's name only. When you look over it, you notice that the deed to the house has not been put in the name of the trust.

Ask: Who would have authority over Elisa's house or to change the name of the house ("fund") the house into Elisa's trust?

Answer – This was kind of a trick questions.

- *If Tom was given the power in the Trust document to "fund" the trust, he can do so.*
- *But this power is not often in Trusts.*
- *If not, remember our discussion of the Financial Power of Attorney?*
    - *The agent named in the POA **IF** there is one and IF that person was given the power to "fund" the maker's living trust.*

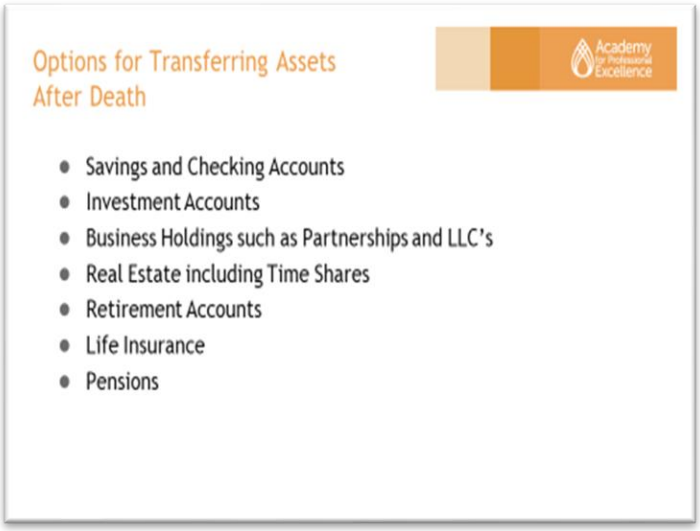
Ask – What if the Trust document and financial POA did not authorize the agent/successor trustee to put assets in the name of the trust ("funding" the trust)?

Answer:

- *We would be stuck.*
- *No one would have legal authority to change title of assets into the name of the trust because Elisa is incapacitated.*
- *The POA would have authority during life, but the client would have probate when he/she died because assets were not funded into the trust.*

Continued

Slide #30: Transferring Assets



Ask: Which ones of these documents do you think are the easiest places to be abused?

Answer:
Beneficiary designations and POD/TOD! But interestingly enough, the typical perpetrators do not target these as often as direct sources of cash with immediate gratification. That is why we see more changes in POA's so that the perpetrators have control and have immediate access to cash and assets.

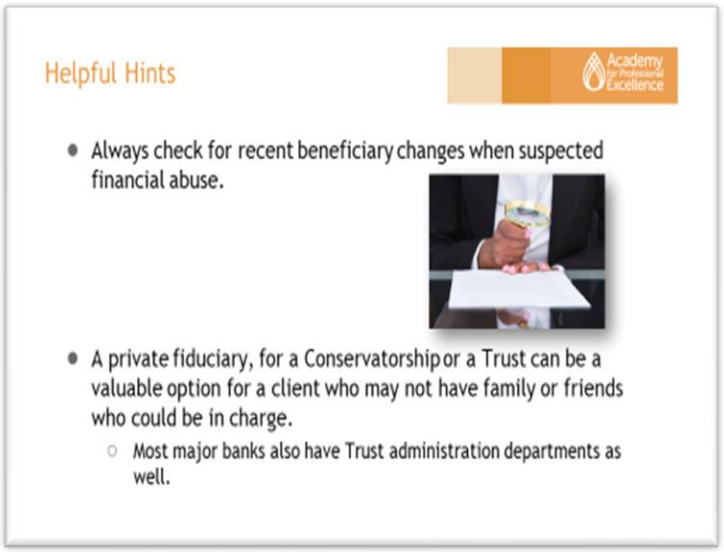
Discuss:

- Many assets will not be subject to a will or trust including securities accounts and bank accounts that have designated beneficiaries, life insurance policies, IRAs and other tax-deferred retirement plans, and some annuities.
- Notably, a trust can be named as the beneficiary of any of these assets, which would also avoid probate.
    - **<u>This is important when investigating financial abuse cases, as a client may have created a trust, but forgotten to change all of their beneficiaries to other accounts.</u>**
    - It's not done automatically, so they may still have bank accounts, life insurance that the abuser is the named beneficiary, but a trust that was created to protect them from that abuser.
    - Remember though, that the beneficiaries of a Trust can be different than on your client's other assets like retirement accounts. I would suggest asking the client to explain the difference if you see this.

Divert discussion of potential abuse:

- These days, the majority of our assets are held in retirement accounts.
- **Point out** that with the electronic age, the vast majority of retirement accounts are easily accessed online, and the beneficiary designations can easily be changed on-line, often with no notarization or certification that the change was done with the client's authorization.

Slide #31: Helpful Hints



Discuss the following helpful hints for APS investigators**:**

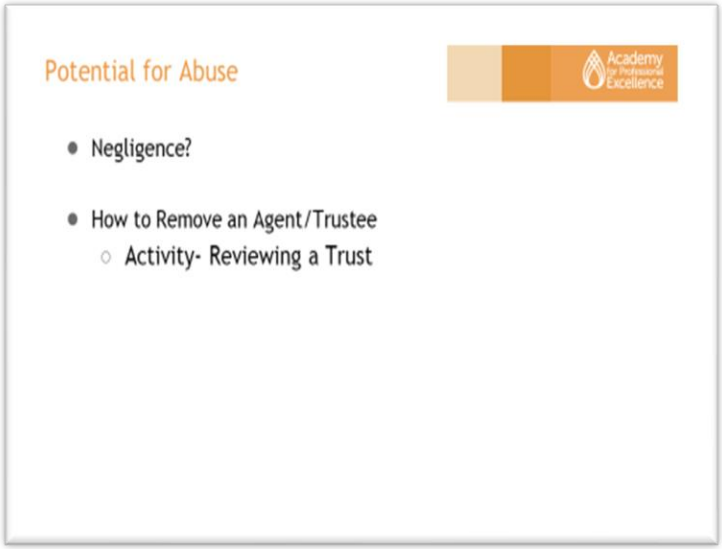
- Always check for recent beneficiary changes when suspected financial abuse.
- A private fiduciary, for a Conservatorship or a Trust can be a valuable option for a client who may not have family or friends who could be in charge. Most major banks also have Trust administration departments as well.

Ask: How many of you have had experience with what you would consider a Negligent Trustees or for Agents for Financial Powers of attorney?

- **Solicit** a few stories/examples

Discuss: When someone volunteers to be the Agent or Trustee (Note – this is a voluntary appointment, no one has to take on that role if they don't want, even if they are listed, they can abdicate – no indentured servitude!) the person assumes legal responsibilities such as being a fiduciary for the principal. This means there can be no self-dealing, and the agent/trustee must make all financial decisions in a prudent, reasonable and conservative manner.

Slide #32: Potential for Abuse



Discuss what is prudent/reasonable/conservative? (**5 minutes**)

Investments should not loose principal value, i.e. investing straight in the stock market is not prudent. Holding real estate may be, only if the value outweighs the expenses and/or liability, but sometimes the prudent thing would be to sell a property. The end game is to preserve as much as the principal money for the Trustmaker as possible, and only spend money for their benefit.

Ask: Could NOT spending money on the client be Negligence?

Answer:

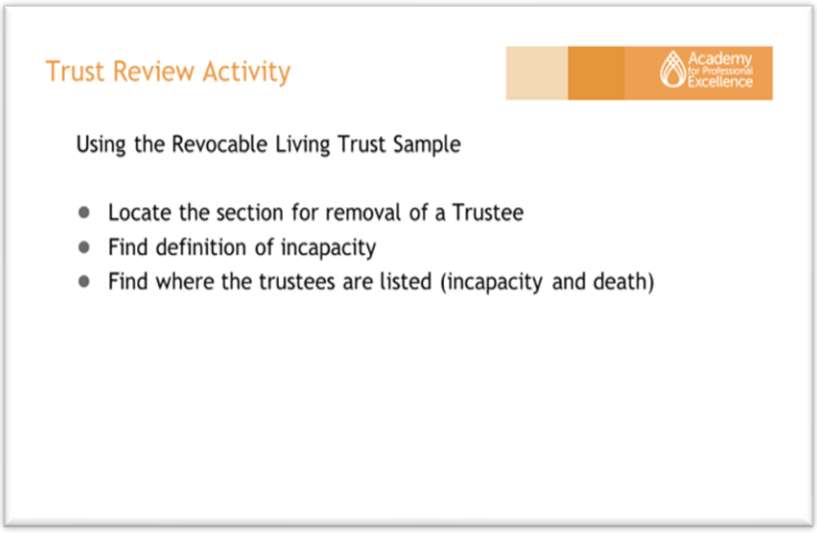
- *Of course – it is common for a successor trustee of POA to not spend on the client and instead spend on themselves, or "save" money while the client is still alive to have more for inheritances.*
- *This is a common combination of neglect and financial abuse.*
- *All money/assets should be leveraged for the sole care of the trustmaker.*

Shout-out - How could one remove an agent/Trustee?

Answer:

- *First look to the document to see if there is language about removal, then – The law has mechanisms for removal.*
- *Generally, someone (a family member or the public guardian) can petition the court for removal, then there is a hearing and the judge will decide on the removal.*

Slide #33: Trust Review Activity



Activity #5-Reviewing a Trust (15 min)

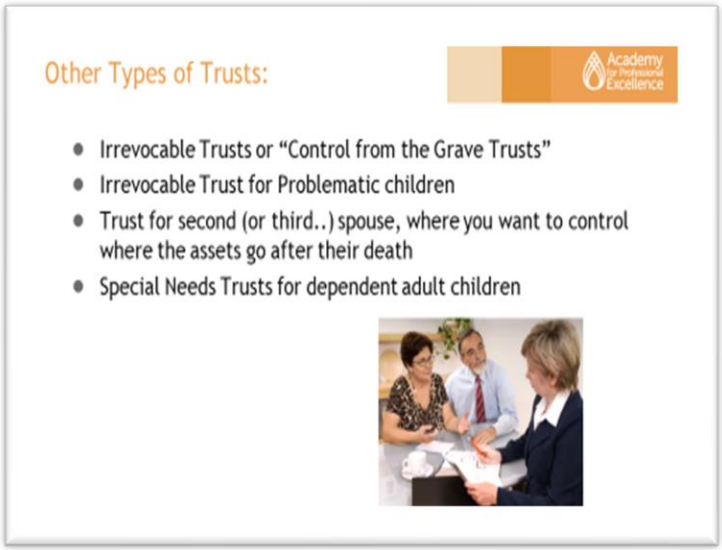
Refer participants back to **Handout #7 - Revocable Living Trust** (samples on their tables) and highlighters (if available).

In table groups, **ask** them to:

1. Locate the section for removal of a Trustee.
    a. Article Three discusses removal and replacement if a Trustee becomes incapacitated, but to remove a Trustee for "Cause" – meaning for bad acts, it would require a court order.
2. Find definition of incapacity (8.5)
3. Find where the trustees are listed (11.2 for incapacity and for death – these can be different)

> **Trainer Note: Remember again, while the executor of a will is subject to direct court supervision, the trustee of a living trust is not. Remember, there are no "trust police." Both the executor of a will and a trustee of a trust serve almost identical functions. Both are responsible for ensuring that your written instructions are followed, but the "policing" of the Trust is done by the beneficiaries, family members, or APS.**

Slide #34: Other Type of Trusts



Ask: What are some other types of trusts that are not Revocable Living Trusts and why would they be created?

Briefly inform participants of other types of trusts.

- Irrevocable Trusts or "Control from the Grave Trusts"
- Irrevocable Trust for problematic children/substance abuse/immature
- Trust for second (or third..) spouse, where you want to control where the assets go after his/her death
- Special Needs Trusts for dependent adult children
- Dynasty trust to provide for grandchildren
- Trust to hold life insurance proceeds or retirement proceeds

Discuss: Irrevocability generally means not changeable by the Trustee or the beneficiary (this is an oversimplification, but will suffice for this training).

Ask: Have any of you had a client with a trust that is now irrevocable after the first spouse died?

Discuss:
This might be because a controlling husband who was the sole financial decision maker. This can become tricky for APS when a client has an irrevocable trust and the Successor Trustee is stealing or neglecting the client - what recourse do you think the client has?

Possible Answers:

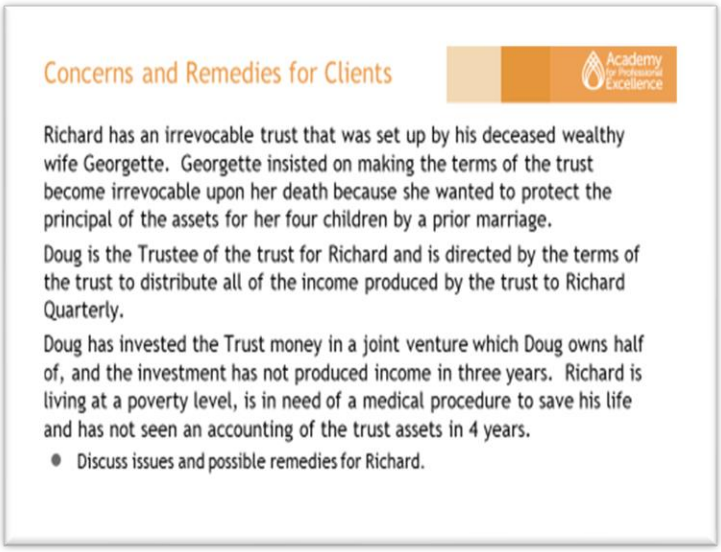
Remember the first rule of discussing these documents? Read the document first!
The Trust may have become irrevocable after the first spouse's death, so not changes should have been made. Alternatively, look to the trust document language which could allow surviving spouse to change trustees, and if not, he/she will need a court order.

Continued

Basically, the main reason to do an irrevocable trust is to control money for the benefit of someone else for a stated term of time or for their whole life.

1. The beneficiary often does not have a “right” to get the money, they have to ask the trustee and the reason has to reasonable at the discretion of the trustee
2. The trust works like a business, files it’s own taxes and has it’s own bank accounts
3. Trustee’s own assets should be kept completely separate (no co-mingling) from Trust assets.

Slide #35: Concerns and Remedies for Clients:



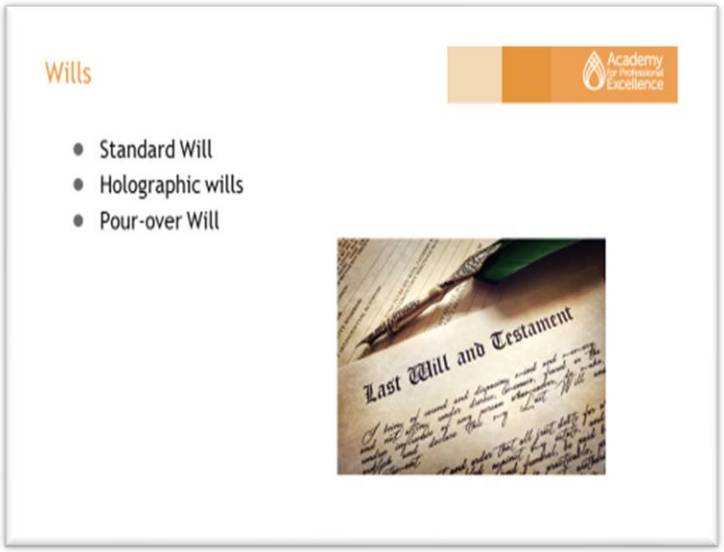
Activity #6: Concerns and Remedies for Clients (10 min)

Hypo: Richard has an irrevocable trust that was set up by his deceased wealthy wife Georgette. Georgette insisted on making the terms of the trust become irrevocable upon her death because she wanted to protect the principal of the assets for her four children by a prior marriage. Doug is the Trustee of the trust for Richard and is directed by the terms of the trust to distribute all of the income produced by the trust to Richard Quarterly. Doug has invested the Trust money in a joint venture which Doug owns half of, and the investment has not produced income in three years. Richard is living at a poverty level, is in need of a medical procedure to save his life and has not seen an accounting of the trust assets in 4 years.

Instructions:
1. **Have** participants get into dyads or triads.
2. **Ask** them to **discuss** issues and possible remedies for Richard.
3. **Solicit** 2-3 answers.

Possible Answers:
Richard has rights as the beneficiary of the Trust to all of the income of the Trust. He can file a civil case in the probate court to get Doug removed as Trustee. If there is no other successor Trustee listed after Doug, the court can appoint someone else or a private fiduciary. Doug may also be civilly liable for the loss in trust money due to his investment in a venture where he has a personal interest (self-dealing is against the rules as a Trustee), and for not providing an accounting at least annually to Richard. Further, if, by Doug's actions of not providing income from the Trust to Richard, his health and wellbeing are risked, Doug could also be held criminally liable for elder abuse/neglect.

Slide #36: Wills



Refer participants to **Handouts #8, #9 and #10** (Three Sample Wills) and **ask: "W**hich is which?"
Give participants a moment to look through the wills.

Lecturette: Overview of Wills (15 min)

1. Will #1: Standard Will: a traditional legal document which:
   a. Names individuals (or charitable organizations) who will receive your assets after your death, either by outright gift or in a trust.
   b. Nominates an executor who will be appointed and supervised by the probate court to manage your estate; pay your debts, expenses and taxes; and distribute your estate according to the instructions in your will.
   c. Nominates guardians for your minor children.
   d. There are California requirements to complete a standard will

2. Will #2: Pour-Over Will: Accompanies a revocable living trust, generally names the same trustees as executors and directs the executor to "Pour-Over" assets in to trust. (this happens when as asset that should have been titled into the trust was forgotten or omitted).

3. Will #3: Holographic Will: Remember we talked about this earlier – A hand written signed and dated Will which is valid in CA (may not be in all states)

Discuss: You may have heard from a client that he/she has a trust or a will or both. A living trust does not remove the need for a will. Generally, you would still need a will—known as a "Pour over Will"—to cover any assets that have not been transferred to the trust.

Continued

Why you may ask, when I previously told you that the trust takes the place of the will to distribute your property with no probate?

Answer: Because people forget to put their assets into the trust name – which is called What? Answer – "funding" the Trust.

Then if the trustmaker dies with assets left outside of the trust, the "pour-over will" acts as a backup plan to "pour-over" assets back into the trust after death if need be through a court proceeding that is much less involved than a full probate. It's a back-up plan.

Explain that the witness requirements for a Will are different than a Power of Attorney as discussed earlier. The witness requirements for Wills #1 and #2 are that two witnesses over the age of 18 are in the same room at the same time watching as the Will maker signs his/her Will. Note the Witness acknowledgment at the end of Will #1 and #2. For Will #3, the requirements for a Holographic Will in California are simply that the Will is handwritten, signed and dated by the Will maker. No Witness necessary.

Note: This my not be the case in states other than California where Holographic Wills may not be allowed.

WILL #1 **HANDOUT #8**

Will of NAME

I, NAME, a resident of _____ County, California, revoke any prior wills and codicils made by me and declare this to be my Will ("my Will").

Article One
Family Information

I am married to SPOUSE. Any reference in my Will to him/her is to SPOUSE.

I have one child, JANE, born on January 1, 2000.

All references in my Will to "my children" are references to my daughter.

References to "my descendants" are to my son and his descendants.

Article Two
Specific and General Gifts

Section 2.01 Specific Distribution to Beneficiaries

If my SPOUSE has predeceased me, then as soon as practicable after my death, I give and bequeath $10,000 to each of XYZ Beneficiaries living at the time of my death. If my SPOUSE survives me, this distribution will lapse, and this property instead will be distributed under the other provisions of my Will.

Section 2.02 Disposition of Tangible Personal Property

I give and bequeath all my tangible personal property, together with any insurance policies covering the property and any claims under those policies in accordance with a "Memorandum for Distribution of Personal Property" or other similar writing directing the disposition of the property. Any writing prepared according to this provision must be dated and signed by me.

Article Three
My Residuary Estate

Section 3.01 Definition of My Residuary Estate

All the remainder of my estate, including property referred to above that is not effectively disposed of, will be referred to in my Will as my "residuary estate."

Section 3.02 Disposition of My Residuary Estate

If my SPOUSE survives me, my Executor shall allocate my residuary estate to my SPOUSE.

If my SPOUSE has predeceased me, my Executor shall allocate my residuary estate to my CHILD(REN).

Article Four
Remote Contingent Distribution

If, at any time after my death, there is no person or entity then qualified to receive final distribution of my probate estate or any part of it under the foregoing provisions of my Will, then the portion of my probate estate with respect to which the failure of qualified recipients has occurred shall be distributed to AUNT MARY. If she is deceased then the property shall be distributed to her descendants, *by representation*, and if none, to those persons who would inherit it had I then died intestate owning the property, as determined and in the proportions provided by the laws of California then in effect.

Article Five
Designation of Fiduciaries

Section 5.01 Executor

I name my SPOUSE as my Executor.

If my SPOUSE is deceased or unable, I nominate my Daughter JANE as my Executor.

Article Six
General Administrative Provisions

The provisions of this Article apply to my probate estate.

Section 6.01 No Bond

No Fiduciary is required to furnish any bond for the faithful performance of the Fiduciary's duties, unless required by a court of competent jurisdiction and only if the court finds that a bond is needed to protect the interests of the beneficiaries. No surety is required on any bond required by any law or rule of court, unless the court specifies that a surety is necessary.

Section 6.02 Informal Proceedings

I authorize my personal representative to administer my probate estate under the California Independent Administration of Estates Act as set forth in the California Probate Code, Division 7, Part 6, beginning with Section 10400.

Section 6.03 Spendthrift Provision

Neither the income nor the principal of any trust created under my Will may be assigned, anticipated, encumbered, alienated, or otherwise voluntarily transferred in any manner by any beneficiary. In addition, neither the income nor the principal of any trust created under my Will is subject to attachment, bankruptcy proceedings or any other legal process, to the interference or control of creditors or others, or otherwise subject to any involuntary transfer.

Article Seven
Powers of My Fiduciaries

Section 7.01 Fiduciaries' Powers Act

My Fiduciaries may, without prior authority from any court, exercise all powers conferred by my Will or by common law or by the California Probate Code, Division 7, Part 5, beginning with Section 9600 or other statute of the State of California or any other jurisdiction whose law applies to my Will. My Fiduciary has absolute discretion in exercising these powers. Except as specifically limited by my Will, these powers extend to all property held by my fiduciaries until the actual distribution of the property.

I, NAME, sign my name to this instrument on January 1, 2000 and do declare that I sign and execute this instrument as my Will, that I sign it willingly, that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence. I ask the persons who sign below to be my witnesses.

_____

NAME

Each of us declares under penalty of perjury under the laws of the State of California that on the day and year written below, NAME, published and declared this instrument to be his Will, that he signed this Will in our presence, that each of us, in his presence and at his request, and in the presence of each other, have signed our names as attesting witnesses. We also declare that each of us is now more than eighteen years of age, is a competent witness, and resides at the address set forth after his or her name.

We also declare that at the time of our attestation of this Will, NAME was, to our best knowledge and belief, of sound mind and memory, eighteen years of age or older, and that this Will was not procured by duress, menace, fraud, misrepresentation, constraint or undue influence.

Executed on January 1, 2000 in the _____ of County, California.

_____ _____

_____, _____,

Witness Witness

_____ _____

_____ _____

HANDOUT #9

Will #2

Will of NAME

I, NAME, a resident of _____ County, California, revoke any prior wills and codicils made by me and declare this to be my Will ("my Will").

Article One
Family Information

I am married to SPOUSE. Any reference in my Will to him/her is to SPOUSE.

I have one child, JANE, born on January 1, 2000.

All references in my Will to "my children" are references to my daughter.

References to "my descendants" are to my son and his descendants.

Article Two
Distribution of My Property

Section 2.01 Pour-Over to My Revocable Living Trust

I give all of my probate estate, excluding any property over which I have a power of appointment, after expenses and taxes are paid under this Will, to the then-acting Trustee of the NAME Living Trust dated January 1, 2000 and executed before this Will, to be added to the property of that trust. I direct that the Trustee administer the property according to the trust and any amendments made prior to my death.

Section 2.02 Alternate Disposition

If the trust referred to in 0 is not in effect at my death, or if for any other reason the pour over fails, I direct my Executor to distribute the remainder of my estate, excluding any property over which I have a power of appointment as directed in my Revocable Living Trust.

Article Three
Designation and Succession of Fiduciaries

Section 3.01 Executor

I nominate SPOUSE as my Executor. If SPOUSE is unwilling or unable to act as my Executor, I nominate the person or persons serving as Trustee of the NAME Living Trust dated January 1, 2000 to serve as my Executor.

Article Four
Executor Powers

My Executor may, without prior authority from any court, exercise all powers conferred by my Will, by common law, or by the California Probate Code, Division 7, Part 5, beginning with Section 9600 or other statute of the State of California or any other jurisdiction whose law applies to my Will. My Executor has absolute discretion in exercising these powers. Except as specifically limited by my Will, these powers extend to all property held by my fiduciaries until the actual distribution of the property.

Article Five
Administrative Provisions

Section 5.01 Court Proceedings

Any trust established under my Will will be administered in a timely manner; consistent with its terms; free of active judicial intervention; and without order, approval, or other action by any court. The trust will be subject only to the jurisdiction of a court being invoked by the Trustees or by other interested parties, or as otherwise required by law.

Section 5.02 No Bond

I direct that no Executor be required to give any bond in any jurisdiction. But if a bond is required by law or by court determination, no sureties will be required on the bond.

Section 5.03 Compensation and Reimbursement

Any fiduciary serving under my Will is entitled to reasonable compensation commensurate with services actually performed. In addition, any fiduciary serving under my Will is entitled to reimbursement for reasonable expenses incurred.

I, NAME, sign my name to this instrument on January 1, 2000 and do declare that I sign and execute this instrument as my Will, that I sign it willingly, that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence. I ask the persons who sign below to be my witnesses.

_____

NAME

Each of us declares under penalty of perjury under the laws of the State of California that on the day and year written below, NAME, published and declared this instrument to be his Will, that he signed this Will in our presence, that each of us, in his presence and at his request, and in the presence of each other, have signed our names as attesting witnesses. We also declare that each of us is now more than eighteen years of age, is a competent witness, and resides at the address set forth after his or her name.

We also declare that at the time of our attestation of this Will, NAME was, to our best knowledge and belief, of sound mind and memory, eighteen years of age or older, and that this Will was not procured by duress, menace, fraud, misrepresentation, constraint or undue influence.

Executed on January 1, 2000 in the _____ of County, California.

_____ _____

_____, _____,

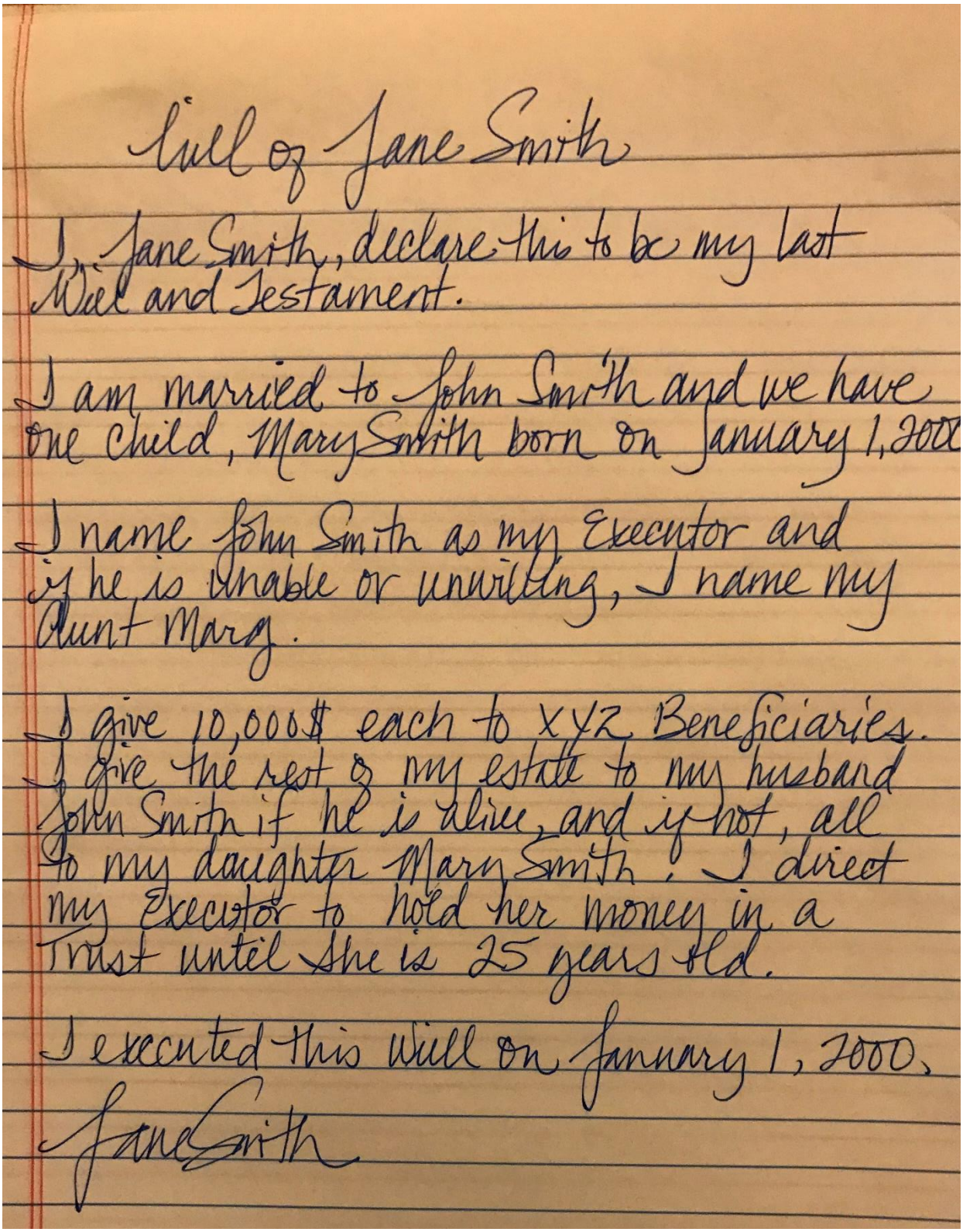
Witness Witness

_____ _____

_____ _____

HANDOUT #10

Will #3



Will of Jane Smith

I, Jane Smith, declare this to be my last Will and Testament.

I am married to John Smith and we have one child, Mary Smith born on January 1, 2000

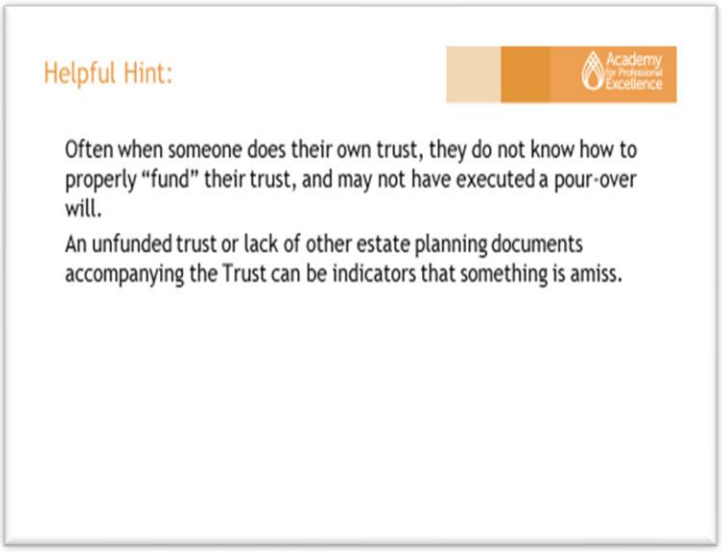
I name John Smith as my Executor and if he is unable or unwilling, I name my Aunt Marg.

I give 10,000$ each to XYZ Beneficiaries. I give the rest of my estate to my husband John Smith if he is alive, and if not, all to my daughter Mary Smith. I direct my Executor to hold her money in a Trust until she is 25 years old.

I executed this Will on January 1, 2000.

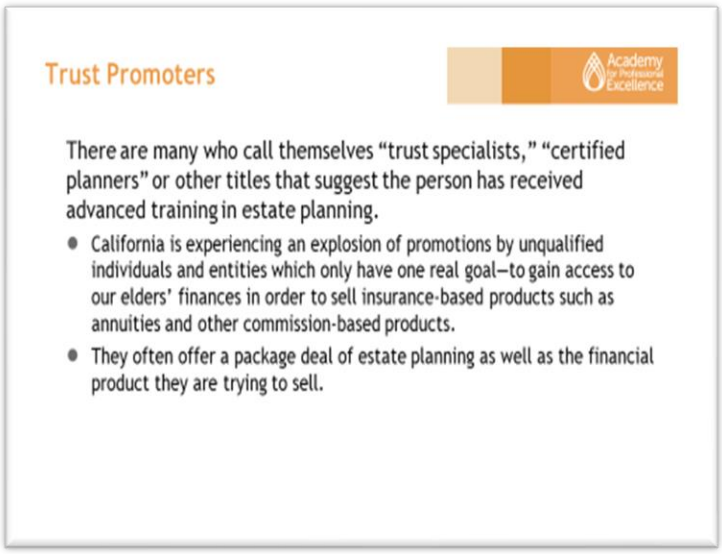
Jane Smith

Slide #37: Helpful Hint:



Explain that often when someone does their own Trust, they do not know how to properly "fund" their Trust, and may not have executed a Pour-Over Will. An unfunded Trust or lack of other estate planning documents accompanying the Trust can be indicators that something is amiss.

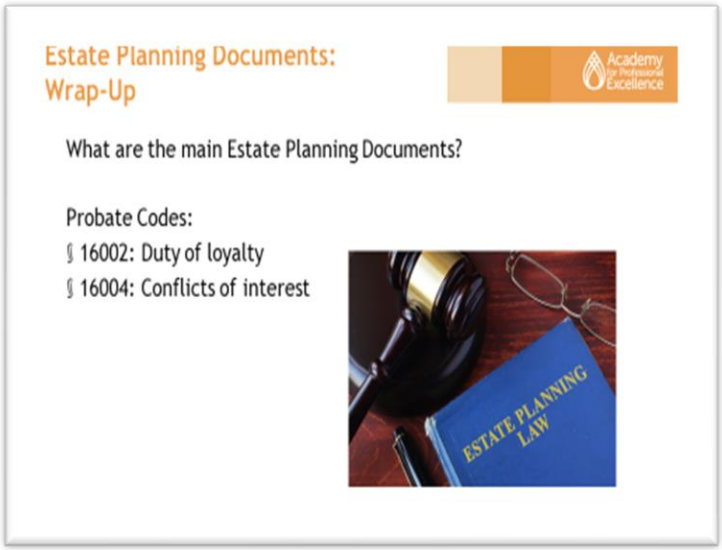
Slide #38: Trust Promoters



Discuss Financial Abuse in relation to "promoters" of financial and estate planning services –

- There are many who call themselves "trust specialists," "certified planners" or other titles that suggest the person has received advanced training in estate planning.
- California is experiencing an explosion of promotions by unqualified individuals and entities which only have one real goal—to gain access to our elders' finances in order to sell insurance-based products such as annuities and other commission-based products.
- They often offer a package deal of estate planning as well as the financial product they are trying to sell.

Slide #39: Estate Planning Wrap-up:



Trainer Note: If running behind, don't go over this slide and go straight to the scenario.

Shout-out: What are the main document?

Answers:

- *FPOA*
- *HCPOA*
- *HIPAA*
- *Trust*
- *Will*
- *Guardian designations for minor children*

Explain: There is a large body of law in the Probate Code that deals with Trusts and Estate Planning, in particular, around forming trusts and the duties and powers of a trustee as well as financial powers of attorney. The trust and POA documents can add to refer generally to these powers and duties, but in most cases can also change them and add to them.

Read aloud the following Probate Code sections as examples of the Probate codes regarding Trusts:

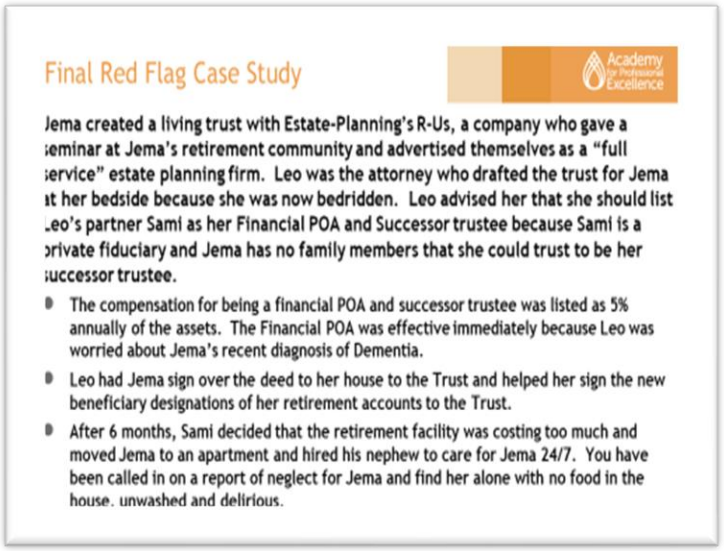
California Probate Code § 16002. *Duty of loyalty*

(a) The trustee has a duty to administer the trust solely in the interest of the beneficiaries.

California Probate Code § 16004. *Conflicts of interest*

(a) The trustee has a duty not to use or deal with trust property for the trustee's own profit or for any other purpose unconnected with the trust, nor to take part in any transaction in which the trustee has an interest adverse to the beneficiary.

Slide #40: Final Red Flag Case Study



<u>Activity #7- Estate Planning Red-Flags Wrap Up (15 min)</u>:

Have participants individually read through the scenario and **have** them **write down** all of the possible the red flags/areas for abuse they see and note why they are considered red flags/potential for abuse**. Inform** them they have 7-10 minutes to do this.

<u>Final Red Flag Case Study –</u>
Jema created a living trust with Estate-Planning's R-Us, a company who gave a seminar at Jema's retirement community and advertised themselves as a "full service" estate planning firm. Leo was the attorney who drafted the trust for Jema at her bedside because she was now bedridden. Leo advised her that she should list Leo's partner Sami as her Financial POA and Successor trustee because Sami is a private fiduciary and Jema has no family members that she could trust to be her successor trustee.

The compensation for being a financial POA and successor trustee was listed as 5% annually of the assets. The Financial POA was effective immediately because Leo was worried about Jema's recent diagnosis of Dementia.

Leo had Jema sign over the deed to her house to the Trust and helped her sign the new beneficiary designations of her retirement accounts to the Trust.

After 6 months, Sami decided that the retirement facility was costing too much and moved Jema to an apartment and hired his nephew to care for Jema 24/7. You have been called in on a report of neglect for Jema and find her alone with no food in the house, unwashed and delirious.

Report Out: Solicit 3-5 responses and down answers on flip chart. **(5 min)**

Possible Discussion topics regarding areas of potential abuse:

- Leo praying on frail elderly with the retirement home seminars
- Leo as an attorney cannot "partner" with non-attorney's
- Leo has a conflict of interest in naming his partner as the successor trustee
- Jema's bedside signing – undue influence?
- Too much compensation
- POA effective immediately
- Leo knew of her diagnosis – did she have capacity?
- Moving her from retirement facility to save money – more compensation for Sami and self-dealing
- Signing over house to trust and change of beneficiaries both generally appropriate – except we don't know if that was her wish and it gave more money to the "trust" assets to be billed for compensation
- Hired Nephew to care for her – self-dealing and neglect because she was left unattended

Discuss possible remedies/interventions APS can do:
– Include probate order of removal, and criminal charges of neglect, undue influence…

Possible answers regarding red flags:

1. *Immediately effective FPOA*
2. *Documents created online (no attorney)*
3. *Self-done unfunded trusts*
4. *Recent changes in beneficiaries to financial accounts such as retirement accounts*

Trainer Note: You may want to give these last 5 "tips" for participant to write down and recall when back in the field as a helpful takeaway from POAs:

1. **It's vital to physically see and READ the POA.**
2. **Locate who the Agent is.**
3. **Locate and define "incapacity" within the document.**
4. **When does it become effective- immediately or springing?**
5. **Find out if there are prior POAs.**

INVESTIGATING AND DOCUMENTING

Time Allotted: 50-60 minutes

Slide #41: Investigations and Documenting for Prosecution



Discuss: Many of the class participants may have already been able to participate in trainings involving the Criminal Justice System and investigations. This section will briefly touch on the nature of APS Investigations in relation to prosecuting cases.

We have already discussed the various Estate Planning documents and their uses and misuses. Now, how can you help assure the cases of abuse have the best possible opportunity to be prosecuted?

Explain: The better you are at interviewing – and documenting, the better chance your case has for conviction at trial.

Slide #42: Helpful Tip:



Remind participants to DOCUMENT, DOCUMENT everything, and always remember the end-game.

Refer them to **HANDOUT #11-APS Financial Abuse Investigation Checklist**

Give class time to read through the handout (5-7 min)

Explain (3 min) - This handout can help you organize your information for prosecution.

Ask: What is APS's main focus in investigating financial abuse cases and what is a Prosecutors main focus? (Or…. Is there a difference in goals or focus between APS and Prosecutors when investigating financial abuse cases?"

Possible answers:
APS is focused on the client, ensuring resources are in place, stabilize the situation, and reduce the risk of future abuse.
Prosecutor tries cases to get a conviction.

Explain the job of a DA: Their job is to assess cases for their potential to win in court if they choose to prosecute – Period. That's the End-Game. There is no other objective of a prosecutor, so it is very important to keep this in mind when investigating and documenting cases you hope to be prosecuted.

HANDOUT #11

APS Financial Abuse Investigation Checklist

Adapted from NAPSA Core Module 12: Financial Exploitation Curriculum

Relationship of the alleged perpetrator to the client:

_____

Cognitive and other deficits

- Signs/symptoms of memory loss
- Signs/symptoms of psychosis
- Alleged abuser states client's memory is good
- Alleged abuser states client's memory is poor
- Alleged abuser's story changes about client's memory
- Client has substance abuse problem which may impair cognition
- Neuropsychological evaluation needed
- Client has vision problem
- Client has glasses/does not have access to them
- Client is hearing impaired
- Client has hearing aid(s)/ does not have access to them
- Client is unable to read
- Client is unable to write
- Client is unable to speak/speak coherently

Extent of client's estate

- Client owns own home
- Client owns other real property
- Client has bank account(s) and/or CD(s)
- Client has a brokerage account and/or other stocks owned
- Account(s) are in client's name only
- Alleged abuser's name is on account(s)
- Joint account is an "or" account
- Joint account is an "and" account
- Changes reported in client's deposit/withdrawal habits
- Client home furnishings/other personal property of value reported missing
- Vehicle(s) owned by client
- Client's name only name on vehicle title
- Alleged abuser's name only name on vehicle title
- Auto insurance in force/insurance in client's name
- Client's auto is registered with DMV in abuser's name
- Client is unable to drive
- Alleged abuser drives client's vehicle
- Client's vehicle is kept at the abuser's address
- Big screen TV seen in client's home

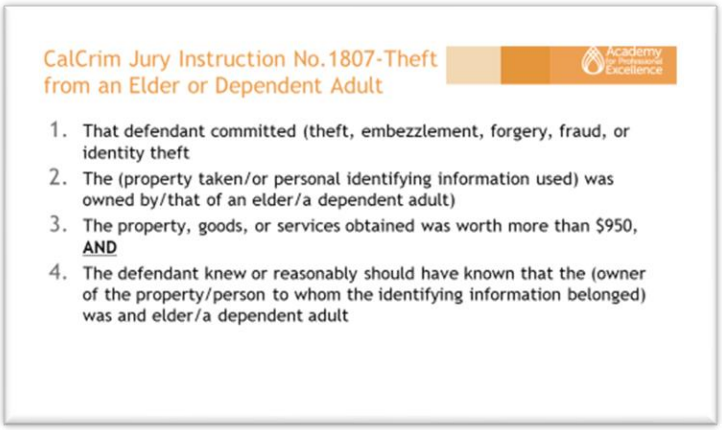
Ownership of real property

- Have Real Property records
- Client and alleged abuser's claims of ownership agree
- Client and alleged abuser's claims of ownership don't agree
- Client's name is only name on the deed
- Alleged abuser's name has recently been added to the deed
- Alleged abuser has removed client's name from the deed.
- Client pays mortgage, or is on the rental agreement/lease
- Client's real property has been refinanced.
- Client is aware/understands property has been refinanced
- Client is aware/understands the amount/terms of the refinance
- Client's real property(s) has been refinanced frequently and equity depleted
- Evidence of shopping addiction on the part of client
- Evidence of gambling problem on the part of client
- Evidence of a shopping addiction on the part of the abuser
- Evidence of a gambling addiction on the part of the abuser
- String of garbage liens on the real property(s)
- Garbage/other liens are inconsistent with client's income
- Property taxes have been paid for current year
- There are gaps in record of property tax payments
- Client is responsible for paying property taxes
- Someone else is responsible for paying property taxes
- Client believes property taxes have been paid
- Client's home is currently in, or approaching, foreclosure or tax sale for unpaid property taxes

Client's finances

- Client handles own finances
- Client pays own bills
- Client has representative payee
- Alleged abuser is rep. payee for client
- Alleged abuser is supposed to pay the client's bills
- Client has a DPOA for finances
- Client has DPOA for health care decisions
- DPOA(s) dated before/after onset of dementia
- A copies of the DPOA(s) have been obtained
- Alleged abuser is named as DPOA
- Client's income received in paper check form
- Client's income is direct deposited
- Method of client receiving income has recently changed
- Clients bank statements and other records are missing from home
- Client has an ATM card
- Client is not aware of having ATM card
- Alleged abuser has access to an ATM card for client's account(s)
- Client unaware of having credit cards/debt
- Alleged abuser using client's identity/credit
- Sample of alleged abuser's signature has been obtained
- Sample of client's signature has been obtained

Slide #43: CalCrim Jury Instruction #1807 – Theft from an Elder or Depenant Adult:



Shout-out – Have you been frustrated with cases you have investigated that don't get prosecuted?

Well – let's look at the prosecutor's end-game – the Jury Instructions that are the sole tool necessary to successfully prosecute a case. They have to prove each and every element of the jury instruction to receive a guilty verdict.

Helpful Hint: In every investigation, I would have a copy of this jury instruction pasted to my desk to remind me of each piece of evidence – does that piece fit one of these elements and how?!

1807.Theft From Elder or Dependent Adult (Pen. Code, § 368(d),(e))
To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant committed theft/embezzlement/ forgery/ fraud/ [or] identity theft;

2. The property taken/ [or] personal identifying information used was (owned by/that of) an elder/a dependent adult;

3. For a Felony - The property, goods, or services obtained was worth more than

$950; (misdemeanor cases = value is $950 or less)

AND

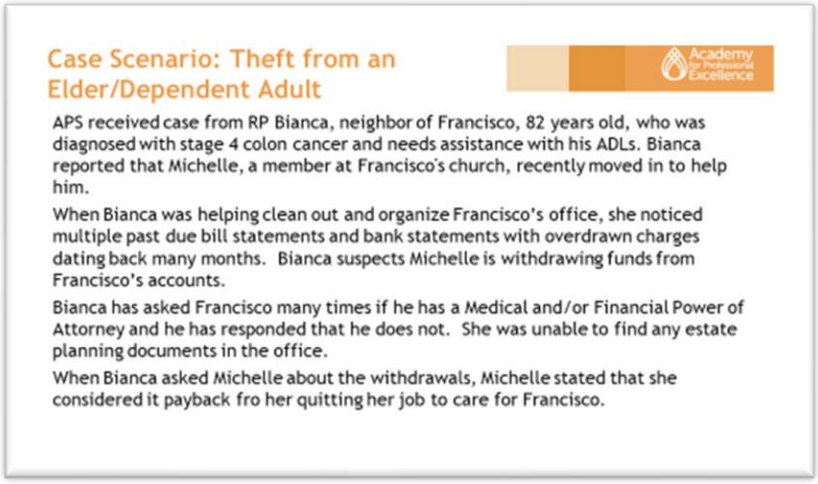
4A. The defendant knew or reasonably should have known that the owner of the property/person to whom the identifying information belonged was an elder/a dependent adult).

OR

Alternative 4B—defendant caretaker:

4. The defendant was a caretaker of the elder/dependent adult.

Slide #44: Case Scenario: Theft from an Elder/Dependent Adult



Activity #8- Theft from an Elder (15 min)

Have a volunteer read the scenario out loud. Note that they should refer back to the last slide with the elements of Theft from an Elder.

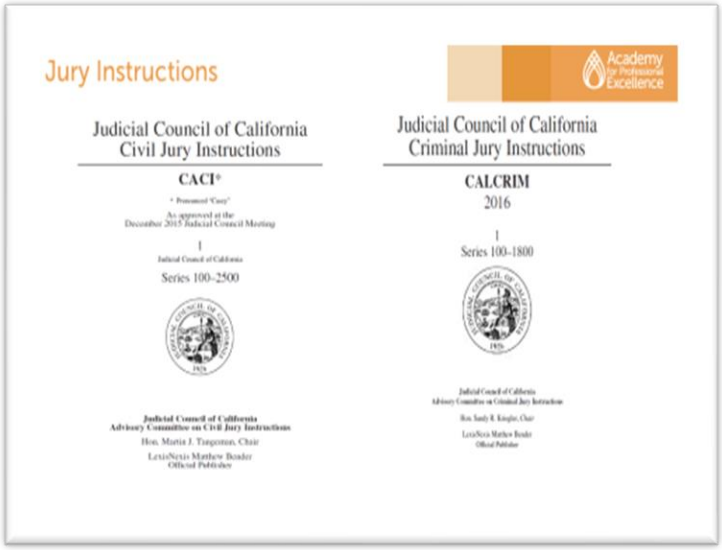
As a large group, **discuss** the elements and what evidence APS might gather to prove each element:

Capture their responses on a flip chart.

Scenario:

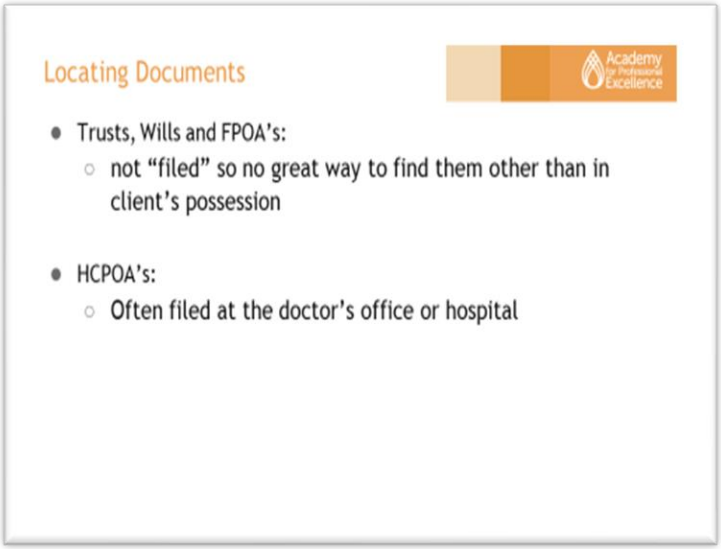
APS received case from RP Bianca, neighbor of Francisco, 82 years old, who was diagnosed with stage 4 colon cancer and needs assistance with his ADLs. Bianca reported that Michelle, a member at Francisco's church, recently moved in to help him. When Bianca was helping clean out and organize Francisco's office, she noticed multiple past due bill statements and bank statements with overdrawn charges dating back many months. Bianca suspects Michelle is withdrawing funds from Francisco's accounts. Bianca has asked Francisco many times if he has a Medical and/or Financial Power of Attorney and he has responded that he does not. She was unable to find any estate planning documents in the office. When Bianca asked Michelle about the withdrawals, Michelle stated that she considered it payback for her quitting her job to care for Fransisco.

Slide #45: References for standard Jury instructions:



Inform participants they can review the references on the slide for more information about elements of crimes.

Slide #46: Investigative Steps: Locating Documents



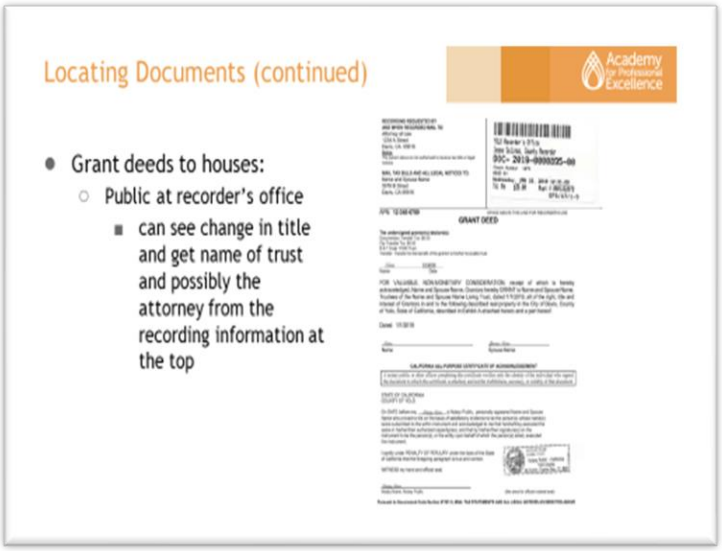
Explain that a lot of APS investigations involve locating Estate Planning Documents.

Ask: "How do you go about locating Trusts and FPOAs? HCPOA's? Grant deeds to Houses?

Explain: Trusts, wills and FPOA's are not "filed" so no great way to find them other than in client's possession

But – HCPOA's are often filed at the doctor's office or hospital

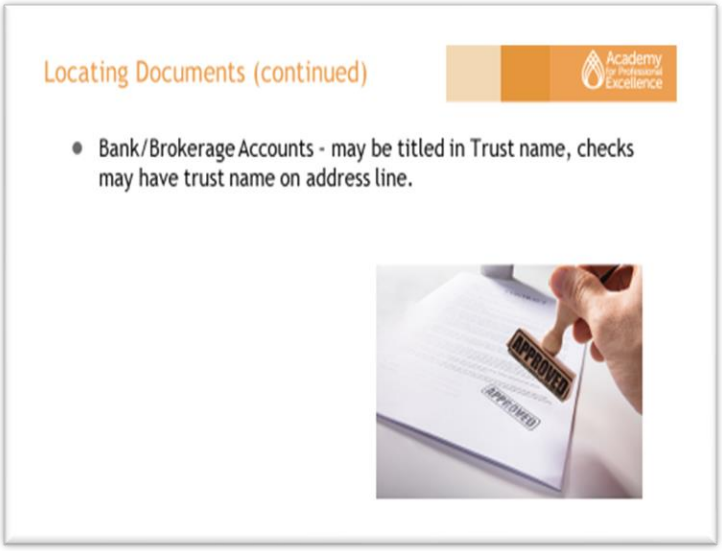
Slide #47: Locating Documents (continued)



Explain that Grant deeds to houses are public at recorder's office.

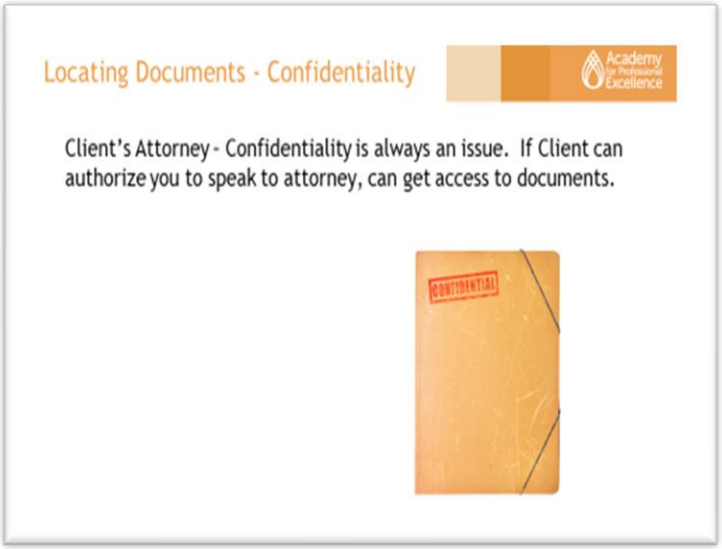
APS can see change in title and get name of trust and possibly the attorney from the recording information at the top.

Slide #48: Locating Documents (continued)



Explain that Bank/Brokerage Accounts – may be titled in Trust name, checks may have trust name on address line.

Slide #49: Locating Documents- Confidentiality

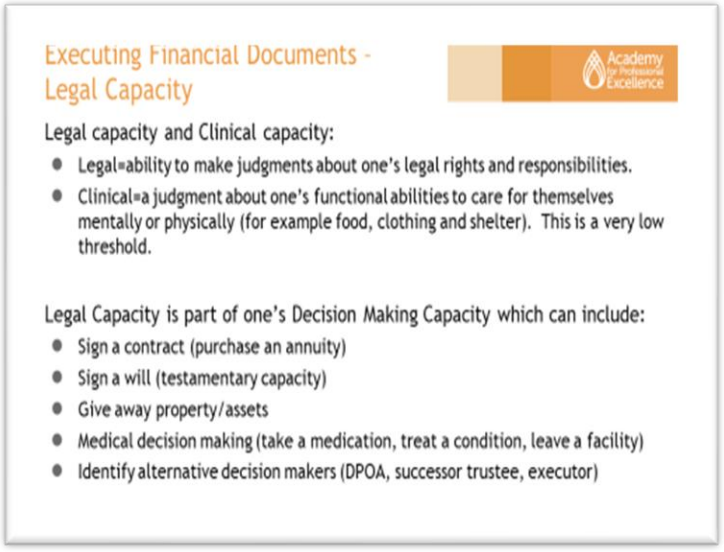


Explain that Client's Attorney – Confidentiality is always an issue.

If Client can authorize you to speak to attorney, can get access to documents.

Ask if they have experience doing this, to share some best practices.

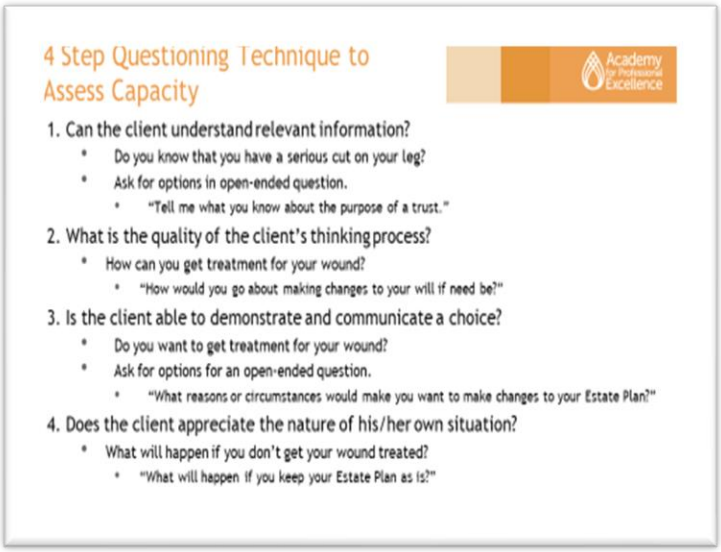
Slide #50: Executing Financial Documents: Legal Capacity (10 minutes)



Explain that the last section of today's training will briefly cover capacity.

Acknowledge that most participants have training on capacity and issues that affect their clients, but this will briefly discuss capacity as it pertains to Estate Planning Documents.

Slide #51: 4 Step Questioning Technique to Assess Capacity



Review the slide and examples.

Ask participants if they can give examples of different ways to ask in the same 4 techniques in Estate Planning situations.

Trainer Note: Estate Planning Specific Interview Techniques are animated to come AFTER you solicit some participant feedback.

WRAP-UP AND EVALUATIONS
Time Allotted: 20 minutes

Slide #52: Lessons Learned and Wrap Up



Acknowledge that today's training covered a large amount of content regarding Estate Planning.

- Some content included:
  - Who needs an Estate Plan and why?
  - Estate Planning Documents such as FPOA, HCPA, Trusts, Wills, etc.
  - Investigation techniques
  - Helpful Hints for APS Professionals investigating these allegations.

Ask participants to write in their Participant Manuals at least 2 lessons learned from today or 2 things they will share with others after today's training.

Ask for several volunteers to share one item they wrote down.

Slide #53: Evaluations and Questions



Ask if participants have any final questions regarding today's training.

Give them time to fill out the evaluations and **express** how important their feedback is to improve APS training in various areas across the Nation!

Thank them for taking time away from their busy caseloads to attend today's training.

References

The below work contributed to the content in this curriculum

Adult Protective Services Training Program (2010). Financial Exploitation, Module 12 [curriculum]. *APS Financial Abuse Investigation Checklist- Handout #10.* Retrieved from https://theacademy.sdsu.edu/wp-content/uploads/2015/06/financial-exploitation-trainers-manual.pdf

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Handout #12

NATIONAL ADULT PROTECTIVE SERVICES ASSOCIATION
THE NATIONAL APS RESOURCE CENTER

Technical Assistance Brief

Health Insurance Portability and Accountability Act: Implications for Adult Protective Services

Candace Heisler, JD
NAPSRC Consultant

The National Adult Protective Services Resource Center (NAPSRC) provides monthly Technical Assistance (TA) calls on subjects requested by the field. Our team of adult protective services (APS) experts provides this national TA to state APS administrators. This brief summarizes the information provided during the May 2015 call.

Introduction

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191, was enacted to protect the confidentiality of health records and information. The Office for Civil Rights in the United States Department of Health and Human Services is responsible for developing the rules, many of which are contained in the HIPAA "Privacy Rule." (45 CFR 164.500 et seq.)

HIPAA and its Privacy Rule give "covered entities" (those with the health care data) discretion to comply with requests for release of protected health records, while attempting to balance patient privacy and confidentiality with those with a need to know the content of such records. HIPAA is intended to "*assure that individuals' health information is properly protected while allowing the flow of health information needed to provide and promote high quality health care and to protect the public's health and well-being. The Rule strikes a balance that permits important uses of information, while protecting the privacy of people who seek care and healing.*" (Office for Civil Rights, 2003, p. 3).

HIPAA's complexity can lead to conflict between entities that hold confidential health records and agencies such as Adult Protective Services and law enforcement that investigate allegations of abuse.

About the National Adult Protective Services Resource Center (NAPSRC)

The National Adult Protective Services Resource Center (NAPSRC) is a project (No. 90ER0003) of the Administration for Community Living, U.S. Administration on Aging, U.S. Department of Health and Human Services (DHHS), administered by the National Adult Protective Services Association (NAPSA). Grantees carrying out projects under government sponsorship are encouraged to express freely their findings and conclusions. Therefore, points of view or opinions do not necessarily represent official Administration on Aging or DHHS policy.

HIPAA protects individually identifiable health information held or transmitted electronically by a covered entity or its business associate, in any form or media, whether electronic, written, or oral. It requires that covered entities protect such information, and except for certain exceptions, requires that if and when a covered entity releases protected health information the entity must notify the patient whose information was released.

Violations of HIPAA rules are subject to civil and criminal penalties. (42 U.S.C. §§1320d-5 and 1320d-6). Actions may be brought by federal and state Attorneys General. For more information refer to the Health and Human Services Health Information Privacy page.

Key Definitions under HIPAA

HIPAA applies to health plans, health care clearinghouses, and all health providers that transmit records in electronic form, whether the provider itself transmits that information or uses a billing service or subcontractor to do so.

In order to understand the Privacy Rule, it is critical to understand the terminology and definitions within HIPAA. Key terms include the following (See 45 CFR 160.103):

- **Protected Health Information** (PHI) is all *"individually identifiable health information held or transmitted by a covered entity or its business associates in any form or media, whether electronic, paper, or oral."*

  "Individually identifiable health information" is information, including demographic data, that relates to:

  - the individual's past, present or future physical or mental health or condition,
  - the provision of health care to the individual, or
  - the past, present, or future payment for the provision of health care to the individual, and that identifies the individual, or for which there is a reasonable basis to believe can be used to identify the individual. This information includes many common identifiers (e.g., name, address, birth date, Social Security Number). (Office for Civil Rights, 2003, at pp 5-6).

- **Covered Entities** include health plans, health care clearinghouses, and health care providers.
  - ***Health Plans*** include providers of medical services and entities that pay for the services, including nearly all individual and group plans that provide or pay the cost of medical, dental, and/or vision services, or prescription drugs, as well as HMOs, Medicare and Medicaid insurers, and long term care insurers (other than nursing home fixed indemnity policies).
  - ***Health Care Providers*** include *"a provider of services, a provider of medical or health services, and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business,"* and who transmits health information in electronic form.
  - ***Health Care Clearinghouses*** process or assist in processing health information received form another entity, including billing and repricing companies. They are included in the Privacy Rule only when using and/or disclosing identifiable health information.

Is APS a "Covered Entity"?

Careful thought should be given to whether there are any circumstances in which an APS agency could be considered a covered entity.

Given the array of actions undertaken by APS, careful thought should be given to whether there are any circumstances in which an APS agency could be considered a covered entity. For example, does APS employ health professionals, and if so, for what purposes? Do they review medical records, conduct medical or cognitive assessments, or treat client medical conditions? How do they record their findings? Are their services billed and if so, to what entity?

There is no simple answer to this determination. APS managers should review the role of such employees with their legal advisors for clarification. If deemed a covered entity, APS is subject to many standards and requirements.

The Privacy Rule

A "covered entity" may not use or disclose protected health information (PHI) except in accordance with the Privacy Rule and/or as authorized in writing by the individual whose information is used or disclosed. (45 CFR 164.502(a)). The Privacy Rule requires that a Covered entity disclose PHI in two situations:

- To the United States Department of Health and Human Services (HHS) when HHS is conducting a compliance investigation or review or enforcement action; and
- To the individual or their personal representative when they request access to or an accounting of disclosures of their PHI (45 CFR 164.508).

A covered entity must obtain the individual's written authorization for any use or disclosure of PHI that is not for treatment, payment or health care operations or otherwise permitted or required by the Privacy Rule (45 CFR 164.508).

Authorizations must be in plain language and contain specific information about the information to be disclosed or used, the person or persons disclosing and receiving the PHI, expiration, right to revoke, and other data. The person giving consent is entitled to a copy of the authorization form. (45 CFR 164.508).

The easiest way for APS to obtain PHI is with client informed consent. To do so requires that the individual be capable of giving legal consent and have decision-making capacity. If an individual has a surrogate decision-maker (such as an agent or attorney-in-fact under a power of attorney for health care decisions or a guardian or conservator with similar authority) that person can give consent for a client who lacks capacity to consent.

Situations in which the duty to provide access and accountings of disclosures does not apply include:

- **When a licensed health care professional has determined, in the exercise of professional judgment, that the access requested is likely to endanger the life or physical safety of the individual or another person;**
- **The PHI makes reference to another person other than a health care provider, and the access requested is reasonably likely to cause substantial harm to such person; or**
- **The request for access is made by the individual's personal representative and providing such access to the personal representative is reasonably likely to cause substantial harm to the individual or another person (45 CFR 164.524).**

If there is a doubt about the client's capacity to consent APS should not seek the client's consent. Not only is relying on consent in such circumstances improper, it may undermine a civil law action or criminal prosecution.

HIPAA requires that the covered entity treat an individual's personal representative the same as the entity would treat the individual as to access to, and accountings about, release(s) of PHI. A personal representative is defined as a person legally authorized to make health care decisions for the individual or to act on behalf of the decedent or estate. *"The Privacy Rule permits an exception when a covered entity has a reasonable belief that the personal representative may be abusing or neglecting the individual or that treating the person as the personal representative could otherwise endanger the individual" (*Office for Civil Rights 2003, p. 16).

Situations in which the duty to provide access and accountings of disclosures does not apply include:

- When a licensed health care professional has determined, in the exercise of professional judgment, that the access requested is likely to endanger the life or physical safety of the individual or another person;
- The PHI makes reference to another person other than a health care provider, and the access requested is reasonably likely to cause substantial harm to such person; or
- The request for access is made by the individual's personal representative and providing such access to the personal representative is reasonably likely to cause substantial harm to the individual or another person (45 CFR 164.524).

The person denied access has a right to have the denial reviewed by a licensed health professional who is designated by the covered entity and did not participate in the initial denial decision.

If APS is conducting an investigation that identifies an alleged perpetrator who is also the individual's personal representative, APS may want to consider if they should share concerns about release of PHI to that personal representative. APS cannot make the decision to grant or deny access for the covered entity but can provide important information that may assist the entity in deciding how to proceed with requests for release of PHI.

A covered entity is permitted but not required to disclose PHI without providing the individual an opportunity to agree or object for the covered entity's own treatment, payment, and health care operations. However, virtually any use and/or disclosure of psychotherapy notes for treatment, payment, and health care operations requires the individual's authorization (45 CFR 164.508(a)(2)).

Finally, a covered entity must make reasonable efforts to limit disclosures to the *minimum* amount of PHI necessary to accomplish the intended purpose of the use, disclosure or request (45 CFR 164.502(b); 164.514(d)). An entire medical record cannot be provided unless it is the minimum necessary to accomplish the purpose of the request.

The minimum necessary standard **does not** apply to several situations including:

- Disclosure to the individual who is the subject of the information or their personal representative
- Use or disclosure subject to authorization (e.g., court order, subpoena, or search warrant)
- Use or disclosure is required by law (45 CFR 164.512(a); 45 CFR 164.502(b)(2)(v)), (e.g., mandatory elder or vulnerable adult reporting law, duty to warn situations).

  Although the minimum necessary standard may not be applicable to an APS request for PHI, covered entities may nevertheless attempt to limit disclosures to the minimum necessary in the "spirit and purpose of HIPAA" and may be unaware that APS may be exempted from minimum necessary requirements.

Psychotherapy Notes

"Psychotherapy notes" are treated differently from other mental health information and afforded special privacy protections because of their sensitive content. Such notes are recorded by a mental health professional providing health care that document or analyze conversations during counseling sessions and are separate from the rest of the patient's medical record. (45 CFR 164.501).

A covered entity must obtain a patient's authorization prior to a disclosure of psychotherapy notes except when disclosures are required by law such as mandatory reporting of abuse and duty to warn situations. A general consent for release of all health care or medical records is not sufficient for disclosure of psychotherapy notes. It is suggested that authorization for disclosure of PHI (medical records) should be on a separate form from authorization for disclosure of psychotherapy records. (45 CFR 164.508(a)(2). More information is available at *HIPAA Privacy Rule and Sharing Information Related to Mental Health* and *HIPAA Privacy Rule*.

Mental health clinicians generally prefer to converse with other professionals seeking information regarding psychotherapy notes (including investigating APS workers) to answer specific questions rather than turn over copies of notes. The APS worker will still need written authorization from the client to obtain this information. That conversation may in fact be more helpful than the notes themselves. If such notes become relevant in a court matter they can be subpoenaed.

A general consent for release of all health care or medical records is not sufficient for disclosure of psychotherapy notes. It is suggested that authorization for disclosure of PHI (medical records) should be on a separate form from authorization for disclosure of psychotherapy records.

Disclosures: How APS Obtains PHI

The Privacy Rule permits use and disclosure of PHI without an individual's authorization or consent for 12 national priority purposes (45 CFR 164.512). These are permitted disclosures *"in recognition of the important uses made of health information outside of the health care context"*; they are not mandated (Office

for Civil Rights, 2003, at p. 6). Those most relevant to APS practice are:

- Required by Law
- Victims of Abuse, Neglect, or Domestic Violence
- Judicial and Administrative Hearings
- Serious Threat to Health or Safety

"Required by law": covered entities may use and disclose PHI without the individual's consent when there is a relevant statute, regulation, or court order. (45 CFR 164.512 (a)).

"Victims of Abuse, Neglect, or Domestic Violence": covered entities may use and disclose PHI to appropriate governmental agencies regarding such victims. These include situations in which there is mandatory reporting of child, elder or vulnerable adult abuse or domestic violence, as well as situations in which persons must report violent crime victimizations or the duty to warn (protect) of a credible threat directed to or at an identifiable target. (See, e.g., Tarasoff v. Regents of the University of California (1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334)(45 CFR 164.512(c)(1)(i)).

The duty to warn/protect authorizes a covered entity to disclose PHI, including information from mental health records. The Privacy Rule permits a provider who has a good faith belief that a warning is necessary to prevent or lessen a serious and imminent threat to the health or safety of the patient or others, to alert persons reasonably believed to be able to prevent or lessen the threat (45 CFR 164.512(j)). The client is entitled to notice. (45 CFR 164.512(c)(2); 164.512 (c) (1) (ii)(B)). For more information, please refer to the HHS Health Information Privacy page.

Judicial and Administrative Proceedings: Covered entities may disclose PHI in such a proceeding when the request for PHI is through a court or administrative tribunal order, a subpoena, or other lawful process (45 CFR 164.512(f)(1)(ii)(A)-(B)-(C)). If APS cannot obtain PHI by request, it may need to seek a court or administrative order.

Serious Threat to Health or Safety: Covered entities may disclose PHI when necessary to limit/prevent a serious and imminent threat to a person or the public, to an entity able to address the threat, or to apprehend an escapee or violent criminal. (45 CFR 164.512(j)).

Application to APS Practice

HIPAA permits, but does not require, covered entities to comply with requests for PHI. A covered entity may violate a state law about disclosure of PHI disclosure without violating HIPAA. Therefore, APS officials must know the precise statutory requirements under which APS has authority to seek PHI.

APS should always seek written consent from a client to obtain PHI if that client's capacity to understand and grant informed consent is not in question. If there is a concern about the client's capacity then APS should seek assistance from appropriate experts to assess the client's capacity. If the client clearly cannot give informed consent, a personal representative who is not suspected of abuse, neglect or exploitation can give informed consent on behalf of the client. If there is no appropriate representative, APS can seek the appointment of a representative such as a temporary guardian or conservator or a guardian ad litem, depending on local statutes.

APS workers seeking client consent for disclosure of PHI are urged to assure that:

- the client understands that you, the APS worker, will request disclosure and use of the client's PHI held by the covered entity,
- the client understands the nature of the information being sought,
- the client understands the included time frame (previous date to present or a specific ending date),
- the client has the right to revoke the authorization in writing at any time (45 CFR 164.508; 164.532).

Of course, the APS worker must also insure that the client is informed and understands that he or she has the right to deny access to PHI.

APS should assure that authorizations:

- are written in plain language and large font,
- specifically describe the information to be disclosed and used,
- provide the identity of persons disclosing and receiving the PHI,
- include the date the authorization expires, and
- inform the client of the right to revoke their informed consent (45 CFR 164.508).

It is suggested that forms be translated into languages commonly used in the community other than English.

APS managers may want to review existing authorization forms and assure that they comply with HIPAA legal requirements.

APS requests for PHI should describe what is sought in clear terms. Avoid open-ended and generic requests that may be interpreted as a request for the entire record unless that is actually required. An example of a specific request is: *"all records of medical treatment, nursing notes, consultations, prescriptions, and diagnosis for Mary Jones, DOB, medical record number, relating to her treatment for trauma (or neglect or suspected abuse) for the period XX to YY"*.

The presence of a legal basis for seeking records under a state law, regulation, or court order does not mean that APS will receive what it has requested. A covered entity may be justifiably concerned about providing too much information and running afoul of HIPAA. APS can enhance its success in obtaining medical information by more precisely defining what it seeks, limiting requests to specific events and dates, and obtaining written authorization from the client or the client's legal representative.

Building strong and positive relationships with covered entities and assuring that they understand the role and legal authority of APS is critical to minimizing conflict and assuring maximum compliance with requests for records. APS can request additional or other PHI at later points in their investigation. A covered entity may continue to disclose to governmental authorities throughout the duration of an investigation (45 CFR 164.512 (b); (c); Campanelli, 2004).

If APS requests are not subject to the "minimum necessary" rule, the request for PHI should clearly state so. It is suggested that the request describe how the request is authorized by law by referencing applicable statutes or regulations.

Language such as *"This is a disclosure required by law, specifically: (name of law and statute number/reference), and is therefore not subject to the minimum necessary requirement"* may be helpful. In addition, consider attaching a copy of the law to the request if there are concerns about compliance.

In addition the request for disclosure should include the following language: *"The information sought is relevant and material, specific, and limited in scope, and de-identifiable information cannot be used."* (See 45 CFR 164.512(f)(1)(ii)(C).) APS management may want to have legal counsel prepare a form with legal and helpful information to use for such requests for disclosure.

Once APS has received PHI it must treat records as confidential and not disclose them without legal or statutory authority, and only to those authorized to receive them. APS management should assure that policies are in place describing how the confidential nature of PHI will be protected.

State vs. Federal Laws

In general state laws contrary to HIPAA and its Privacy Rule are pre-empted by federal law. "Contrary to federal law" means that it would be impossible for a covered entity to comply with both state and federal requirements, or

that the state law is an obstacle to accomplishing the purpose and objectives of HIPAA. (Office for Civil Rights, 2003 at p. 17). The Privacy Rule provides exceptions to the general rule of federal preemption for state laws that:

- Relate to the privacy of individually identifiable health information and provide greater privacy protections or privacy rights with respect to such PHI
- Provide for the reporting of disease or injury, child abuse, birth, or death, or for public health surveillance, investigation, or intervention… (Office for Civil Rights, 2003 at p. 17; 45 CFR 160.202 and 203).

There is no conflict between elder and vulnerable adult reporting laws and HIPAA. When state or other law authorizes such reports be made to APS and directs that APS conduct investigations which include obtaining medical and other health records subject to HIPAA, a covered entity can comply with the state or other requirement and comply with HIPAA.

In light of this guidance there is no conflict between elder and vulnerable adult reporting laws and HIPAA. When state or other law authorizes such reports be made to APS and directs that APS conduct investigations which include obtaining medical and other health records subject to HIPAA, a covered entity can comply with the state or other requirement and comply with HIPAA.

One example of where there could be seeming conflict between the Privacy Rule and state reporting laws concerns disclosure of the identity of the reporter to APS. State laws typically require that the name of the reporter be kept confidential and not disclosed except under specific circumstances such as consent of the reporter or pursuant to a court order or to rules of criminal discovery if a case is criminally prosecuted. (See, e.g., MN Stats. 626.557, subd. 12b).

HIPAA authorizes an individual or their personal representative to receive an accounting of disclosures which would likely include the identity of the reporter. (See 45 CFR 164.502(g) and 164.528(a)). Can these apparent conflicts be resolved?

The answer is *"yes."* The Privacy Rule permits a covered entity to refrain from telling an individual or their personal representative that a report to APS has been made if the notification would place the individual at risk of serious harm or would not be in their best interest. A covered entity can decline to provide an accounting to a personal representative if it reasonably believes that the representative is an abuser or that providing the accounting could endanger the individual. (45 CFR 164.502(g)(5)). Additionally, the covered entity can suspend an accounting for a period of time when the disclosure is to law enforcement or a health oversight entity for whatever period is specified by the agency if the accounting is reasonably likely to impede the agency's efforts (45 CFR 164.528(a)(2)). Finally, the Privacy Rule does not actually require that the covered entity release the name of the reporter. Instead, the covered entity can limit its accounting to the date of disclosure, the recipient of the information, the purpose of the disclosure, and a brief description of the information disclosed (Campenelli, 2004, p. 3).

Conclusion

HIPAA is complex and APS should exercise caution when obtaining client informed consent, requesting PHI, and maintaining the confidentiality of records once received from a covered entity.

It is suggested that APS agencies have clear policies and protocols for compliance with HIPAA and relevant state laws and regulations and that staff receive training on the Privacy Rule, state laws, and policies and protocols. The better these requirements are understood and applied, the better staff will be equipped to work effectively with clients, covered entities, courts, and allied professionals.

Let us know what you think of this brief. Please take a quick six question survey.

Citations

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About the Author



Candace J. Heisler served as an Assistant District Attorney for the City and County of San Francisco for over 25 years. During her career, she headed the Domestic Violence, Charging, Misdemeanor, and Preliminary Hearing Units. She served as the Chairperson of the California District Attorneys Association Domestic Violence Committee. She has planned and presented training for that organization for approximately 20 years in the areas of Domestic Violence and Elder Abuse.

Ms. Heisler has edited four judicial and curricula and a prosecutors' manual on Domestic Violence. She helped develop curricula on elder abuse for judges, prosecutors, and victim advocates for the Office on Violence Against Women, US Department of Justice, the American Bar Association and the California Administrative Office of the Courts. She has authored numerous articles on Domestic Violence and Elder Abuse, including several in the Journal of Elder Abuse and Neglect. She co-authored Elder Abuse Detection and Intervention: A Collaborative Approach and wrote a chapter on "Elder Abuse" in the book Victims of Crime. She has participated in developing numerous distance learning courses and training courses for California law enforcement. She provides law enforcement training on Domestic Violence for recruits, first responders, and investigators in California. She also trains probation officers, emergency dispatchers, and victim advocates about elder abuse and domestic violence.

Ms. Heisler served as a member of the California Violence Against Women Act Stop Task Force and as an officer and board member of The National Committee for the Prevention of Elder Abuse for many years, and was a member of the Texas Medical Association Blue Ribbon Panel on Family Violence.

Ms. Heisler has received numerous awards to include the California Governor's Victim Services Award, the California Crime Victims United "Prosecutor of the Year" Award, and the National College of District Attorneys presented her with its Lecturer of Merit (2001) and its Distinguished Faculty Awards (2007).

She has presented on elder abuse and domestic violence subjects throughout the United States. She is also an Assistant Adjunct Professor of Law at the University of California's Hastings College. She now teaches for and consults with a wide variety of state, local, and national governmental agencies as well as private organizations.