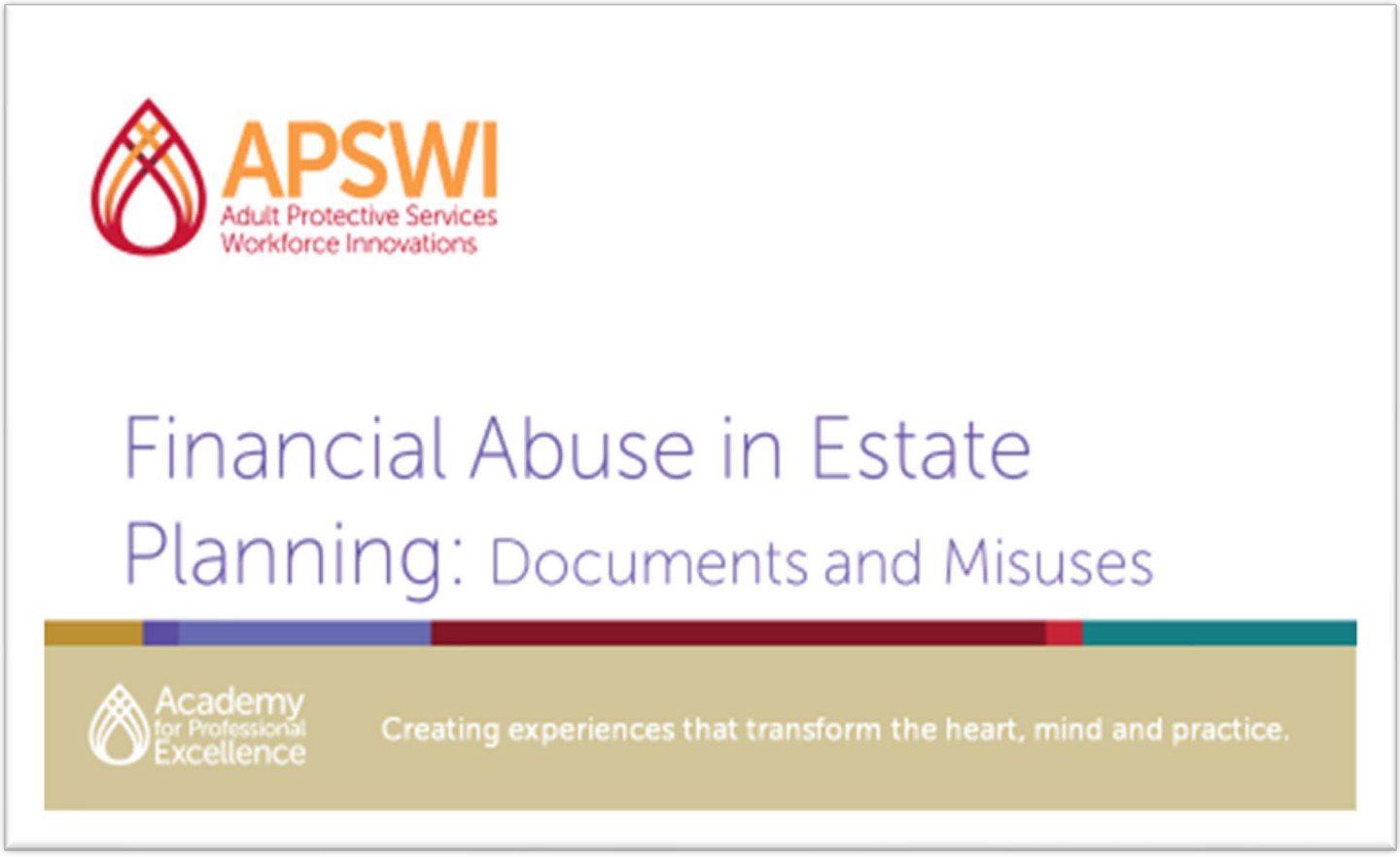
PARTICIPANT MANUAL



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, Participant 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)

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Agencies

California Department of Social Services, Adult Programs Division
County of Los Angeles Workforce Development, Aging and Community Services
Orange County Social Services Agency
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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Committees

APS Training Planning Committee
National Adult Protective Services Association Education Committee
Protective Services Operations Committee of the County Welfare Directors Association of California

Curriculum Developer 2019

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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?*	
Lecturette: California Small Estates	*Shout-Out: Size of Estates- Handout#2- Small Affidavit*	
ESTATE PLANNING DOCUMENTS		**TOTAL: 215 minutes**
Class Discussion: Financial Abuse Risk		
Lecturette: Financial Powers of Attorney	*Shout-Out: Clients with POAs*	
BREAK		**15 minutes**
Activity #2: Verifying POAs with client (Large Group)	*Nathan and Jamal Case Scenario*	
Activity #3: Understanding the Forms (Table Groups)	*Sample Financial POA: Short and Long Forms- Handouts #3 &#4*	
Lecturette: Medical Powers of Attorney	*Handout #5-Standard CA Health Care POA*	
LUNCH		**60 Minutes**
Class Discussion: Witness or Notarize?		
Activity #4: Reviewing a client's POA (Table Groups)		

Class Discussion: HIPPA	*Handout #6- HIPPA Authorization* *Shout-Out: Post-Death Documents; Trust or Will?*	
Lecturette: Revocable Living Trust	*Handout #7- Revocable Living Trust Sample*	
BREAK		**15 minutes**
Activity #5: Reviewing a Trust (table groups)	*Handout #7* *Shout-Out: Other Type of Trusts*	
Activity #6: Concerns and Remedies for Clients	*Richard, Georgette and Doug case scenario*	
Lecturette: Wills	*Handouts #8, #9 & #10*	
Activity #7: Wrap-up-Estate Planning Red-Flags	*Case scenario*	
INVESTIGATING AND DOCUMENTING		**60 minutes**
Lecturette: Financial Abuse Investigations	*Handout #11- APS Financial Abuse Checklist*	
Activity #8: Theft from an Elder		
Lecturette: Executing Financial Documents: Legal Capacity		
WRAP-UP & EVALUATIONS		**TOTAL:** **20 minutes**
TOTAL (INCLUDING LUNCH AND BREAKS)		**7 hours**

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

Course Goal

- Improve APS professional's ability to identify estate planning documents in relation to client contact, as well as investigations and testimony when those documents are involved in financial abuse.
- Help APS professionals develop an understanding and appreciation for estate planning as it relates their profession.
- Enhance APS professionals ability to help direct clients' use of necessary legal documents, and identify red flags within these documents for financial abuse.

Learning Objectives

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

What is Estate Planning

"What does Estate Planning mean to you?"





Who Needs an Estate Plan?

- 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
- Guardian designations for minor children or dependent adult children.

Legal Description of Small Estate in CA

- A small estate: Under $150,000 total AND no real estate
- A large estate: Over $150,000 total and/or real estate



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

Pre-Death Estate Planning Documents: 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

Who is at higher risk for financial abuse?

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

Powers of Attorney

- 1. Medical or Financial, and
- 2. Effective Immediately or Upon Incapacity



Financial Powers of Attorney

- Most Often Used/Abused Document
- Everyone over 18 should have one

- Other names:
  - Durable POA
  - Springing POA
  - General Durable POA



Case Sample

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.



- *What type of POA (Medical/Financial) does Keisha have and when is it effective (immediately or upon incapacity)?*

Short Form Review

Terminology to look for:

- *Agent*
- *Springing Power of Attorney*
- *Durable Power of Attorney*
- *General or Special Powers of Attorney*
- *Principal (Creator)*

Free CA Statutory POA Reference: saclaw.org

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

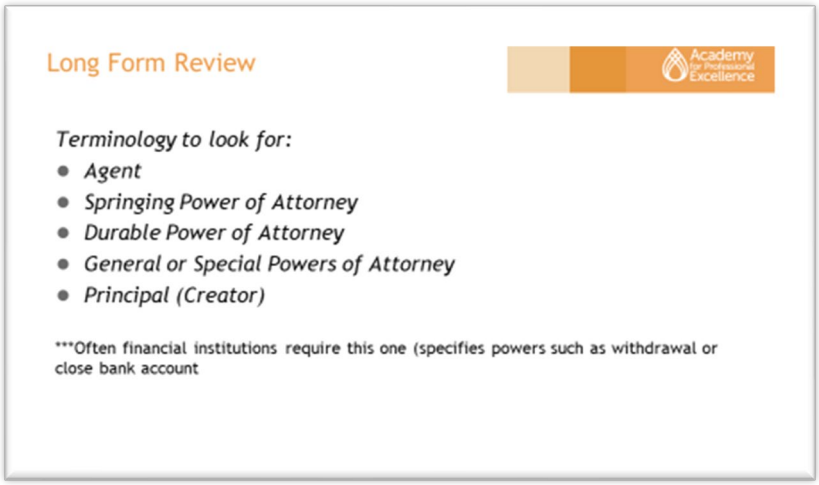
State of California
County of _____

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)


Long Form Review
Academy for Professional Excellence
Terminology to look for:
Agent
Springing Power of Attorney
Durable Power of Attorney
General or Special Powers of Attorney
Principal (Creator)
***Often financial institutions require this one (specifies powers such as withdrawal or close bank account

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 Effectiveness Option 2

The authority granted to my Agent under this power of attorney will become effective immediately upon executing and signing this document.

Section 2.03 Effectiveness Option 3

I am incapacitated whenever my agent provides a written opinion 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.

Section 2.04 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 2.05 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

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)

Short and Long POA Forms

Activity #3: Understanding the Forms

- Using **both** short and long forms
  - Group 1:
    - Identify "Effectiveness", pros/cons and areas for potential for abuse
    - Durable? General? Springing POA?
  - Group 2:
    - Identify "Incapacity" and pros/cons
    - Identify the ability to regain capacity
    - Identify areas for potential abuse



Various Powers Often Granted by a Financial Power of Attorney

- Create, amend, revoke, or terminate a revocable trust
- Make a gift
- Create or change rights of survivorship
- Create or change a beneficiary designation
- Authorize another person to exercise authority under this Power of Attorney
- Access the content of electronic communications
- Exercise fiduciary powers that the principal has authority to delegate

Conservatorship -Alternative to Financial Power of Attorney

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.



Conservatorships

Handled in the probate court.

- Probate court has legal authority to make decisions about 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.

General/**Limited** conservatorship; in addition, a **Temporary** conservatorship may need to be set up until a permanent conservator can be appointed.

- In a **Limited Conservatorship**, for adults with developmental disabilities who cannot fully care for themselves or their property, but 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;
- In a General Conservatorship, the general conservator has authority to take care of a broad range of the conservatee's needs

Second Pre-death Estate Planning document - Medical Power of Attorney

Everyone over 18 should have one.

Medical Powers of Attorney/Advanced Heath Care Directive

- 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…

- Section 1: Designate an Agent
- Section 2: End of Life Decisions
- Section 3: Organ Donation

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

(<u>Sign your name or initials</u> at your applicable choice):

(3.1) <u>ORGAN DONOR.</u> 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

<u>NO ORGAN DONATIONS</u>

_____ (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: _____

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

To Witness or Notarize?

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.

Reviewing a Client's POA

- Group(s) 1: You are given a financial or medical POA 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 granddaughter's spouse.
- Group(s) 2: You are given a financial or medical Poa 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.
  - Write down pros/cons of using witness vs. authentication
  - How would you discuss the issue of execution of documents with your client to help gather evidence of abuse?

Additional Pre-death documents

- **HIPAA Authorization**
- **Guardian Nomination for Minor children**



Authorization for Release of Protected Health Information

HANDOUT #6

(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

Helpful Tip

- Always remember to ***READ*** the document for answers to questions first.
- What is written in the document is what, how and who has power, so READ the documents for answers first.



Post Death Estate Planning documents

What is the difference between a will and a trust?

- 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.



Revocable Living Trusts

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



Revocable Trust 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

Funding



- Titling Assets in the Name of Your Living Trust



Unfunded Trust Case Scenario

You are meeting with the Reporting Party, Tom, who is the son of Elisa. Elisa is living with Alzheimer's and has been medically found incapacitated. Tom is named as the Successor Trustee in Elisa's trust 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.

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

Options for Transferring Assets After Death

- Savings and Checking Accounts
- Investment Accounts
- Business Holdings such as Partnerships and LLC's
- Real Estate including Time Shares
- Retirement Accounts
- Life Insurance
- Pensions

Helpful Hints

- 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.

Potential for Abuse

- Negligence?
- How to Remove an Agent/Trustee
  - Activity- Reviewing a Trust

Trust Review Activity

Using the Revocable Living Trust Sample

- Locate the section for removal of a Trustee
- Find definition of incapacity
- Find where the trustees are listed (incapacity and death)

Other Types of Trusts:

- Irrevocable Trusts or "Control from the Grave Trusts"
- Irrevocable Trust for Problematic children
- Trust for second (or third..) spouse, where you want to control where the assets go after their death
- Special Needs Trusts for dependent adult children



Concerns and Remedies for Clients

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.

- Discuss issues and possible remedies for Richard.

Wills

- Standard Will
- Pour-over Will
- Holographic wills



HANDOUT #8

WILL #1

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

_____

_____

Will #2

HANDOUT #9

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.

_____ _____

_____, _____,

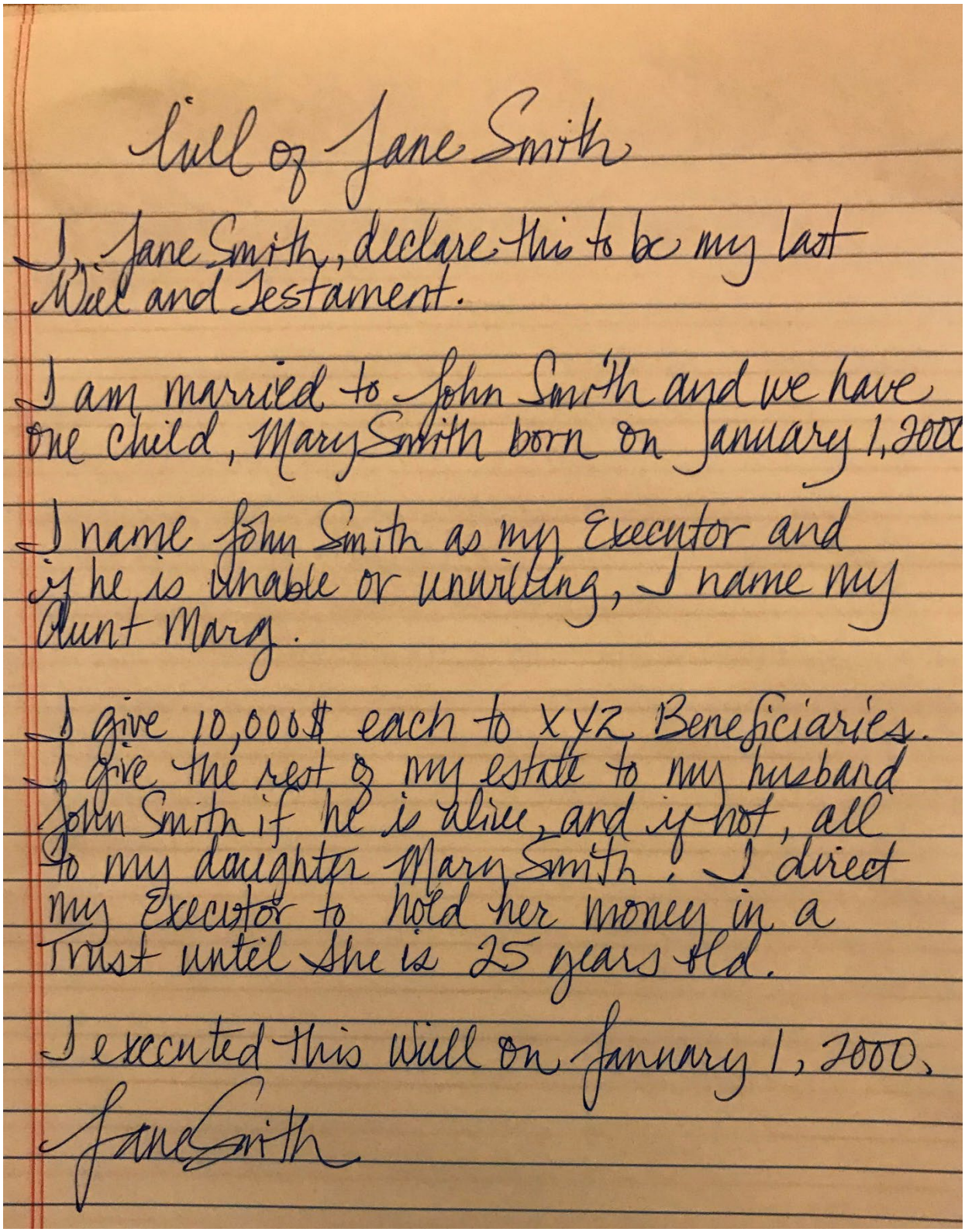
Witness Witness

_____ _____

_____ _____

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

Helpful Hint:

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.

Trust Promoters

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.

Estate Planning Documents: Wrap-Up

What are the main Estate Planning Documents?

Probate Codes:

§ 16002: Duty of loyalty

§ 16004: Conflicts of interest



Final Red Flag Case Study

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.

Investigations and Documenting for Prosecution

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



Helpful Tip

DOCUMENT, DOCUMENT everything, and always remember the end-game.



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

CalCrim Jury Instruction No.1807-Theft from an Elder or Dependent Adult

1. That 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. The property, goods, or services obtained was worth more than $950, **AND**
4. The defendant knew or reasonably should have known that the (owner of the property/person to whom the identifying information belonged) was and elder/a dependent adult

Case Scenario: Theft from an Elder/Dependent Adult

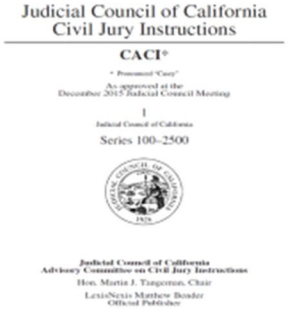
APS received case from RP Bianca, neighbor of Francisco, 82 years old, who was diagnosed with stage 4 colon cancer and needs assistance with his ADLs. Bianca reported that Michelle, a member at Francisco's church, recently moved in to help him.

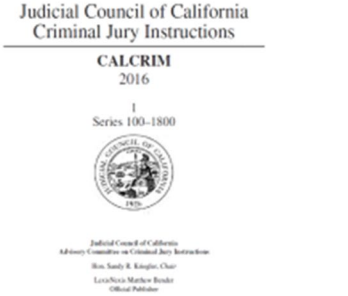
When Bianca was helping clean out and organize Francisco's office, she noticed multiple past due bill statements and bank statements with overdrawn charges dating back many months. Bianca suspects Michelle is withdrawing funds from Francisco's accounts.

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 fro her quitting her job to care for Francisco.

Jury Instructions





Locating Documents

- Trusts, Wills and FPOA's:
  - not "filed" so no great way to find them other than in client's possession
- HCPOA's:
  - Often filed at the doctor's office or hospital

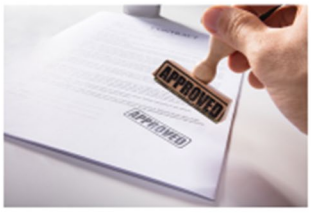
Locating Documents (continued)

- Grant deeds to houses:
  - Public at recorder's office
    - can see change in title and get name of trust and possibly the attorney from the recording information at the top


GRANT DEED

Locating Documents (continued)

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



Locating Documents - Confidentiality

Client's Attorney - Confidentiality is always an issue. If Client can authorize you to speak to attorney, can get access to documents.



Executing Financial Documents - Legal Capacity

Legal capacity and Clinical capacity:

- Legal=ability to make judgments about one's legal rights and responsibilities.
- Clinical=a judgment about one's functional abilities to care for themselves mentally or physically (for example food, clothing and shelter). This is a very low threshold.

Legal Capacity is part of one's Decision Making Capacity which can include:

- Sign a contract (purchase an annuity)
- Sign a will (testamentary capacity)
- Give away property/assets
- Medical decision making (take a medication, treat a condition, leave a facility)
- Identify alternative decision makers (DPOA, successor trustee, executor)

4 Step Questioning Technique to Assess Capacity

1. Can the client understand relevant information?
   - Do you know that you have a serious cut on your leg?
   - Ask for options in open-ended question.
     - "Tell me what you know about the purpose of a trust."
2. What is the quality of the client's thinking process?
   - How can you get treatment for your wound?
     - "How would you go about making changes to your will if need be?"
3. Is the client able to demonstrate and communicate a choice?
   - Do you want to get treatment for your wound?
   - Ask for options for an open-ended question.
     - "What reasons or circumstances would make you want to make changes to your Estate Plan?"
4. Does the client appreciate the nature of his/her own situation?
   - What will happen if you don't get your wound treated?
     - "What will happen if you keep your Estate Plan as is?"

Lessons Learned & Wrap Up

- Take a moment and look through today's materials.
- In Participant Manual, write down two lessons learned from today or something(s) you will share with others after this training.



Evaluations and Questions

- Final Questions?
- Please fill out evaluations!

THANK YOU for attending today, and your commitment to serve older and vulnerable adults.



References

The below work contributed to the content in this curriculum

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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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HIPAA-Related References

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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.