

Autonomy vs abuse: Can a patient choose a new power of attorney?

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Dear Dr. Mossman,

At the hospital where I serve as the psychiatric consultant, a medical team asked me to evaluate a patient's capacity to designate a new power of attorney (POA) for health care. The patient's relatives want the change because they think the current POA—also a relative—is stealing the patient's funds. The contentious family situation made me wonder: What legal risks might I face after I assess the patient's capacity to choose a new POA?

Submitted by "Dr. P"

As America's population ages, situations like the one Dr. P has encountered will become more common. Many variables—time constraints, patients' cognitive impairments, lack of prior relationships with patients, complex medical situations, and strained family dynamics—can make these clinical situations complex and daunting.

Dr. P realizes that feuding relatives can redirect their anger toward a well-meaning physician who might appear to take sides in a dispute. Yet staying silent isn't a good option, either: If the patient is being mistreated or abused, Dr. P may have a duty to initiate appropriate protective action.

In this article, we'll respond to Dr. P's question by examining these topics:

- what a POA is and the rationale for having one
- standards for capacity to choose a POA
- characteristics and dynamics of potential surrogates
- responding to possible elder abuse.

Surrogate decision-makers

People can lose their decision-making capacity because of dementia, acute or chronic illness, or sudden injury. Although autonomy and respecting decisions of mentally capable people are paramount American values, our legal system has several mechanisms that can be activated on behalf of people who have lost their decision-making capabilities.

When a careful evaluation suggests that a patient cannot make informed medical decisions, one solution is to turn to a surrogate decision-maker whom the patient previously has designated to act on his (her) behalf, should he (she) become incapacitated. A surrogate can make decisions based on the incapacitated person's current utterances (eg, expressions of pain), previously expressed wishes about what should happen under certain circumstances, or the surrogate's judgment of the person's best interest.¹

States have varied legal frameworks for establishing surrogacy and refer to a surrogate using terms such as *proxy*, *agent*, *attorney-in-fact*, and *power of attorney*.² POA responsibilities can encompass a broad array of decision-making tasks or can be limited, for example, to handling banking transactions or managing estate planning.^{3,4} A POA can be "durable" and grant lasting

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Disclosures

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Douglas Mossman, MD
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Clinical Point

A ‘durable’ POA has power regardless of disability; a ‘springing’ POA springs into action when the designator has lost capacity



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Table 1

State statutory criteria concerning competence to designate power of attorney

Statutory source	Criteria
California Probate Code §4120	“A natural person having the capacity to contract may execute a power of attorney.”
Massachusetts General Laws chapter 201D, §2	“...at least eighteen years of age, of sound mind and under no constraint or undue influence.”
Utah Code Annotated §75-2a-103	“...understands the consequences of appointing a particular person as agent.”
Title 18 Vermont Statute Annotated, Chapter 231, §9701(4)(A)	“...the individual has a basic understanding of what it means to have another individual make health care decisions for oneself and of who would be an appropriate individual to make those decisions, and can identify whom the individual wants to make health care decisions for the individual.”

power regardless of disability, or “springing” and operational only when the designator has lost capacity.

A health care POA designates a substitute decision-maker for medical care. The Patient Self-Determination Act and the Joint Commission obligate health care professionals to follow the decisions made by a legally valid POA. Generally, providers who follow a surrogate’s decision in good faith have legal immunity, but they must challenge a surrogate’s decision if it deviates widely from usual protocol.²

Legal standards

Dr. P received a consultation request that asked whether a patient with compromised medical decision-making powers nonetheless had the current capacity to choose a new POA.

To evaluate the patient’s capacity to designate a new POA, Dr. P must know what having this capacity means. What determines if someone has the capacity to designate a POA is a legal matter, and unless Dr. P is sure what the laws in her state say about this, she should consult a lawyer who can explain the jurisdiction’s applicable legal standards to her.⁵

The law generally presumes that adults are competent to make health care decisions,

including decisions about appointing a POA.⁵ The law also recognizes that people with cognitive impairments or mental illnesses still can be competent to appoint POAs.⁴

Most states don’t have statutes that define the capacity to appoint a health care POA. In these jurisdictions, courts may apply standards similar to those concerning competence to enter into a contract.⁶ **Table 1** describes criteria in 4 states that *do* have statutory provisions concerning competence to designate a health care POA.

Approaching the evaluation

Before evaluating a person’s capacity to designate a POA, you should first understand the person’s medical condition and learn what powers the surrogate would have. A detailed description of the evaluation process lies beyond the scope of this article. For more information, please consult the structured interviews described by Moye et al⁴ and Soliman’s guide to the evaluation process.⁷

In addition to examining the patient’s psychological status and cognitive capacity, you also might have to consider contextual variables, such as:

- potential risks of not allowing the appointment of POA, including a delay in needed care

- the person's relationship to the proposed POA
- possible power imbalances or evidence of coercion
- how the person would benefit from having the POA.⁸

People who have good marital or parent-child relationships are more likely to select loved ones as their POAs.⁹ Family members who have not previously served as surrogates or have not had talked with their loved ones about their preferences feel less confident exercising the duties of a POA.¹⁰ An evaluation, therefore, should consider the prior relationship between the designator and proposed surrogate, and particularly whether these parties have discussed the designator's health care preferences. *Table 2* lists potential pitfalls in POA evaluations.^{2,4,5,8,11-13,16}

Responding to abuse

Accompanying the request for Dr. P's evaluation were reports that the current POA had been stealing the patient's funds. Financial exploitation of older people is not a rare phenomenon.^{14,15} Yet only about 1 in 25 cases is reported,^{16,17} and physicians discover as few as 2% of all reported cases.¹⁵

Many variables—the stress of the situation,⁸ pre-existing relationship dynamics,¹⁸ and caregiver psychopathology¹¹—lead POAs to exploit their designator. Sometimes, family members believe that they are entitled to a relative's money because of real or imagined transgressions¹⁹ or because they regard themselves as eventual heirs to their relative's estate.¹⁶ Some designated POAs use designators' funds simply because they need money. Kemp and Mosqueda²⁰ have developed an evaluation framework for assessing possible financial abuse (*Table 3*).

Although reporting financial abuse can strain alliances between patients and their families, psychiatrists bear a responsibility to look out for the welfare of their older

Table 2

Pitfalls in power of attorney (POA) evaluations

Not consulting ethical or legal experts when appropriate ^{2,4,5}
Not knowing the appropriate legal standard ^{4,5}
Equating age, diagnosis, or psychological test scores with capacity ⁸
Not using a systematic approach, such as a structured assessment tool ¹¹
Not reporting to Adult Protective Services when required ¹²
Not keeping sufficient records to document evidence regarding capacity ¹³
Not considering the context of the decision to appoint a POA and the POA's relationship to patient ¹⁶

Table 3

8 Risk factors for elder financial abuse

Vulnerability (because of lack of capacity or other conditions)
A trusting relationship with the perpetrator
Isolation and control of the older person or transaction
Exertion of undue influence
Lack of concern for the welfare of the older person
Lack of ethics in transactions
Secretiveness
Change of assets during the period of vulnerability
Source: Reference 20

patients.⁸ Indeed, all 50 states have elder abuse statutes, most of which mandate reporting by physicians.²¹

Suspicion of financial abuse could indicate the need to evaluate the susceptible person's capacity to make financial decisions.¹² Depending on the patient's circumstances and medical problems, further steps might include:

- contacting proper authorities, such as Adult Protective Services or the Department of Human Services
- contacting local law enforcement

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Before the evaluation, you should understand the person's medical condition and the powers the surrogate would have

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- instituting procedures for emergency guardianship
- arranging for more in-home services for the patient or recommending a higher level of care
- developing a treatment plan for the patient's medical and psychiatric problems
- communicating with other trusted family members.^{12,18}

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Bottom Line

Evaluating the capacity to appoint a power of attorney (POA) often requires awareness of social systems, family dynamics, and legal requirements, combined with the psychiatric data from a systematic individual assessment. Evaluating psychiatrists should understand what type of POA is being considered and the applicable legal standards in the jurisdictions where they work.