



CONSIDER THE IMPORTANCE

Powers of Attorney

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In the world of financial and estate planning, everyone knows the term “power of attorney,” and it carries with it a unique gravitas. Sometimes, however, powers of attorney documents might be afforded too wide of a berth and viewed as though all are created equal and convey almost unfettered power. Let’s take a closer look at different types of powers of attorney and how they really operate.

DURABILITY? SPRINGING?

When it comes to powers of attorney^{*}, one of the most important distinctions involves when they are in effect. Absent compelling reasons otherwise, most POAs are drafted in a way that they will continue to be in effect if and when the Principal becomes incapacitated. POAs that operate like this are known as “durable.” In contrast, a “non-durable” POA would cease to be in force when the Principal becomes incapacitated.

If a non-durable POA expires upon incapacity, then it would be important to also have a “springing” power of attorney, which is exactly what it sounds like: the powers “spring” into being whenever the Principal becomes incapacitated. However, making a determination of capacity can be an involved process requiring official input from doctors and/or attorneys, as many financial institutions would refuse to make such a call themselves. This is why durable POAs are the most popular route to take.

Some people may balk at the idea that their Agent under a durable POA would have control over their assets from the get go and could pursue nefarious ends using the POA. Simply put, if a Principal has that concern, then it is definitely time to re-think the person they have named as their Agent!

BY YOUR POWERS COMBINED

The powers granted by a POA can be numerous and, most importantly, are not universal. Managing investment accounts or writing checks may be standard fare, but a POA could be drafted specifically to include, exclude, or limit one or more powers. For example, the power to continue an established gifting

^{*} For the purposes of this article, we’ll be focusing purely on financial powers of attorney and won’t wade into the waters of healthcare POAs.

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strategy (which can be vital for estate and tax planning) can be very important, but does the Agent also have the power to establish an entirely new gifting regime? Moreover, states have varied rules and regulations regarding POAs. As such, a prudent advisor needs to have a working understanding of what exactly a particular client's power of attorney conveys.

One additional dynamic to remember is the effect that death has on POA operation. If an Agent predeceases the Principal, the POA may offer guidance as to who becomes the successor Agent. If it does not, then the POA is no longer in effect and a new document must be executed. And when the Principal dies, any and all POAs are no longer in effect *whatsoever*; an Agent has no authority over any aspect of the Principal's estate unless and until they are named in the will as Executor (also known as Administrator or Personal Representative).

Finally, it should certainly be remembered that if a client becomes incapacitated without an effective power of attorney in place, or if a durable Agent is no longer able to serve and no successor is named prior to the incapacity, the consequences can be very undesirable. In this situation, the courts would have to appoint a guardian for the incapacitated client, which is a process that will undoubtedly cost time and money. Therefore, it is important to regularly review powers of attorney documents and update them when necessary.

WHERE DO WE GO FROM HERE?

For any Financial Service Professional, it may not be necessary to know everything there is to know about powers of attorney, but it is paramount to understand working details of your clients' powers of attorney, to know what powers they grant (and don't grant), and to follow them accordingly. When undertaking financial or estate planning in collaboration with an Agent, care should be taken to ensure that the necessary steps are covered by the powers granted in the POA. And, as always, attentive conversations about and reviews of the powers of attorney documents help to ensure that they remain in line with a client's wishes.

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*Not in the practice of law for Underwriters Brokerage Service

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