



Role of the power of attorney

No one likes to consider the possibility of becoming mentally incapacitated due to age, accident or illness, but the fact is that almost every family will eventually face this kind of difficulty. Everyone should consider naming an agent to act in their best interests, in case they become unable to make their own decisions over the course of their lives.

Power of attorney

An authorization that provides legal permission to someone (called an “agent” or “attorney-in-fact”) to act on behalf of another person (called the “principal”). There are various powers specified by a power of attorney, which could be appropriate due to a specific circumstance where someone else is needed to act on one’s behalf, or where someone is absent or incapacitated. In that case, without a power of attorney, the loved ones may have to go to court to get the authority to handle the affairs of their incapacitated loved one.¹

It is a good idea to plan for the possibility by having a power of attorney in place. There are several forms of power of attorney.

A **general power of attorney** can grant broad powers over one’s affairs. The agent manages financial assets, but may not make health care decisions.

A **limited power of attorney** has limited powers, giving the agent the authority to handle affairs of the principal during a period of time, such as when the principal is traveling out of the country. The principal determines what the powers will be. If a principal becomes incapacitated, the agent loses all powers.

A **durable power of attorney** remains effective even after the principal’s incapacitation. The durable power of attorney appoints an agent to manage the principal’s financial affairs and conduct business during the period the principal is unable to make their own decisions. A durable power of attorney remains effective throughout the period the principal is incapable of handling their own affairs, while ordinary powers of attorney automatically end if the person who makes them loses mental capacity.

To effectively plan for incapacity, you should consider executing a general, durable power of attorney.

Another type of power of attorney — often called an “advance health care directive” or “living will” — contains the written health care instructions to the agent and health care providers. In some states, the medical power of attorney and living will are combined in a single document called the advance health care directive (see our worksheet on page 61 for more details).

¹ <http://definitions.uslegal.com/p/power-of-attorney/>; Copyright © 1997–2016 US Legal, Inc.

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Selecting an agent

Signing a power of attorney that grants broad authority to an agent is a very serious matter. Be sure to choose wisely and understand the powers being granted. The agent must be at least 18 years old, and may be a family member and/or loved one, a trusted longtime friend or professional, such as the family lawyer, doctor or accountant. More than one agent may be named. It is important for the principal's intentions to be discussed carefully with the agent, to prepare the agent to make decisions on the principal's behalf.

Upon death of the principal, the power of attorney becomes invalid and the executor takes over to carry out the wishes of the estate. The principal may name the same person as both agent and executor; however, an executor assumes his position following the death of the principal.

Risks and concerns

The fiduciary authority conveyed by the power of attorney is both useful and potentially dangerous. Although the power is simple to convey, the arrangement provides no oversight and few restrictions. It is important to weigh carefully the assignment of power of attorney. Unfortunately, the lack of oversight with a power so broad can lead to abuse of these privileges. Power of attorney abuse may take several forms:

- Improper use of the principal's income or pledge or sale of assets for the agent's own benefit rather than the intended benefit.
- Commingling of funds with the agent's own funds and lack of recordkeeping.
- Changes to life insurance beneficiaries, granting gifts, or selling assets the principal did not intend to sell.
- A power of attorney authorization may itself be fraudulent, in some cases.

Protections

For estates of a certain size, trusts can provide greater protections than a simple power of attorney provides (see Role of corporate trustee on page 57). However, power of attorney is widely used in most cases. Many of the legal cases in this area hinge on the specific circumstances unique to each situation. Little has been done to provide guidance to agents about the fiduciary role they assume by acting as power of attorney. There is one consistent piece of advice to principals: Care and selection in the choice of an agent is paramount.²

² Seal, Catherine (2010) "Power of Attorney: Convenient Contract or Dangerous Document?," Marquette Elder's Advisor: Vol. 11: Iss. 2, Article 5. Available at: <http://scholarship.law.marquette.edu/cgj/viewcontent.cgi?article=1024&context=elders>.

All investments involve risk, including loss of principal.

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