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Powers Of Attorney: Highly Used – Highly Dangerous
Part 1 of 2

Good advisors counsel clients to have something in place for someone to handle their affairs if they become disabled. If there is nothing, a court may need to appoint a conservator.

Court appointment of a conservator can be time consuming, public, and expensive. Most clients (and their advisors) would want to avoid it. The usual response is to have clients sign a durable power of attorney.

It has been our experience that powers of attorney are not the panacea people believe them to be. The following is a short summary of pitfalls we have seen with powers of attorney:

Blank Check

Because the agent may need to take care of any financial transaction, the usual power of attorney grants broad powers. The agent can buy, sell, or lease property, set up or change investment and bank accounts, sell cars, and on and on. In short, the agent is the client's *alter ego* - literally *"another self."*

Effective Immediately

Many broad powers of attorney are effective immediately upon signing, not when there is a need. Some form documents do make the power effective only upon disability, but the definition of disability is usually simply the decision of a doctor. There is no instruction on who finds the doctor or what the doctor must find in order to make the power effective. So, the client gives up complete control over finances with little or no control over *when* that control will be granted.

No Instructions

Clients normally do not think about, and are seldom asked about, leaving instructions for how the power should be used. The document is simply "I trust you, you can do anything".

No Reporting

We use powers of attorney to avoid court supervision, so there is generally no reporting required. Some state laws have reporting requirements, but most require accounting only *after* actions are taken. Some might call this "closing the barn door after the horse is gone." Because most helpers named are individuals, often the money is gone, or the damage done before the problem is even discovered.

Not Honored

Under most state laws, there is no requirement that a third party (like a financial institution) honor the power of attorney. Some make the third party as liable to the helper as they would be to the client if the third party refuses to honor the helper's wishes. In most states, however, often there is no such provision or simply a statement that the power must be honored without any penalty if the power is refused. Many institutions will honor only their own form power of attorney-even when the client has a validly executed document of their own! In fairness, there are some solid reasons for these policies.

As one considers each of these points, the complete loss of control becomes more evident-and uncomfortable. We will address these concerns in part 2 of this article.

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Powers Of Attorney: Highly Used – Highly Dangerous Part 2 of 2

The first installment of this series pointed out some of the dangers of powers of attorney. Typically, they are a "blank check" list of powers granted *immediately* to the named agent. In my experience most clients expect that the power is granted "just in case" it is needed!

Avoiding power of attorney abuse begins with a clear explanation of the extraordinary power being granted. Clients can be counseled to name multiple agents, insuring checks and balances. They should also be told that in some states a power of attorney can be "springing"; that is, it only becomes effective upon a showing of mental disability.

Clients can define the time of their mental disability by naming a "panel" of people to make that determination. The panel can include both doctors (providing protection) and family members (to assure the timing is right).

This approach *ensures* that multiple people are involved, *and* that a discussion among them takes place. This avoids the most common abuse situation, where a sole agent is named and takes action without consulting other family members or loved ones.

Financial institutions prefer the disability panel approach. The normal "blank check" power of attorney places such institutions in a difficult situation because the company has no direct knowledge that the power is even supposed to be used at that time. The "nightmare" picture for an institution is an agent asking for an action to be taken, while Dad stands at the back of the line saying "no, don't!" Under some state statutes, the companies would be liable to *both!*

In addition, most powers of attorney are either signed long before the agent attempts to use it, or just immediately before that time. The first scares companies because they aren't sure the agent is even still in contact with the client, let alone supposed to be taking action. The second clearly raises the issue of client competence.

Financial institutions protect themselves first by requiring "certification" that the power is still valid and not revoked; second, through a policy of only honoring their power of attorney, including language protecting the financial institution. The latter protects the company, but can result in the client family unexpectedly being denied use of an otherwise valid power of attorney.

Some states do not allow "springing" powers. In these cases the client could store the document with a third party *(not the agent named)* with instructions to give it to the agent at the disability panel's direction. The client could give a liability release to advisors who agree to take on this role. In my experience, financial advisors, CPA's, or the drafting attorney who have worked closely with the client are good choices for this role.

I hope the review encourages you to re-think the off-the-cuff recommendation of standard powers of attorney, and helps you understand how the extraordinary powers granted may be controlled and monitored for the good of our clients.

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