Power of Attorney

One size does not fit all...

by **Steven A. Early**

A Power of Attorney is a legal instrument that individuals create and sign; it gives someone else the authority to make certain decisions and act for the signer. The person who has these powers is called an "agent" or "attorney-in-fact." The signer is the "principal."

Agent

The person designated to be the agent assumes certain responsibilities. First and foremost, the agent is obligated to act in the principal's best interest. The agent must always follow the principal's directions. Agents are "fiduciaries," which means that the agent must act with the highest degree of good faith on behalf of their principals. It is crucial that trustworthy individuals are chosen to execute a power of attorney. Principals usually grant their agents fairly broad powers to manage their finances and to conduct financial transactions in their behalf. Even so, principals can grant their agents as much or as little authority as they think reasonable.

Creating a Power of Attorney

When individuals create a power of attorney they are stating what they want their agent to be able to do for them. For the power of attorney to be effective the principal must be competent to give this authority.

In most cases when individuals create a power of attorney, their signature on the form should be witnessed by a notary. A Medical Power of Attorney must be witnessed by two people, one of whom can not be a relative or other interested party.

In order to create a legally effective power of attorney, the principal must be mentally competent. The principal needs to know and understand what he is doing. A person who is mentally incapacitated cannot meet these requirements. In most instances, all the principal needs to do to create a legally valid power of attorney is properly complete and sign (before a notary public) a document that's is a few pages long.

Types of Powers of Attorney

General Power of Attorney: A general power of attorney is one that permits the agent to conduct practically every kind of business or financial transaction—with the principal's assets—without any restraints. Because of the great harm to the principal's financial well-being that an incompetent or untrustworthy agent can cause with a general power of attorney, the principal should be extremely careful in choosing an agent. Additionally, the principal should maintain vigilance over the agent's transactions in the principal's behalf.

Special or Limited Power of Attorney: A special power of attorney, also known as a limited power of attorney, is created to empower an agent to perform a specific act or acts. For example, if the principal is unable to do it himself, he can prepare a special power of attorney so that the agent can complete the purchase or sale of real estate. Most powers of attorney carefully define and enumerate the scope of the agent's authority. Thus, most powers of attorney are limited powers of attorney.

Springing Power of Attorney: Any power of attorney can be written so that it becomes effective as soon as the principal signs it. But, the principal can also specify that the power of attorney goes into effect only upon the occurrence of some triggering event. In other words, it "springs" into effect at a later date, if ever. The triggering event can be something as simple as the principal's reaching a certain age or when a certain calendar date occurs. It can also be much more specific, such as if and when a doctor certifies that the principal has become incapacitated. These kinds of springing powers of attorney enable individuals to keep control over their affairs unless and until they become incapacitated, when it springs into effect. They are also known as durable powers of attorney.

Durable Power of Attorney: Unless a power of attorney specifically says otherwise, an agent's authority ends if the principal becomes mentally incapacitated. On the other hand, a power of attorney may state explicitly that it is to remain in effect and not be limited by any future mental incapacity of the principal. A power of attorney with this sort of clause is called a durable power of attorney. The word "durable" means that the principal's agent can continue to conduct business for the principal if the principal becomes incapacitated.

Because of their potential utility to individuals who lack capacity after executing them, durable powers of attorney are arguably the most important form of these versatile legal documents. Durable powers of attorney are intended to address cases wherein which the following applies:

- The principal intends the agent to have authority only if the principal becomes incapacitated.
- The principal intends for the power of attorney to take effect immediately and to remain in effect regardless of the principal's future disability.

The principal must list the specific powers under the durable power of attorney that are given to the agent and when those powers are to take effect. The agent must still act in the principal's best interest, making decisions and using the principal's assets only for the principal's benefit.

The alternatives to creating a durable power of attorney may not be what the principal intends. If the principal have not executed a durable power of attorney and subsequently the principal becomes mentally incapacitated, a court may appoint a guardian or conservator for the principal. A guardianship or conservator ship must be established by a probate court. It is usually easier and much less expensive to manage one's affairs with a power of attorney.

Like all powers of attorney, a durable power of attorney ends or ceases to carry authority upon the death of the principal.

There are two general types of | *continued on* **page 42** ►

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► *from* **page 17** | durable powers of attorney: a durable power of attorney for finances, and a durable power of attorney for health care (or Medical Power of Attorney). Depending on the terms of the document, the durable power of attorney for finances allow the agent to serve the interests of the principal in financial matters before, during, or after the agent becomes incapacitated. The durable power of attorney for health care authorizes the agent to make medical decisions for the principal if the principal cannot otherwise make those decisions.

Revoking a Power of Attorney

All powers of attorney automatically expire upon the principal's death. However, Power of attorney can be revoked at any time, as long as the principal is are of sound mind. To revoke a power of attorney, the principal must do so in writing. Typically, the principal merely needs to prepare a simple statement containing the following:

- The principal's name and date
- The principal's claim to be of sound mind
- The principal's explicit desire to revoke the durable power of attorney
- The date the original durable power of attorney was executed
- The name of the principal's agent or agents
- The principal's signature

It is important to distribute copies of this revocation statement to the agent and to any institutions and agencies, such as banks and hospitals that may have had notice of the principal's power of attorney. If the power of attorney is on file with a county records department, the statement revoking the power of attorney should be filed in the same place. After the durable power of attorney is revoked, the principal can 1) execute a new power of attorney naming someone else as agent to handle the principal's affairs; or 2) handle the affairs independently.

Powers of Attorney, like most legal documents, should be tailored for your unique needs. Although there are 'standard' forms available, one size does not fit all circumstances. mt