

From the desk of

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## ***What is a Durable Power of Attorney?***

A power of attorney is a legal document in which one person (the principal) authorizes another (the agent) to act on the principal's behalf. There are financial powers of attorney and medical powers of attorney.

As far as I am concerned, most every adult should have both financial and medical powers of attorney so that a family member or trusted friend will have the legal authority to carry out your wishes if you can no longer speak or act for yourself. Without a power of attorney, if you lose your ability to make decisions, your family may face court proceedings and a court supervised guardianship.

Clients occasionally come to our office with powers of attorney they purchased at an office supply store or downloaded off the Internet. These documents usually accomplish the purpose of legally authorizing persons to act on another's behalf, but there are certain things a standard power of attorney may not address. In fact, there are certain matters your agent cannot handle unless there is specific wording in the document that empowers them to do so. Such matters include the power to apply for public entitlements (such as Medicaid), the power to make gifts on your behalf, and the power to create a trust on your behalf.

Typically you want any power of attorney to be "durable," meaning that the power of attorney remains effective if you subsequently become disabled or incapacitated. If the document does not contain a statement to that effect, then the authority of your agent terminates if you later lose your ability to make decisions for yourself. Obviously, that is when it may be most important.

You can also make a financial power of attorney a "springing" power by stating in the document that it becomes effective only *upon* your incapacity or disability. If that is your choice, the document should also state what type of proof (such as a statement from your doctor) of your incapacity will be sufficient. If the bank or title company is hesitant to rely on your physician's statement, your family may be forced to go to court to get a judge to declare you incapacitated in order for your agent to be able to act.

The fact that an agent has the authority to act on your behalf does not mean he or she has the right to do whatever they desire. An agent under a power of attorney is a "fiduciary" with all the obligations that come with it. Your agent must act strictly in your best interest, being careful to avoid any conflicts of interest, and must be prepared to fully account for every penny received and/or spent on your behalf. In fact, if your agent cannot fully explain every action, he or she can be held liable even if the reason is simply sloppy record keeping. As you might expect, abuse of an agent's authority under a power of attorney may also be a crime.

Many children of elderly parents decide that a power of attorney gives them the right to finally start doing the things that they had been unable to convince their parents to do, such as getting rid of certain assets the *children* think are no longer needed. BE CAREFUL! That property still belongs to the parents. Doing what *you* want, knowing that it goes against your principal's wishes, may get you in a load of trouble. Even if you escape liability, you will be violating the trust was placed in you.