



Powers of Attorney

Basics That All Investors Should Know and Consider¹

A Power of Attorney, commonly referred to as a POA, allows for the management of your financial affairs in an orderly way, even if illness or disability impacts your ability to manage these affairs yourself. Through a POA, you confer authority to another person (commonly referred to as an attorney-in-fact) to act for you, in the event you cannot act for yourself or in any other instance you may stipulate. Despite the title, an attorney-in-fact does not need to be a licensed attorney; an attorney-in-fact is a person you authorize to act on your behalf according to the authority granted in the POA.

Although it can be an uncomfortable topic to consider, preparing for situations in which you may no longer be able to make sound investment decisions is an important part of prudent financial planning. Whether due to cognitive decline or an unexpected accident, a well-drafted POA for property can provide a clear method for transferring financial decision-making authority from you to the person you designate.

A properly structured POA allows you to determine who will act on your behalf and to define the circumstances under which the authority will be triggered, i.e., immediately upon execution of the POA or later, at the time of incapacity. By addressing these issues in advance, you retain control over the process and help reduce uncertainty, delays, and potential disputes if the need arises.

Because a POA allows your attorney-in-fact to manage your financial affairs, great care should be taken when appointing someone to that role. In addition, it's helpful to remember that having a properly executed POA can help avoid the uncertainties and complications that may arise if one is not in place. Without a POA, your family members might need to go through the court to have a guardian or conservator appointed to manage your affairs, which can involve filing fees, attorney's costs, and potentially the appointment of a guardian ad litem to represent your interests.

While these proceedings are designed to provide protection, they can also be time-consuming, costly, and emotionally taxing for your loved ones. Establishing a POA in advance may help reduce the likelihood of a legal proceedings and the uncertainty that may come if you are no longer able to make those decisions for yourself.

¹ This informational guidance is intended to be informational only, provided by the Senior Issues and Diminished Capacity Committee of the North American Securities Administrators Association (NASAA). It is not legal advice, and it does not necessarily represent the views of NASAA or any of its members. Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA's membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, México, Puerto Rico, the U.S. Virgin Islands, and Guam. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

It is important to note that specific requirements apply in each jurisdiction as to the powers your attorney can exercise and when they can be exercised. Accordingly, it is important to understand what applies in your jurisdiction.

The discussion about whom to appoint and how to appoint your attorney-in-fact is best had with your legal counsel.

Having said this, we are providing an overview of some basic points to consider before executing a POA.

Who is the right person to appoint as your attorney-in-fact?

Choosing the right person to act for you when you cannot act for yourself is critical. Some questions you should consider before the appointment are:

- Is the person willing to take on the role?
- Is the person financially knowledgeable and responsible with money?
- Are you confident the person will act in your best interest?
- Is this person legally able to take on the role? (Some jurisdictions may have laws prohibiting certain classes of people from acting in the role, for example, minors or someone with an undischarged bankruptcy.)
- Does the person have the time to dedicate to the task?
- Does the person have the ability, given their current life circumstances, including location and other family obligations, to take on the task?
- Have you considered alternates if that person is unable to serve?

In addition, clients should understand that failing to have a properly executed POA in place may result in significant delays and unnecessary court involvement if they become incapacitated. Without a POA, family members may need to petition the court for the appointment of a guardian or conservator, which can involve court costs, attorney's fees, and the appointment of a guardian ad litem to represent the individual's interests. These proceedings can be time-consuming, expensive, and emotionally burdensome for loved ones.

What is the right form of POA?

Including the appropriate provisions in a POA is just as important as whom you choose to act as your attorney-in-fact. Here are some questions to consider:

- Are there protective measures you might consider putting in your POA? For example, do you wish to limit the financial decision-making authority of the attorney-in-fact? Do you wish to set out restrictions on any gifts the attorney-in-fact can make under the POA?
- Should you require a second signature or co-agent for larger transactions?
- Do you want to consider compensating the attorney-in-fact for the time taken to act on your behalf?
- Should you limit your attorney-in-fact's ability to change your beneficiary designations?
- Should you consider a provision that would allow for a periodic, third-party audit of your designee's actions, perhaps by an appointed accountant or family member?

Disclose the existence of the POA to interested persons

Once you make the decision to designate an attorney-in-fact, to optimize the use of the POA, consider the following tips:

- Be sure that the person designated as the attorney-in-fact fully understands your wishes and their role;
- Tell family members that you chose to create a POA and tell them who the attorney-in-fact is so that it is not a surprise to the family if and when the POA is triggered;
- Make certain that you tell your financial advisor, and other professionals that you work with, about the existence of the POA, so that they can contact the person you trust to handle your financial decision-making when you are unable to do this for yourself;
- Provide to these same professionals a copy of the POA for their files; and
- Introduce your attorney-in-fact to your financial professional.

By communicating your wishes to your attorney-in-fact, your family and the people providing professional services to you will avoid surprising the interested parties. This will enhance the

likelihood of a seamless transition to the attorney-in-fact, which is the purpose of the POA, and allow your financial professional to work collaboratively with your designee and others.

In most cases, your financial professional will be focused on the following aspects of your POA document:

- The triggering events for the POA;
- The proof the attorney-in-fact will have to present to show that the POA is effective and that they have authority to act;
- Whether the POA is limited or grants broad authority for all financial matters;
- Whether there is more than one attorney-in-fact; and,
- Whether the POA names an alternate attorney-in-fact if the first is unable or unwilling to assume the role for your benefit.

Other considerations

It is possible that your financial services firm may request that you use their “form” POA document and in some instances may state that the firm will only accept POAs using these forms. If you already have a duly executed POA, particularly one that has been drafted by legal counsel, signing the firm’s form document could impact the efficacy of your existing POA. For instance, there may be conflicting provisions in the two POAs. Should this issue arise, you should consult with your legal counsel.

Last, in most cases, POA documents can be changed at any time. If you designate someone whom you no longer trust, has passed away, or who has indicated that they are no longer suited for the role, you should promptly confer with your legal counsel to discuss changes to the terms of your POA.

Conclusion

Planning for the orderly management of your financial affairs in the event of incapacity is important. As explained above, informed decisions about the scope of the POA and who should serve as your attorney-in-fact and clearly communicating your intentions about the use of the POA to family, financial advisors, and other interested persons, enhances the probability that the POA will serve its purpose in meeting your needs and expectations. As you consider whether to execute a POA, be sure to consult with your trusted advisers and legal counsel to make sure you understand all of the aspects of how the POA will work.