

Powers of Attorney

Why Discussing a Power of Attorney Can Be Important to the Financial Professional and Client Relationship¹

Most would agree that a well-drafted will is an essential estate planning tool. But wills, by definition, are meant to express one's wishes at end of life. What happens if there is a need to express similar wishes while one is still living, for example in the event of a stroke or event that hampers one's ability to make sound investment decisions? A Power of Attorney (POA) provides an option, with the authority to manage your client's property, to provide for the orderly management of your client's financial affairs, if illness or disability impacts their ability to manage those affairs, or in any other instance that they may stipulate. Through the POA, the client confers authority to another person to act on their behalf. The power granted to the person that the client appoints (usually referred to as an attorney-in-fact), can be broad or limited. Despite the title, an attorney-in-fact does not need to be a licensed attorney; an attorney-in-fact is a person the client authorizes to act on their behalf according to the authority granted in the POA. Importantly, the POA allows the attorney-in-fact to make financial decisions when your client can no longer do so. The POA can be revoked or amended, provided that the client has the capacity to make such changes.

In the event that an accident or illness renders the client incapacitated, the POA usually grants the attorney-in-fact significant power over the principal's affairs. A well-planned and well-communicated POA can ensure that the financial professional and client relationship is preserved during times of incapacity. Conversely, a poorly considered and communicated POA can lead to:

- An attorney-in-fact who is unwilling to act.
- An attorney-in-fact who does not fully appreciate the client's wishes.
- Misunderstandings and disagreements between the attorney-in-fact and other family members.

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.

- Misunderstandings and disagreements between the attorney-in-fact and the financial professional.
- Risks of financial exploitation.

It is important to note that specific requirements apply in each jurisdiction as to the powers an attorney can exercise and when they can be exercised. Accordingly, it is important to understand what applies in your jurisdiction. Discussions on structuring the POA should be left to your client and their legal counsel; however, the financial professional can educate clients about how a POA can be beneficial and issues to raise with their legal counsel. Having this discussion helps the client but also helps the financial professional, should the client lose the ability to make sound financial decisions.

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.

Engaging in this conversation not only supports the client's planning efforts but also helps protect the financial professional if the client later loses the capacity to make sound financial decisions. Below, we provide some tips for financial professionals when discussing POAs with their clients and for navigating their role when a client loses capacity and a POA is triggered.

Tips for Financial Professionals

Discuss why having a POA may be a good idea and may be helpful to the Financial Professional

Although it is not the easiest discussion to have with clients, explaining the value of a POA when unexpected events arise is important to do. The main point is that planning prevents problems when the need arises. The POA empowers the trusted person to act for the client. The POA allows a seamless transition in decision-making power when the client is unable to make sound financial decisions. The POA helps trusted persons to act for the client. Suggest that the client consider a discussion with their legal counsel about POAs and the important role that a POA can play in the orderly management of the client's financial affairs through the end of life.

Encourage your client to carefully consider who would be good for the role

Discuss the fact that choosing an attorney-in-fact under a POA is important and not something to be taken lightly. Here are some questions the client should consider before going to visit their legal counsel to discuss having a POA executed:

- Is the potential attorney-in-fact willing to take on the role?
- Is the potential attorney-in-fact good with money; do they have good financial judgment and do they have the time to dedicate to the task?
- Does the potential attorney-in-fact have the ability, given their current life circumstances, including location, other family obligations and financial knowledge, to take on the task?
- Can the potential attorney-in-fact perform the obligations of the POA in the location in which the client resides?
- Has the client considered who might be good choices as successors to the initial attorney-in-fact if that person is unable to serve?

It is also important to remind the client that a POA is not the same as a “trusted contact” designation. A trusted contact is someone the firm may reach out to in limited circumstances—such as suspected financial exploitation or concerns about diminished capacity but has no authority to transact business or make decisions on the client’s behalf. Only a validly executed POA (or other legally recognized legal authority) grants an individual the power to act for the client.

Have the client consider whether they want to include protective measures in their POA

Educating a client about how the POA can work may go a long way to ensuring that the client is prepared to protect themselves against the potential for misunderstandings or financial exploitation. For example, the POA’s breadth is often broad and variable and can include protective provisions, including:

- Restricting or clearly defining the attorney-in-fact’s ability to make gifts;
- Requiring an annual accounting by a trusted third-party contact or appointing a monitor more generally;
- Limiting the ability to make beneficiary change designations;
- Requiring a second signature or co-agent for larger transactions;

- Requiring an inventory of assets when the attorney-in-fact begins to act that is verified by an independent third party; and
- Limiting the class of assets the attorney-in-fact can invest.

Consider suggesting a meeting with the attorney-in-fact

Clear communication about the POA helps the financial professional be prepared when the POA is triggered and understand that the attorney-in-fact is both properly appointed and trusted by the client. This may promote a collaborative working relationship between the financial professional and the attorney-in-fact.

It may be beneficial to suggest a meeting between the financial professional, attorney-in-fact and the client while the client is still in good health. This meeting would allow the client to provide a copy of the POA to both the financial professional and the attorney-in-fact to make sure their documents are in order, to make it clear what the client would like to occur in the event of incapacity, and to answer any questions.

Prepare for and consider the changed relationship

The relationship between a financial professional and client will evolve as the client loses capacity and an attorney-in-fact, under a legally valid POA, steps in to exercise authority. The financial professional will need to understand their obligations to the client when working with an attorney-in-fact who has the authority to make certain decisions on behalf of the client pursuant to the POA.

Below are some points to consider as the attorney-in-fact begins to exercise authority:

- Speak to the client, if possible, about the transition to the attorney-in-fact under the POA;
- Review the document to ensure that the attorney-in-fact is properly appointed as the sole appointed person, or, if co-attorneys-in-fact are named, that their respective authority is clearly defined²;
- Ensure that, if the POA has a contingency of powers provision, the event that caused the attorney-in-fact's authority to come into effect has indeed occurred; meaning, the client lost capacity and the designee has the power to act; and,
- Carefully review the document for any limitations imposed by the POA on the authority of the attorney-in-fact.

² State laws vary in their default rules for co-attorneys-in-fact—some require joint action, while others permit independent or majority decision-making. These defaults can be overridden if the POA specifies whether co-attorneys-in-fact are to act jointly, independently, or by majority.

What to do if you suspect financial exploitation

Separately, it is incumbent on financial professionals to understand how applicable laws and rules apply to them in cases of suspected financial exploitation.

On January 22, 2016, North American Securities Administrators Association (NASAA) adopted the [Model Act to Protect Vulnerable Adults from Financial Exploitation](#) (NASAA Model Act), which includes the following key provisions:

- **Mandatory Reporting:** Qualified individuals, including certain financial professionals, who reasonably believe that financial exploitation of an eligible adult has been attempted or has occurred must promptly notify Adult Protective Services (APS) and the state securities regulator.
- **Notification:** The NASAA Model Act authorizes disclosure to third parties where the eligible adult has previously designated the third party to whom the disclosure can be made (e.g., a trusted contact person).
- **Delayed Disbursement:** The NASAA Model Act provides the ability to delay disbursing funds from an eligible adult's account for up to 15 business days if the financial professional reasonably believes that disbursement would result in the financial exploitation of the eligible adult, with the ability to extend an additional 10 business days should the securities regulator or Adult Protective Services request an extension.
- **Immunity:** Immunity is provided for the reporting of suspected financial abuse to governmental agencies, the disclosure of information to designated third parties, and the decision to delay disbursements.
- **Records:** A requirement that broker-dealers and investment advisers comply with requests for information from APS agencies or law enforcement in cases of suspected or attempted financial exploitation.

Since the adoption of the NASAA Model Act, more than 30 states have adopted substantially similar laws. Laws in individual jurisdictions vary, but usually allow firms to place a hold on disbursements or transactions where they reasonably suspect that financial exploitation has occurred, is occurring or will occur, absent intervention. The laws also provide a safe harbor protecting those who properly report the suspected financial exploitation to various government agencies.

Financial professionals can do the following to prepare to deal with financial exploitation:

- Educate themselves on relevant laws and rules including any tools they might be

able to use under those laws and rules that could be of assistance should the financial professional suspect financial exploitation;

- Educate themselves and become more aware of signs of a client's loss of sound decision-making ability and financial exploitation; and,
- Seek to add a trusted contact person to an account and the consent of the client to reach out to the trusted contact person in certain circumstances.

Conclusion

Planning for contingencies, including those that impact financial decision making, is an important aspect of the relationship between financial professionals and clients. These can be difficult discussions but are nonetheless important for both the client and the financial professional. The information above can help guide these discussions as financial professionals work with their clients to plan a secure financial future.