

WHY YOU NEED A DURABLE POWER OF ATTORNEY

Imagine that tomorrow you suddenly become severely ill or incapacitated. Who would take care of your finances? How would they do it? If you don't have a durable power of attorney, others—even your spouse—may not be able to conduct all your financial needs on your behalf.

A power of attorney is a legal document authorizing another person (an agent), or financial institution, to step in on your behalf to execute certain financial transactions should you be unable to do so. The transactions might be as basic as paying bills and handling insurance claims, or as complex as selling real estate and filing a tax return. Without a power of attorney, your spouse, children or friends will probably have to petition the court to step in on your behalf—a cumbersome, time-consuming and potentially expensive process at a time of immediate need and emotional stress.

Just about any adult, young or old, single or married, should have a power of attorney. Yes, even married. While your spouse can probably take care of the basic bill paying, many financial transactions, such as the sale of an investment or home, require both spouses' signatures. You may have some assets in your name only, so that your spouse has no access to those assets should they be needed—such as to pay the medical expenses due to the disability that's preventing you from handling your own finances.

Some types of powers of attorney are convenience documents used for a specific transaction or to manage finances for a limited time while one is away. There's also a durable power of attorney for medical care, which appoints someone to make medical decisions on your behalf should you be incapacitated. This should be a separate document.

The financial power of attorney most financial planners recommend is a durable power of attorney. This goes into effect upon signing and remains in effect through any incapacity and until your death, unless you revoke it. This power of attorney typically allows the agent to perform a broad range of financial transactions on behalf of the person.

Because a durable power of attorney allows the agent (or a successor agent, if needed) to step in immediately, some people try to limit the power by not allowing the document to “spring” into effect until they are actually incapacitated. Many estate planning experts dislike this approach, however, arguing that its implementation could be delayed unnecessarily because determining incapacity is often an inexact science. If you don't trust the person in the first place, they argue, you should find another agent.

Have an attorney draft the power of attorney. It costs more than buying a standardized version, but to be fully effective it needs to meet state laws, which vary from state to state. The document also will likely require specific language not found in off-the-shelf documents.

Experts commonly recommend that the document grant powers as broad as possible so the agent has maximum flexibility. It's difficult to anticipate what might need to be done financially on your behalf.

Beyond granting broad powers, the document will need to be specific about certain rights granted to the agent. For example, the IRS has ruled that the grantor must explicitly give an agent the right to make gifts on behalf of the grantor in order for those gifts to qualify as gifts for estate tax purposes. You must specify the right for your agent to complete and sign your tax returns, exercise stock options or sue a third party.

At the same time, you may want to incorporate certain restrictions in the document, such as how your retirement plan accounts are drawn down or under what conditions an asset might be bought or sold. Perhaps you want to require a second signature on checks above a certain amount.

As with all estate planning documents, a power of attorney should be reviewed and updated periodically so that it reflects your needs and desires. You'll likely need to revoke and draft a new power of attorney should you divorce or your financial circumstances change significantly. Third-party financial institutions also prefer seeing current powers of attorney, and they like copies in advance (be sure to get rid of copies of previous versions); otherwise, some institutions can get sticky about accepting the power if it's abruptly presented out of the blue.