

## Power of Attorney

A power of attorney (POA) is a written document that gives legal authorization for one person to act on behalf of another. The person granting the power of attorney is the principal and the person who is authorized to act on behalf of the principal is the attorney-in-fact or agent.

The principal must be able to understand the nature and consequences of the power of attorney at the time he or she signs it in order for the power of attorney to be legally valid. This determination is made at the time the principal signs it, so it is still valid even if the principal later becomes incapacitated (if the power of attorney is "durable").

### **Types of Powers of Attorney**

#### **General**

The general power of attorney gives the agent broad power to do almost anything for you, the principal. While the power of attorney may give the agent authority to make medical decisions, this authority is generally granted separately in an advanced medical directive or health care power of attorney. An agent cannot make a Will for the principal.

**Limited.** A limited power of attorney gives the agent authority to do only certain specific things spelled out in the document.

**Durable.** This means that the power of attorney will remain in effect if you later became mentally incapacitated. Under Virginia law, the power of attorney may automatically terminate when the principal becomes incapacitated unless the document states: "This power of attorney (or his authority) shall not terminate on disability of the principal" or other words showing the intent of the principal that such power or authority shall not terminate upon his disability.

**Springing or Contingent powers of attorney.** A power of attorney is effective as soon as you sign it unless it contains language stating that it will go into effect only upon (i) a specified future date, (ii) the occurrence of a specified future event or (iii) the existence of a specified condition which may occur in the future.

## **POA as a Planning Tool**

A durable general power of attorney could be very useful to you if you ever become temporarily or permanently incapacitated and unable to handle some or all of your business and personal affairs. Your agent could step in and take care of your affairs for you without delay.

If you become incapacitated and have not signed a power of attorney, someone may be forced to petition the Circuit Court to have a guardian and/or conservator appointed for you. A guardianship and/or conservatorship proceeding can be an expensive, unpleasant and slow process for you, your family, and your friends. It is expensive because you will have to pay lawyers, court fees, and other fees. It can be unpleasant because a hearing must be held in open court, and it can be slow because it takes time to obtain a court date for the hearing. After the hearing, the Court will decide who should be your guardian or conservator and it may not be someone you would want handling your affairs. In addition, your conservator may be required to file certain documents with the court on an ongoing basis, which can be both time-consuming and expensive.

## **Timing**

Your General Power of Attorney will take effect on the date you sign it unless it is a springing power of attorney. This does not mean you will lose the power to take care of your own affairs and make your own decisions. Under Virginia law, the agent you name must act only in your best interests. As long as you are competent, the agent should act only when directed by you. However, the agent may act legally at any time unless the general power of attorney is a springing power of attorney. You should tell the agent to use the power of attorney only if you become incapacitated. Your durable power of attorney remains in effect during your lifetime unless you revoke it.

A springing power of attorney may seem like a good way to prevent the agent from using the power of attorney before it is necessary, but it may lead to problems. The

agent may have a hard time using the power of attorney because it may not be accepted unless the agent can prove that you are disabled every time he tries to use it. If you do not trust your agent to use the power of attorney only when it is necessary, you probably should name another person as your agent. If you want to use a springing power, you should consider including language about how your incapacity is to be determined, such as a letter from your physician that is to be attached to the power of attorney. Some attorneys will hold the power of attorney for you until a physician informs the attorney that you are no longer able to handle your own affairs.

The time to sign a general power of attorney is as soon as you decide that it's a good planning tool. You never know when something might happen to you that would cause you to be unable to handle your affairs. This is true regardless of your age. It is often too late to sign a power of attorney once you need it because you may no longer have the mental capacity to execute a valid power of attorney.

## **Preparing**

A lawyer should prepare a general power of attorney for you because you want to be sure that the agent will be able to use it if it becomes necessary. Banks and other institutions may not accept a power of attorney that has not been prepared by a lawyer because it doesn't contain the exact wording that is deemed necessary. A lawyer should be knowledgeable about what language should be in the power of attorney to make it "durable" and give the agent the authority she may need to conduct your affairs.

If you had a power of attorney prepared while you were living in another state or country and you have now moved to Virginia, it might be valid under Virginia law. You should have an attorney review it for you or have a new one prepared.

- Most lawyers charge only a small fee for preparing a power of attorney, particularly if you also have a Will and an advance medical directive prepared. Your local legal aid office may prepare it for you at no charge if you are eligible. You will find the legal aid office nearest you by searching this website using the keywords **legal aid** or **power of attorney** and either your zip code, city or county. You may also call the Legal Services Corporation of Virginia at 1-804-782-9438 to locate a legal aid office in your area of Virginia. You can also go to [www.valegalaid.org](http://www.valegalaid.org) to find your local legal aid office and to read more basic

information on elder law.

## **The Agent**

You may appoint any competent adult as your agent. It is a good idea to name more than one agent in case your agent is unable to assist you when the time comes. You can name co-agents or a successor agent. You can appoint an agent who lives outside Virginia; however, it may be more convenient if your agent lives near you.

**Be sure you completely trust your agent because you are giving that person powers that can be abused. Do not name someone as your agent if you do not completely trust him or her.**

## **After Signing**

You can revoke the power of attorney if you change your mind and if you are still competent. If you are competent and wish to revoke a power of attorney, you will need to send a signed notarized letter revoking the power of attorney to every place your agent used the power of attorney, as well as every place the agent might use the power of attorney. If you are no longer competent and the agent can no longer serve or someone suspects the agent is misusing the power, a guardian or conservator could be appointed by a court and the power of attorney revoked. A person interested in your welfare also can request that your agent show the records of the actions that agent has taken during the last five years, and can bring a case in court to hold the agent liable if he/she misused the power of attorney.

You should talk to the person(s) you name as the agent about the following:

- Be sure your agent(s) is willing to use the power of attorney to take care of your affairs if it becomes necessary. No one can be forced to serve as an agent.
- Instruct your agent(s) not to use the power of attorney while you are competent unless you ask him to do so.
- You need to make sure your agent(s) knows where your power of attorney is kept, so he/she will have access to it if you become incapacitated. If you keep it in your safety deposit box, make sure that your agent will be able to get into the box if need be. You may want to let your agent keep the power of attorney document.

- Tell your agent that if he or she uses your power of attorney and must sign for you, he/she should sign as follows:

\_\_\_\_\_ (Your name) by \_\_\_\_\_ (Agent's name), agent for \_\_\_\_\_ (your name).

It will then be clear that he/she is signing on your behalf only and is not personally liable for your debts (will not have to pay your debts out of his/her own money).

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