

Power of Attorney

How, when and to whom...

By Bill Beyers

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At some point many of us must consider giving others our power of attorney. The decision must be carefully considered and researched. Many things need to be taken into account when choosing the right person to have power of attorney for you. Also, find out what it means and when it becomes effective, who needs copies of your power of attorney and how it can be changed.

Q: When does my power of attorney become effective?

A: Both medical and financial powers of attorney become effective upon signing. If you do not want the power of attorney to become effective immediately (as is sometimes the case with a financial power of attorney) the person making the power of attorney (the “principal”) can specify under what circumstances the other person (the “agent”) can act for the principal in the future. This is known as a “springing power of attorney.” Usually the triggering event is a physician’s certification that the principal no longer has capacity to make appropriate medical or financial decisions.

Q: How can I make sure that my power of attorney remains effective if I become incapacitated?

A: Colorado law provides that unless a power of attorney specifically states that it is durable, the power of attorney is no longer effective once a person becomes incapacitated. This is usually the opposite of what most people want. Therefore, you must state in the power of attorney that it is durable so that it remains effective, even in the event of later incapacity.

Q: How can I be sure that financial institutions will honor my power of attorney?

A: Unfortunately, this common problem happens when people use a generic form of power of attorney that contains general language relating to the agent's authority. This document lacks the specificity and sophistication that third parties, such as title companies, banks, and other financial institutions, may require before relying on the document for transactions regarding real estate, securities, and large financial transactions. It is much better to carefully and specifically spell out, in the power of attorney, the authority the principal is giving to the agent, taking particular care to anticipate any unusual problems the drafter might foresee. Future problems can also be avoided by providing a copy of the document to any entity that may be asked to honor it in the future. A person can then address, in advance, any concerns that the institution might have or any specific language the institution might want included in the document. Finally, include a clause in the power of attorney that holds third parties harmless from any liability as long as they rely upon the document in good faith. Although Colorado law provides protection to third parties, using explicit language might give comfort to the third party, particularly one that is unfamiliar with the law relating to powers of attorney.

Q: Who should receive copies of my medical power of attorney?

A: A copy of your medical power of attorney should be given to your agent. It is also a good idea to give a copy to your regular physician and other family members who may be involved in the decision-making process. Review your medical power of attorney with them to head off potential problems or concerns. This also provides an excellent opportunity to educate the agent and health-care providers about your wishes regarding end-of-life medical treatment.

Q: How can I change or revoke my power of attorney once it has been signed?

A: A power of attorney can be revoked at any time either orally or in writing. From a practical standpoint, the document should always be revoked in writing and a copy of the revocation should be provided to everyone who received a copy of the original. Always keep a record of everybody who has a copy of these documents. I generally do not suggest amending an earlier power of attorney because this requires that copies of the amendment be provided to everyone who was given a copy of the original and that both documents then be kept together. It is easier and safer to revoke the

original power of attorney and then draft a new one containing the revised provisions.

Q: How often should I update my power of attorney?

A: A power of attorney has no time limit. However, many institutions are reluctant to honor a power that is more than a few years old. Therefore, it is a good idea to update these documents every few years. An agent may also provide the institution with an affidavit certifying that, to the best of the agent's knowledge, the document has not been revoked and remains in effect.

Q: I executed a power of attorney in another state. Is it still valid here in Colorado?

A: Although a power of attorney executed in another state should be effective here in Colorado, financial institutions and health-care providers are often reluctant to honor documents executed in another state. The safest practice is to execute a separate power of attorney in each state in which you spend a significant amount of time.

Side Bar Article

A person's capacity to execute a power of attorney needs to be carefully considered. Although it appears obvious, many people fail to recognize that the principal must have a general understanding of the nature of the power of attorney that they are signing or the document will be subject to legal challenge.

If one suspects that there may be a challenge to a person's capacity to execute such a document (usually by a disgruntled family member who is not appointed as agent), it may be advisable to have a capacity assessment completed by an experienced health-care provider which can establish the person's ability to understand and execute the power of attorney.

Another alternative is to have the document witnessed. While not required in Colorado, witnesses may make a legal challenge to a person's capacity more unlikely. It should be noted that capacity is not an all-or-nothing situation. For example, a person may want to execute a power of attorney during the early stages of Alzheimer's when the person has lucid intervals interspersed with periods of incapacity. As long as the document is signed when the principal is lucid, it should be given legal effect.