

TAX

BY ROBERT MENDENHALL

Preparing the power of attorney

An advisor must be ready when the client can no longer make decisions.

What happens when your client is no longer capable of making his or her own decisions? Perhaps your client



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has planned for this event and given a power of attorney (POA) to someone he or she trusts. What, then, is your new role?

These changed relationships can put advisors in an uncertain position. Given the industry's know-your-client rules, an advisor may understand the client's wishes better than the new attorney. Legally, though, they are obliged to act on instructions from the attorney once it's determined that the POA is valid.

A POA is a deed that gives a person (attorney) the right to act on another person's (donor) behalf. There are two different kinds of POAs. The first is an ordinary POA. Most clients would use an ordinary POA for convenience, such as when on an extended vacation. Their attorney transacts their affairs, as needed or as instructed, until their return. The POA may last for a specified time or may stay in effect until your client revokes it. The powers given to the attorney may be specific or broad.

By law, an ordinary POA ends when the donor becomes mentally

incapacitated. This creates an obvious difficulty. Not only is the person unable to make decisions, but they also no longer have someone to look after their affairs. Lawmakers responded by creating the enduring POA. It continues through a person's mental incapacity. Alternatively, the enduring POA may not come into effect until the donor is mentally incapacitated.

client. As discussed below, the law definitely leans more towards respecting the decision-making power of the attorney as opposed to relying on the advisor's own professional oversight of a client's affairs.

Many lawyers agree that, when presented with a POA and after making certain inquiries, the advisor is obligated to abide by the attorney's wishes for their client. It is not an advisor's place to over-police an attorney's decisions.

Advice for advisors

Currently, the law in Canada favours the attorney's right to act over advisor oversight. However, court cases have also recognized that financial advisors must act with reasonable care and have a duty to inquire about certain transactions (*Gold et al. v. The Toronto Dominion Bank et al.*, 2001 BCCA 170). Thus, seeds of imposing greater oversights by an advisor are present in our law, though not firmly rooted. In addition, there is an increasing trend in the U.S. for advisors to be held accountable for insufficient oversight of attorneys (see "Power of Attorney: A Can of Worms?," *Financial Advisor*, April 2008).

meet other formal requirements of provincial law.

- › Read the document carefully to see if there are any limitations in place.
- › Make reasonable inquiries to ensure that triggering events have occurred that put the POA into effect.
- › Speak to the client directly, if possible. Verify the client intends for the attorney to act on their behalf at that time.
- › Ask the attorney if there are other attorneys acting for your client. Some attorneys may feel, mistakenly or otherwise, that they can act under a revoked POA.
- › Ensure the client is still living, as many attorneys have assumed they can act on the POA even after the client's death.

Review these steps, if necessary, to make sure the POA is still valid each time the power is exercised.

In uncertain situations, do not avoid the issue. Rely on your compliance process or compliance department for help, which may include seeking legal counsel.

Advice for clients (donors)

Take POAs very seriously. Understand how great an impact an attorney can have on your finances and estate when given this authority to act. When putting a POA in place, whether for the short term or for long-term estate planning, share this information. Have a frank discussion about your affairs and your wishes with your professional advisors and attorneys.

Be careful about using broad, general or indeterminate language when drafting your POA. Consider naming more than one person as an attorney; some donors are naming protectors who can remove an attorney. Finally, consider asking that a third party be notified if your attorney decides to act.

Advice for the attorney

Understand that an advisor needs to take a hard look at the document you're presenting and make certain inquiries to ensure that it is legally valid. Do not be offended by the fact that they want to know what happened to their client. Most professionals will want to look behind the scenes to determine that you have the right to act on their client's behalf.

Be mindful that there may be planning structures in place, such as tax minimization strategies, that could be impacted by the financial decisions you make. An advisor will likely want to discuss these arrangements with you before acting on your instructions.

Appreciate that you have a statutory duty to act in the best interest of the donor. Provinces have legislation in place to hold negligent attorneys liable if necessary. ^{AER}

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For the time being, advisors need to strike a balance when dealing with a POA. They may:

› Discuss with clients who they might name if they were to draft a POA, or who their attorney is if they have a POA in place already.

- › Explain how an attorney's actions might affect their tax and estate planning, especially when an attorney acts without understanding the structures in place.
- › Obtain a copy of the client's POA to keep on file.
- › Meet the client's attorney in advance to discuss these issues, if possible.

When presented with a POA, you should, at a minimum:

› Check the attorney's identification and ensure the document is legally valid. The POA must be written and witnessed, and

The advisor position, then, requires a careful balance between respecting the POA and the advisor's professional obligation to act in the best interest of their

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