

POWER OF ATTORNEY- MYTHS AND MISCONCEPTIONS

At Berwitz & DiTata LLP, we believe that lifetime planning is at least as important as planning for after death and that no plan is complete without a carefully drafted and thorough power of attorney. A power of attorney designates a person, called the *agent*, to make decisions and take responsibility for managing the *principal's* property. Agents, even those who are well-meaning, do not always understand their responsibilities and principals may not always understand the authority placed in the hands of their agent. This article is intended to debunk some common misconceptions.

As agent, I do not need to keep records. The agent under a power of attorney can be asked to account for all of his or her activities undertaken as an agent. It is important for the agent to maintain accurate and complete records so that a full account can be rendered, if necessary.

I am not the power of attorney, I just help my loved one with her bills. Even if you are not an agent appointed under a power of attorney, you can still be considered a *de facto* agent. As a *de facto* agent, you are making decisions and taking actions that a duly appointed agent would take. For this reason, you are also liable to account for your actions while serving in this role and, again, it is essential that you keep accurate and complete records.

Since I am my mother's agent I can just sign her name on checks. When you are an agent, you should be signing all documents in a way that indicates that you are acting as an agent under a power of attorney. For instance, you would sign: "Jane Doe by Mary Doe, POA" or "Mary Doe as agent for Jane Doe."

I can revoke my power of attorney simply by taking it back, ripping it or executing a new one. To revoke a power of attorney, it is not enough to destroy the document or execute a new instrument. The new instrument must specifically revoke prior instruments. You also must give notice to your agent and to any individual, bank or institution who received a copy of the power of attorney you wish to revoke.

I executed a power of attorney in another state, or years ago, and do not need another one. The standard form for powers of attorney changed in New York State after 2009 and again in 2010. Not every state has the same rules regarding what is required to execute a power of attorney or what powers it can convey. In order to ensure that your agent will not face obstacles when acting under the instrument, having an updated power of attorney executed in New York is important.

There are no limits to the actions an agent can take. While it is very important to execute a power of attorney, it is just as important that you carefully review an instrument you have executed or one which appoints you as agent. The extent of an agent's power depends upon the instrument. Powers of attorney can be very broad but they have to be properly drafted to have that effect. For example, assume you have given annual gifts to your child and your child is now your agent under your power of attorney. If you intend that your child continue to make these gifts, as you would, such power must be specifically incorporated in your power of attorney. You must also specifically provide your agent with authority to protect your assets in the event you require long term care.

Under a durable power of attorney, I can continue to access my loved one's accounts and assets after they die. A durable power of attorney allows the

agent to continue to act even after the principal loses capacity. However, an agent is never authorized, under a power of attorney, to act after the death of the principal. Any authority granted by a power of attorney ceases upon the principal's death.

As agent, I can decide what I think is best for my principal. As agent you are expected to act in a fiduciary capacity, which means you must act in the best interest of the principal. You are also expected to follow the principal's directions and carry out the principal's wishes. You cannot take actions you believe are in the best interest of the principal if such actions are against the stated desire of the principal. You are required to take direction from the principal.