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THE DURABLE power of attorney is regrettably unappreciated and undervalued by most lawyers. This attitude can be measured by comparing the time spent drafting the power of attorney and the time spent drafting a will or trust. Attorneys should expend as much time and effort in preparing the power of attorney as they put into the client's last will and testament or trust agreement.

The amount at risk can be equal under each document, and the authority exercised by executor or trustee or agent under power of attorney can be indistinguishable other than whether their actions are pre- or post-mortem. And since the agent under power of attorney will act while the principal is alive, the consequences are arguably more serious than those of an executor under a will. Unfortunately, if there is an error in the drafting, it is likely not to be detected until it is too late, when the principal has lost the capacity to make conforming changes.

The worth of the power of attorney needs to be re-examined. It should be viewed as the most important tool in the arsenal of the elder law attorney. Used properly, it can allow an orderly transition in the management of a client's financial affairs should the principal be alive but disabled. It can avoid the necessity of a costly and time-consuming guardianship proceeding. The recent Special Inspector General's Report and the Report of the Commission on Fiduciary Appointments (www.courts.state.ny.us/fiduciaryreport/fiduciary.htm) have drawn attention to the serious problems that can occur in an Article 81 proceeding under the Mental Hygiene Law. A properly drafted power of attorney can spare the family unnecessary anguish or a legal proceeding. The best attorney is the one who keeps the client away from litigation.

Practical Steps

The most important drafting consideration is to be sure that the power of attorney is ultimately recognized by the intended entity, most commonly a financial institution. As an advance directive, it is created at one point of time with the expectation that a third party will recognize the authority of the agent at a future time. If the document is not honored, it has failed utterly. There are several practical steps that can be taken to increase the chances of success.

Execute Multiple Originals. The general practice is for the financial institution to require the agent to present the original power of attorney, which is then photocopied. The original is returned to the agent, and the photocopy is placed in the file. Some institutions, however, insist upon retaining the original power of attorney as a condition of recognition. They argue reasonably, that in the event of a subsequent dispute as to the authenticity of the document, the original would be more persuasive evidence than a photocopy.

If the power of attorney is used to convey real property, the original must be submitted for recording. While the original will eventually be returned, the process could take months.

In these circumstances, agents with only one original and no counterpart, will be reluctant to part with the original since they will be unable to transact affairs thereafter.

If multiple originals have been executed, the agent can part with one original and still have other originals with which to be able to conduct business.

Use Specific Power of Attorney Forms for Each Financial Institution. In addition to the general power of attorney, the principal should execute a separate power of attorney for each institution where accounts are held. Certain financial institutions are required to honor the statutory short form power of attorney. General Obligations Law §5-1504 defines

the term "financial institutions" to include "...a bank, trust company, national bank, savings bank, federal mutual savings bank, savings and loan association, federal savings and loan association, credit union, federal credit union, branch of a foreign banking corporation, public pension fund, retirement system."

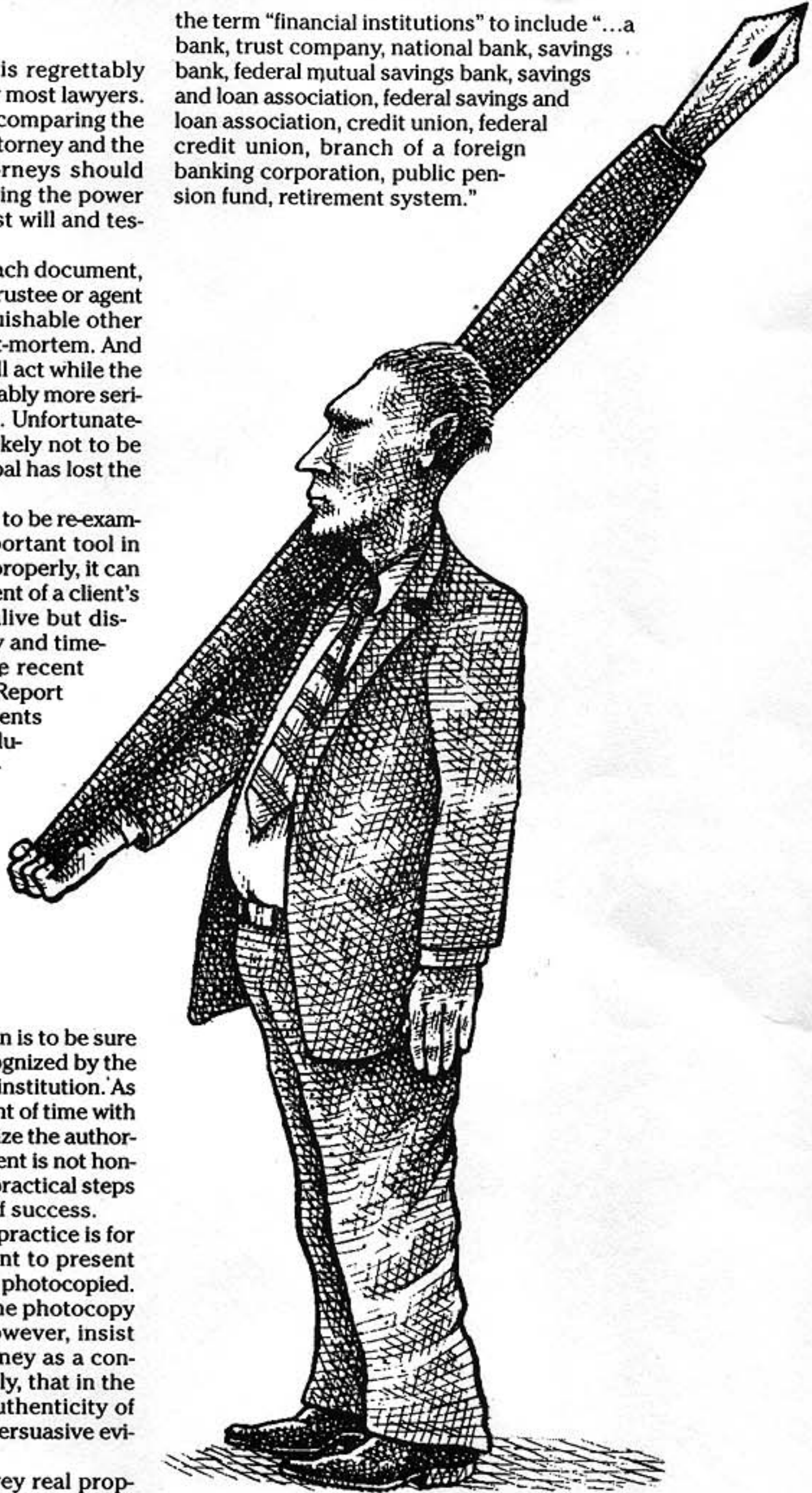


ILLUSTRATION BY PAUL KOLSTI/PEN TIP

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It is easy to think of many financial organizations not enumerated, such as brokerage firms, insurance companies, mortgage companies, taxing authorities and the Social Security Administration. The separate power of attorney is especially needed for entities not covered by the statute. Even for institutions covered by the statute, the better practice is to execute the specific power of attorney form made available by that institution. Each

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financial institution has its own power of attorney form. That form is limited and only covers accounts in that particular institution.

Each institution is most likely to recognize its own form. For example, the Internal Revenue Service has its own form (2848) to authorize a representative to represent an individual in tax matters. If it is anticipated that the agent will be called upon to sign a return or receive and respond to IRS communications, this particular form should be executed. While General Obligations Law §5-1504(3) deems it unlawful for a financial institution to refuse to honor a properly executed statutory short form power of attorney, there is no penalty attached to any such refusal.

If Power of Attorney Is Not Recognized, Send Letter to Bank Quoting General Obligation Law §5-5104. If the agent presents a properly executed statutory short form power of attorney and it is not honored, intervention by the agent's attorney may be required. This situation is so common that some attorneys have a standard form letter quoting §5-1504 of the General Obligations Law, and they provide this letter to the agent at the time of execution. This allows the agents to make the institution aware of the law at the earliest opportunity.

The goal here should be to understand the reason behind the refusal to honor the power of attorney and to try to negotiate an amicable resolution. The financial institution may have a legitimate concern which can be addressed. These negotiations should begin at the branch manager level before reaching the legal department of the institution. If reasonable attempts to resolve the situation do not result in a satisfactory agreement, a complaint can be filed with the Office of Thrift Supervision, located at 10 Exchange Place, 18th Floor, Jersey City, N.J. 07302.

Add a Space for the Signature of the Agent Appointed. The preprinted and statutory powers of attorney have a place for notarized signature of the principal but not for the agent. This makes execution simpler since only the principal need appear, but it creates the situation where the third party financial institution can check the signature of its customer but not the agent. A space should be added for the signature of the agent so that the financial institution can have a specimen of the signature that it is being asked to recognize.

Present the Power of Attorney to the Financial Institution Immediately After It Is Executed. The traditional power of attorney becomes effective immediately upon execution. However, as a practical matter, the longer the period between the execution of the power of attorney and the presentation to the third party financial institution, the more likely it is that the document will not be honored. Some institutions have their own informal rules as to when a power of attorney becomes "stale."

Although the statute contains no "staleness" provisions it is common to face problems with a document executed even six months prior to its offering. To avoid this problem, the power of attorney can be presented to the financial institution immediately after it is signed and notarized. If the document is in order, the institution will usually indicate the agent's ability to transact business on that account on its

computer system. When the agent transacts business on the account in the future, his or her authority will be recognized without delay. If the third party identifies an objection to the document, the principal who still retains capacity is in a position to make the changes requested so that the document is honored. When there is a delay in the presentation to the third party, the principal may have lost capacity in the interim and be unable to make the changes requested. It is preferable to test the acceptability of the power of attorney as quickly as possible.

Avoid Use of the Springing Power of Attorney. It is understandable that many individuals are reluctant to grant authority to an agent to act contemporaneously (as is suggested above), in advance of the time that assistance is needed. They may be tempted to use the springing power of attorney, authorized under General

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Obligations Law §5-1506. The section permits the principal to create a power of attorney that will not become effective until the occurrence of a contingency in the future.

If there is any uncertainty as to the trigger event, there is a great risk that the power of attorney will not be recognized. To try to allay this fear, the statute provides that the principal must name a person to certify in writing that the "trigger" event has occurred. The third party need not inquire as to whether or not the "trigger event" has in fact occurred.

By way of example, the agent could define the trigger event as incapacity and name a physician to make such a finding. If the physician made such a conclusion in writing, it would presumably be conclusive and the third party would be under no obligation to make an independent investigation of the capacity of the principal. It is still likely that if there were doubt as to the actual occurrence of the condition precedent, a cautious institution would be reluctant to recognize the authority of the agent. While the springing power of attorney is a laudable concept, it still faces serious practical impediments and should not be used except in very limited circumstances.

Create a Database of Customized Provisions. Attorneys should keep a list of customized provisions for dealing with specialized situations. In this way the document can actually be tailored to the specific situation. Institutions are more likely to recognize the authority of the agent if the institution is specifically mentioned in the power

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of attorney. To properly draft this customized section, the attorney must be familiar with the individual circumstances of that particular client.

Pay Particular Attention to Gift-Giving Authority. New York State case law is clear that a gift is void if the power of attorney does not expressly authorize gift giving.

Initially we note that "[a] power of attorney ... is clearly given with the intent that the attorney-in-fact will utilize the power for the benefit of the principal" (*Moglia v Moglia*, 144 AD2d 347, 348). The relationship between an attorney-in-fact and his principal has been characterized as agent and principal with the attorney-in-fact under a duty to act with the utmost good faith toward the principal in accordance with the principles of morality, fidelity, loyalty and fair dealing (see, *Semmler v Naples*, 166 AD2d 751, 752, appeal dismissed 77NY2d 936). "Consistent with this duty, an agent may not make a gift to himself or a third party of the money or property which is the subject of the agency relationship." (id.)

In the event such a gift is made, there is created a presumption of impropriety which can only be rebutted with a clear showing that the principal intended to make the gift." *Mantella v Mantella*, 268 A.D.2d 852, 701 N.Y.S.2d 715 (3rd Dept., 2000).

The same result was reached in *Estate of Roth*, 283 A.D.2d 504, 724 N.Y.S.2d 476 (2d Dept., 2001) and *Estate of Agrest*, 279 A.D.2d 471, 719 N.Y.S.2d 261 (2d Dept., 2001).

The statutory short form power of attorney has a provision for the agent to make annual exclusion gifts not to exceed \$10,000 per person in any year. Gift giving considerations frequently arise in the context of estate planning and asset protection. There can be profound negative financial consequences if this authority is not expressly authorized.

Conclusion

The power of attorney is a cost efficient estate planning tool for all attorneys, not just elder law attorneys, and for all clients not just the elderly. Given appropriate respect and individualized attention it can be a cost efficient and valuable tool to enhance the independence of the principal.