

# POWER GRAB

Powers of attorney are important estate planning tools for clients. But as **Harold Geller** reports, the grey area between what's acceptable and what's questionable makes these legal documents tricky for advisors

**W**hy do financial advisors often encounter serious issues with powers of attorney? A continuing power of attorney is a legal document where one person (the grantor) gives another person (the attorney) the authority to make financial and medical decisions on his behalf.

Generally, a grantor appoints an attorney so if he ever becomes mentally incapable, key issues concerning his personal affairs can still be resolved.

Sounds simple enough, but how would you handle the following situations?

*The attorney tells you that the client has decided to change investment strategies and take on either more or less risk than has been the case in the past. How do you deal with this change? Do you require a new KYC, and if so, from whom?*

Although your dealer probably has a policies and procedures manual, it may not provide adequate direction. Besides, reliance on a manual does not relieve you of your professional obligations to your client.

Here are a few ways you can protect yourself from a lawsuit:





## INSIST ON RECEIVING ALL POWERS OF ATTORNEY IN WRITING

When you receive the document, review it and seek advice from your compliance officer. Then adhere strictly to the powers and obligations set out. If the power of attorney is confusing, get a legal interpretation of the document at the firm level.

## KEEP CAREFUL NOTES

You'll want a written record of any meetings you had with the attorney, the attorney's instructions, and your recommended advice. Consult with your supervisors frequently to ensure compliance with your firm's policy.

## DO WHAT'S BEST FOR YOUR CLIENT

Remember: the attorney is not your client, but makes decisions on behalf of your client. Sometimes, however, the attorney may be interested in serving the interests of the beneficiaries (i.e. investing in riskier investments than the client currently has, to achieve a higher rate of return for the future estate). That is not appropriate. You have an obligation to your client. If the attorney appears to be acting without concern for what works best for the client, you need to point this out to the attorney. After all, the attorney is not the one performing the due diligence or making suitability recommendations — you are. And you cannot depend on the attorney to report back to the client about your professional recommendations.

The issue of "informed consent" comes down to the following questions:

1. Does the client understand?
2. Does the client consent?

Remember, the attorney can only provide the second answer. Only you can determine whether your client understands your professional advice. This is especially important when you discuss the risks or possible negative consequences of a recommendation.

If necessary, decline the instruction or order. It is better to lose an account than accept instructions that do not advance the interests of your client.

## NOTE MATERIAL CHANGES IN THE GRANTOR'S CIRCUMSTANCES

Your client's change of circumstances — not the attorney's — should always govern your professional obligations. So if there's a material change to your client's well-being, you need to take that into consideration when giving advice.

If your client becomes mentally incapable, that may be a material change. For example, a sophisticated investor becomes less sophisticated upon losing their mental capacity. The exception would be if there is an enforceable, written direction to the contrary that was made while the grantor was competent to do so.

The circumstance that causes the grantor's incapacity may involve an event that limits his life expectancy. In this case, it becomes a material change that must be reflected in the client's investment profile. Your client's incapacity may prevent her from travelling abroad. It may restrict her willingness or ability to make gifts or loans to family members. These type of issues can also affect the client's investment profile.

## TREAD CAREFULLY WITH CONTROVERSIES

In theory, an attorney can speak for the grantor about all financial issues apart from making a will. Generally, beneficiary designations are an exception. Registered accounts pass directly to the designated beneficiary on the death of the annuitant. Life insurance policies convert from contract to benefit on the death of the insured.

Unfortunately, some courts have ruled that attorneys can change designations under life insurance policies (*Desharnais v. Toronto Dominion Bank*, 2001 BCSC 1695. Approved by *Re Moss (Bankrupt)*, 2010 MBCA 39 and *Easingwood v. Cockroft*, 2013 BCCA 182). These courts have ruled that a beneficiary designation is simply an exercise of a property right, which is exactly the right that a power of attorney document confers on an attorney.

If you are involved in this situation, consult your supervisor or life insurance company for instructions on how to move forward. Alternatively, an advisor can obtain legal advice at their own expense.

Powers of attorney are not as straightforward as they appear. They trigger inquiries and legal responsibilities. That's why it's crucial to ensure you understand the rules of engagement up front. 

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