

Durable Powers of Attorney

Considering the Financial Institution's Perspective

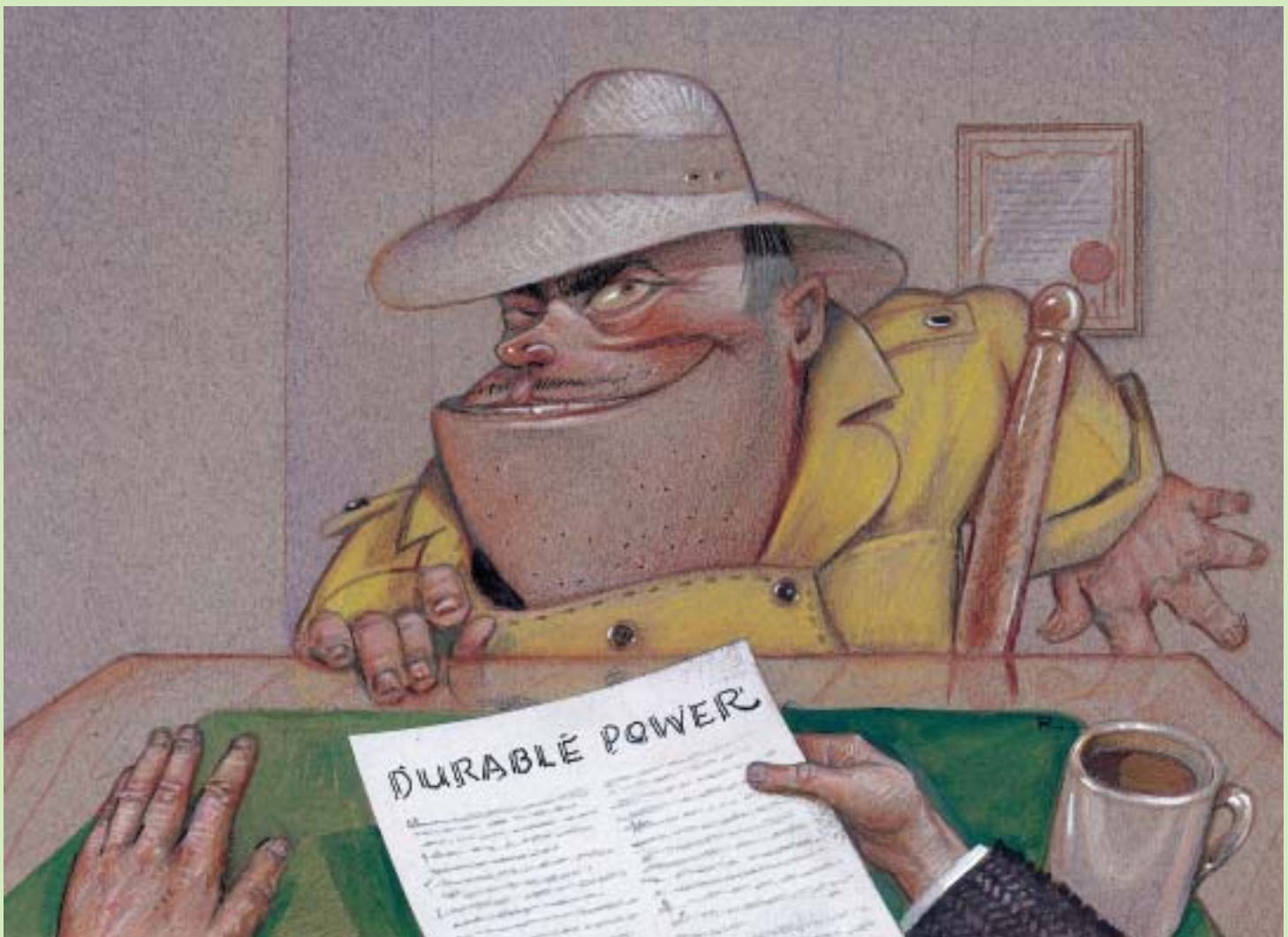
By Daniel A. Wentworth

Durable powers of attorney have become an integral part of personal estate planning. Many estate plans executed today include a durable power of attorney that permits an authorized attorney-in-fact to act on behalf of an individual in handling personal, financial, and legal affairs even after the individual is unable to do so because of legal incapacity.

When an estate planning attorney advises a client about options and issues to consider in the preparation of the power of attorney document, the attorney may first consider with the client the appropriate person to act as attorney-in-fact, because this individual may have broad access and authority over the client's assets. A second consideration is the range of authority that should be granted to the attorney-in-fact. For example, should the power to make gifts be included? To what extent should such gift-giving ability be limited? Should authority of the attorney-in-fact begin immediately or only upon some future event?

Not as commonly considered are the third parties that may become involved in transactions with the named attor-

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ney-in-fact by presentation of the power of attorney. This third party could be a real estate purchaser or seller, a retirement plan administrator, or the principal's business operatives. Often the third party is a financial institution, whether a bank, broker, or IRA custodian, that is presented with a power of attorney document by an attorney-in-fact along with a request that such power be recognized. This article will examine durable powers of attorney from the perspective of a financial institution presented with the power. It is intended to suggest to estate planners the importance of considering the financial institution's perspective at the time that the power of attorney is drafted to facilitate later acceptance of the document.

The Ultimate Goal: Use the Power of Attorney for the Client's Benefit

When planning with powers of attorney, focusing solely on "who to name" as attorney-in-fact and "what powers to give" may not be enough. (In this article, the individual executing the power of attorney will be referred to as the "principal" and the named agent will be referred to as the "attorney-in-fact.") Ultimately, the planner wants to assist the client in naming the right person, granting the right powers, and facilitating later use of the power. If a financial institution is unable to accommodate the attorney-in-fact, has the client been served in the most effective manner? Obviously, the planner cannot guarantee acceptance of a power of attorney, and stories abound among estate planners about the intransigence of financial institutions regarding

power of attorney acceptance. Some of these stories are well founded and are an unfortunate result of financial institutions that either may not have thought through their power of attorney acceptance policies or simply misunderstood acceptance policies in a particular situation.

If a financial institution refuses to accept a power of attorney document in a particular instance, however, it is not always the fault of the financial institution. In some cases, fault may lie with the attorney who did not consider particular types of transactions or accounts in drafting the power of attorney, or who used boilerplate language that does not work for the requested transaction. Ultimately a careful estate planner will consider the selection of the attorney-in-fact, the scope of the attorney-in-fact's authority, the particular transactions that the principal might want the attorney-in-fact to make on the principal's behalf, the financial institutions likely to be relying on the document, and the nature of the accounts owned by the principal to facilitate document acceptance. By considering the financial institution's perspective, a planner can help to make sure that when it is time to use the document, the client's needs are advanced by the efficient recognition of the power of attorney.

Risks Facing a Financial Institution in Acceptance of Powers of Attorney

When considering power of attorney acceptance from the financial institution's perspective, it is first worth a broad view of what the financial institution sees when presented with a power of attorney.

"The Balancing Act"

A financial institution may receive cash, securities, or other assets from an individual and hold these assets in an account registered in the name of the individual. The financial institution may also have an account agreement governing the account that permits the account owner to exchange investments, place securities trades, reinvest dividends, write checks, transfer assets, name beneficiaries, and conduct other

account transactions. The account agreement typically recognizes that *the account owner controls the account*—the financial institution merely maintains custody of the account for the owner. An attorney-in-fact who comes forward to the financial institution presenting a power of attorney document is *someone who is not the account owner, is entirely foreign to the account* (and perhaps even foreign to the financial institution), *yet professes to have the authority to access and control the owner's entire account*. Given this perspective, account owners might find it entirely appropriate—and somewhat reassuring—for the initial reaction of their financial institution when approached by an attorney-in-fact to be one of hesitation and scrutiny. After all, in the usual case, the account owner places his or her assets with the institution with the implicit understanding that *only* the account owner will be able to access the account. Verifying the authority of the attorney-in-fact to act for the account owner, therefore, is the first priority of every financial institution, and an estate planning attorney must recognize (and, when working with attorneys-in-fact, should set the expectation) that this initial reaction is appropriate.

Although a financial institution may be justified in initial wariness of someone wielding a power of attorney, the institution should also recognize that its account owners have visited with estate planning attorneys and have conveyed authority under these documents so that a named attorney-in-fact can access their accounts. It is the account owner's intent that the financial institution recognize the attorney-in-fact. So, on the one hand, someone who is not the financial institution's customer is asking for access to its customer's assets, but, on the other hand, the customer may have planned ahead so that this could happen. It is this tension that makes the acceptance of powers of attorney such a difficult balancing act for a financial institution.

Specific Risks When Considering Acceptance of a Power of Attorney

With this backdrop, this section will detail some specific risks facing a finan-

cial institution presented with a power of attorney. Consideration of these risks from the institution's perspective may help the planner facilitate acceptance of the document.

Fraud

Remembering that the attorney-in-fact coming forward is not the financial institution's customer and that the attorney-in-fact's access to the account can be very broad, the financial institution first needs to be concerned about the risk of fraud.

Laws in many states offer minimal protections for a financial institution considering acceptance or rejection of a power of attorney document presented to it that may be fraudulent. An example of this risk is presented in a 1994 Illinois state court opinion, *In re Estate of Davis*, 632 N.E.2d 64 (Ill. App. Ct. 1994). In *Davis*, Citicorp Savings Bank (Citibank) was presented with a forged power of attorney that appeared to have been executed by the bank's customer, Mrs. Davis, naming her nephew as attorney-in-fact. Citibank relied on the forged document and allowed the nephew to access Mrs. Davis's account. He subsequently withdrew all of the account's assets. When Mrs. Davis's guardian later discovered the withdrawals, she brought an action against Citibank for breach of contract, negligence, and breach of fiduciary duty for permitting the unauthorized withdrawals. Citibank defended itself by relying on Section 802-8 of the Illinois Power of Attorney Act, which provided at the time that: "Any person who acts in good faith reliance on a copy of the agency will be fully protected and released to the same extent as though the reliant had dealt directly with the principal as a fully-competent person." Id. at 66.

The Illinois circuit court entered judgment against Citibank for the entire loss. On appeal, the appellate court held that Citibank was entitled to no protection under Section 802-8 of the Act when it relied on a forged power of attorney. This was true even though Citibank had actually received and relied on an original of the document. The court reasoned that when the power of attorney document was

fraudulent, no agency was ever created, and "[i]n order to claim good faith reliance on an agency, an agency, as defined by the Act, must first exist." Id. at 66. It should be noted that the governing Illinois power of attorney statute has since been modified to protect a financial institution if it relies on a "copy of a document purporting to establish an agency." 755 ILL. COMP. STAT. 45/2-8 (2003). This new language should assist Illinois financial institutions and give them greater protection against the risk of fraud when considering acceptance of a power of attorney. But, while some states offer protection if a power appears valid on its face, other jurisdictions still maintain language in power of attorney statutes similar to the Illinois statute interpreted in *Davis*. As state laws may not protect against the risk of accepting a fraudulent document, a financial institution must protect itself through its own acceptance procedures. It may be reasonable to deny recognition of a power of attorney when the execution circumstances appear questionable.

Revocation of the Power of Attorney Document

A second risk facing the financial institution is that it may be presented with

A financial institution must protect itself through its own acceptance procedures.

a power of attorney that has been revoked. Revocation of the attorney-in-fact's authority may occur through death of the principal, through incapacity of the principal (if the power of attorney was not durable), by express revocation by the principal, or through state statutes that revoke an attorney-in-fact's authority through operation of law (such as when a guardian is appointed). Although some revocations may not apply to acts permitted by the financial institution if it acts without knowledge of the revocation, a finan-

cial institution does not want to imperil the assets of its customer by accepting an agency document that no longer reflects its customer's intent.

Some financial institutions take the position that the passage of time alone may revoke the attorney-in-fact's authority. What may be surprising to some planners is that agency law, in some circumstances, does raise the possibility that the passage of time could revoke an agent's authority, depending on the principal's intent. RESTATEMENT (SECOND) OF AGENCY § 38. But because many powers of attorney are intended to be operational only at some future time, it would seem that "staleness" alone should not cause revocation of an attorney-in-fact's authority.

Risk That the Attorney-in-Fact Will Exceed the Authority Granted in the Power of Attorney Document

The law of agency provides that a third party relying on an agent's powers is charged with knowing the extent of the agent's powers and is charged with enforcing any limitations on those powers. RESTATEMENT (SECOND) OF AGENCY § 311. Two federal district court opinions dealing with the same facts, *Grabowski v. Bank of Boston*, 997 F. Supp. 111 (D. Mass. 1997), 997 F. Supp. 130 (D. Mass. 1998), highlight the dangers to a financial institution that lurk in a power of attorney document. In *Grabowski*, the plaintiffs were depositors of Bank of Boston (the Bank), which had executed powers of attorney naming Mr. Epstein as an attorney-in-fact. The powers of attorney contained a provision that each applied to an account at the Bank that was "solely for the buying and selling of Prime Bank Instruments of Credit. [The] Account at all time shall contain cash and /or Prime Bank Instruments of Credit . . . in an amount of not less than the initial cash deposited." Id. at 116.

The Bank had established deposit agreements with the plaintiffs that stated that the Bank would act according to the plaintiffs' instructions. The Bank had also accepted the powers of attorney on the plaintiffs' accounts and maintained copies of them. Mr. Epstein, acting under the authority in the powers of attorney, withdrew

What Estate Planners Can Do

Remember the Financial Institution's Perspective

When working with a power of attorney, remember the balancing act faced by the financial institution and the risks that it faces when it considers accepting the document. Remember that the attorney-in-fact is *not* the financial institution's customer. Build in sufficient time for the financial institution to conduct its document review. Do not set the expectation when advising attorneys-in-fact that access to the principal's account will happen immediately.

Draft Both Comprehensive and Specific Language in the Document

When drafting, remember that general authority language is helpful, but it is not always sufficient to authorize specific actions. Specify with precise language any authority that the client believes may be necessary for the attorney-in-fact. Think prospectively about the types of accounts that your client may later own. Add specific language to reflect the client's wishes. For example, specific language generally *must* be in the document when the attorney-in-fact may want to execute beneficiary designations on the principal's behalf.

Backstop with Broad Authority, But Don't Rely on It

Backstop the document with broad general authority language. Although not sufficient by itself, broad general language can give additional comfort to the institution as to its customer's intent. In close interpretive cases, the institution may use broad language to permit a specific transaction.

Minimize Limitations That Make Acceptance Difficult

Powers of attorney that contain material limitations on the ability of the attorney-in-fact to act will make acceptance difficult. When drafting, minimize restrictions on the attorney-in-fact's ability to access, trade, or deal with the principal's assets. Examples of material limitations include expiration dates or events, restrictions on the attorney-in-fact's ability to act with certain assets (for example, "the attorney-in-fact may not trade my IBM stock"), or conditions that terminate authority that are outside the purview of the financial institution (for example, "my agent's authority shall last so long as I reside in XYZ Assisted Living Facility").

"substantially all" of the assets—millions of dollars—from the accounts and absconded with the assets. No "Prime Bank Instruments of Credit" were placed in the account to replace the amount withdrawn.

When the plaintiffs realized that their attorney-in-fact had taken their money, they brought an action in federal district court against the named attorney-in-fact and against the Bank. They alleged that the Bank had violated the terms of the depositor agreements between themselves and the Bank, and that the Bank had allowed the attorney-in-fact to act beyond his authority. In denying the Bank summary judgment, the court's opinion stated that the acceptance of the power of attorney documents bound the Bank to administer the plaintiffs' accounts only in a manner consistent with the terms of the powers of attorney. The court found that "an implied contract for the handling of the plaintiffs' accounts" had arisen by the Bank's acceptance of the powers of attorney and that the terms of the powers of attorney acted

together with the Bank's deposit agreements to bind the Bank. When the Bank paid out all of the assets of the account and did not withhold "cash and/or Prime Bank Instruments of Credit in an amount of not less than the initial cash deposited," the Bank had violated its agreement with the plaintiffs. The opinion concluded that "*where, as here, a bank can easily ascertain whether an agent is exceeding his authority on the face of documents necessary to the transaction, it will be liable for the unauthorized transactions.*" Id. at 117 (emphasis added).

Compounding this risk is the interpretive principle that a document conferring agency on another must be construed narrowly. RESTATEMENT (SECOND) OF AGENCY § 37. Under this rule, codified by statute in several states, a third party is generally not entitled to interpret ambiguous provisions in favor of allowing the agent to act for the principal. Case law also provides examples in which courts have rejected the attorney-in-fact's ability to take actions that were not expressly identified in the document.

These agency principles make it difficult for financial institutions presented with a power of attorney document to know what they should and should not allow when the document does not clearly address the request. The general language that is included in most powers of attorney "to do any and all things that I may do myself" may be helpful in discerning the general intent of the principal but may not be dispositive when considering the scope of the agent's authority. A financial institution may be within its rights not to permit the attorney-in-fact to take a requested action unless the specific authority to take such action is included in the power of attorney. One court has stated it simply: "A written power of attorney must be strictly construed so as to reflect the clear and obvious intent of the parties." *Crawford Sav. & Loan Ass'n v. Dvornak*, 352 N.E.2d 261, 264 (Ill. App. Ct. 1976). For this reason, it is critical that estate planners not rely on broad boilerplate grants of authority in powers of attorney if they want to truly plan in an effective way.

What Estate Planners Can Do

Plan Ahead When Drafting Springing and Joint Power Provisions

Certain provisions can cause problems if not carefully drafted. Springing powers of attorney generally provide that the authority of the named attorney-in-fact becomes effective only upon some event, typically the incapacity of the principal. Financial institutions recognize this provision, but the planner needs to draft the "springing" event provision so that it is absolutely clear to the institution what is required to prove incapacity (and thus the document's effectiveness). State in the power what documents a third party can rely on to know that the springing event has occurred. A financial institution that receives a springing power of attorney in which it is not clear *exactly* what it can rely on may reasonably refuse to recognize the power.

Similarly, planners should draft specific guidelines regarding succession. To state that a successor attorney-in-fact will act if the first named attorney-in-fact is "unable or unwilling to serve" can create ambiguities. Producing the death certificate of the first named attorney-in-fact shows that a successor has authority to act, but what about other situations? Is the successor's writ-

ten statement that he can't locate the first named attorney-in-fact acceptable? Is an affidavit signed by the successor acceptable? What if the primary attorney-in-fact is incapacitated? The planner needs to make it clear how the financial institution can verify the identity of the acting attorney-in-fact.

Another common planning technique that may present difficulties is the use of joint powers that name multiple attorneys-in-fact to act unanimously. There are many good planning reasons for joint powers, but the financial institution needs to receive joint instructions for *every* instruction that it receives to recognize the authority granted under the document. For example, every securities transaction might need joint signatures, and this would create an administrative burden for a financial institution (and for the attorneys-in-fact) acting under a joint power. Planners should weigh the goal of facilitating efficient use of the power of attorney against the goals achieved through use of the joint power. In some cases, multiple attorneys-in-fact should be given individual rather than joint authority. Alternatively, the document could provide for delegation to one of the attorneys-in-fact by the others.

Risks in Not Accepting the Power of Attorney

Given the above risks facing a financial institution presented with a power of attorney, one wonders why it would recognize one at all. One answer is that if the financial institution unreasonably refuses to recognize a power of attorney, the financial institution faces risks from non-acceptance. Some state statutes require that a third party accept a reasonable and valid power of attorney. Section 709.08(11) of the Florida Statutes provides an example: "In any judicial action under this [durable power of attorney] section, including, but not limited to, the unreasonable refusal of a third party to allow an attorney in fact to act pursuant to the power, and challenges to the proper exercise of authority by the attorney in fact, the prevailing party is entitled to damages and costs, including reasonable attorney's fees." These statutes are based on the policy that a financial institution should not unreasonably

fail to honor a valid power of attorney.

Because these statutes contain a reasonableness standard, a financial institution that rejects a document based on reasonable acceptance and review guidelines should be protected from liability. In addition, the damages that would result from liability for non-acceptance would generally be different from those stemming from exposure for permitting an unauthorized person to access the account. For example, damages for an unreasonable failure to accept a power of attorney might equal the costs associated with the court appointment of a guardian in lieu of reliance on the power of attorney. Even without liability exposure, a financial institution's unreasonable failure to accept a valid power of attorney is not sound business policy. As stated above, many account owners intend that these documents be honored, and an unreasonable power of attorney rejection can lead to customer dissatisfaction.

Institutional Risk Mitigation Steps When Accepting a Power of Attorney

After considering the risks involved in the acceptance of powers of attorney, the financial institution must consider what steps are available to protect itself. The estate planner working with attorneys-in-fact should be familiar with these steps to facilitate document acceptance. The first step might be a requirement that only an original power of attorney document will be accepted. In some cases, a document may include a provision that a photocopy may be relied on as if an original, a provision that might be acceptable for some institutions. Others, however, may require an original document to protect against the fraud risk discussed above. A third group might ask for some type of certification by a notary or attorney that the copy presented is a valid copy of the original.

A second step may be requiring an attorney-in-fact to execute an affidavit stating that the power of attorney remains effective at the time it is pre-

What Estate Planners Can Do

Consider the Client's Assets and How They Are Owned

Make sure that the principal's assets are owned in a manner that allows an attorney-in-fact to act on them. Certain account registrations may not accommodate powers of attorney. For example, if a power of attorney was executed by an individual to cover assets owned by that individual, a financial institution may not be able to recognize the attorney-in-fact's authority to act over an account with a trust registration.

Execute Multiple Originals

Because a financial institution may request an original document to help protect it against the risk of fraud, consider executing multiple originals of the power of attorney. When determining where the originals will be stored, consider security, ease of access, and how the document may be used.

Consider Re-execution of the Power of Attorney When the Plan Is Revisited

Agency law may provide that the authority of an attorney-in-fact will lapse because of the passage of time. In addition, the named attorney-in-fact may no longer be appropriate. The planner should review and re-execute

the client's durable powers of attorney when the estate plan is reviewed. This will permit the planner to amend the document with new specific powers that the attorney-in-fact may now need. Add language to the power of attorney document that expresses the principal's intent that the lapse of time will not cause the authority granted in the document to expire.

Consider Use of the Financial Institution's Power of Attorney Form

After the estate planner has gone through the work of carefully crafting the document for the client, it may sound illogical to ask the client to execute a standard power of attorney form offered by the financial institution. It may be worth considering, however, to facilitate recognition of the attorney-in-fact's authority. Here, the planner will need to weigh the goal of customization against the goal of efficient use. As in much of estate planning, there is no "right" answer, and each client may have different objectives. If the planner does complement the power of attorney document with a financial institution's form, be sure to name the same attorneys-in-fact to prevent later disputes. The financial institution seeks certainty, and, if it is lacking, recognition of an attorney-in-fact will be more difficult.

sented. Under the Uniform Durable Power of Attorney Act, enacted in a number of states, the financial institution receives protection from certain risks, including the risk of revocation, if it has relied on an affidavit executed and submitted by an attorney-in-fact that declares that the power of attorney is still effective. The Uniform Act's affidavit, however, does *not* protect the financial institution against the risks presented by a power of attorney that is not valid for the requested specific transaction or by an expired power of attorney. In addition, the affidavit may not offer any protection in the case of a forged power of attorney.

A third mitigation step might be a requirement that an attorney-in-fact indemnify the institution against its exposure for acceptance-related risks. Because the financial institution accepts the power of attorney as an accommodation to its customer, it may ask for an indemnification to cover the risks that the attorney-in-fact may act beyond the scope of his

or her authority or that the principal has revoked his or her authority.

A fourth step might be a review of the power of attorney document under pre-established guidelines to verify the scope of the attorney-in-fact's authority. By careful review under its own procedures, the financial institution can establish a reasonable process for screening out unacceptable powers. Because of the risks inherent in the document, the financial institution would be wise to scrutinize it before acceptance. This step may result in some delay in access to the account by the attorney-in-fact.

Finally, another step taken by many financial institutions is the provision of a standard form durable power of attorney for its customers. Obviously, when incapacity of the customer has already occurred, this form is offered too late. In addition, some planners may not be comfortable with use of the financial institution's standard "one size fits all" form. Financial institutions generally like their own preprinted forms, however, because they have

drafted the document and are therefore familiar with the scope of the attorney-in-fact's authority.

Conclusion

Financial institutions have at times earned their difficult reputation for durable power of attorney policies. But many financial institutions are trying hard to accommodate their customers by taking a fresh look at these policies, even in the face of the significant risks that face institutions with every power of attorney that they accept. Consideration of the financial institution's perspective may make an estate planner better able to facilitate a client's wishes by drafting effective powers of attorney. This involves thoughtful drafting of the attorney-in-fact's authorized actions and consideration of the financial institution and types of accounts owned by your client. Taking steps in these areas at the time the estate plan is drafted can facilitate the later interaction between the client's attorney-in-fact and his financial institution at the time when it is most important for the client. ■