

# Make Sure Your Financial Power of Attorney Will Work When You Need It

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A Financial Power of Attorney (FPOA) is an essential tool of every retiree's estate plan to allow another trusted family member or friend to handle your finances if there comes a time when you cannot. A well-drafted FPOA will allow you to avoid probate guardianship upon a decline in capacity.

In the last few years, banks in the U.P. and Northern Wisconsin and investment and insurance companies have either rejected or delayed recognition to FPOAs. These rejections and delays have been caused by unfortunate misuse, sometimes fraudulent, of FPOAs by relatives, caregivers, and others across the nation. In such cases of financial abuse of the elderly, the intended heirs who have been disinherited by the exploitation of the appointed agents may sue not only the

agent but the financial institution that honored the apparent authority of the agent.

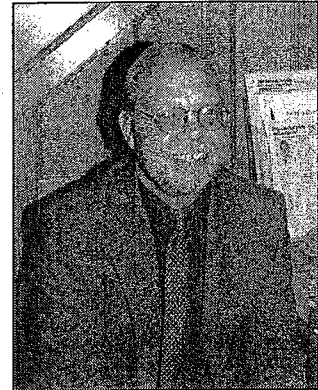
The delays and rejections of valid FPOAs by financial institutions are motivated by the need to limit their risk of being sued.

**Some financial institutions have a policy to reject FPOAs which are older than four years. This is why our Firm recommends that FPOAs be updated every four years.**

While we can appreciate the need for financial institutions to protect themselves, their rejections of well-drafted and valid FPOAs have caused financial harm, unnecessary probate, and frustration to families of the disabled who need to pay bills and apply for government benefits.

## Practical Alternatives to Avoid FPOA Rejection

The best way to avoid these problems as to banks and credit unions is to add a trusted loved-one's name as a joint



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owner with survivorship rights to the account(s). This avoids probate and the need to use a FPOA. If you want the loved one to share the account with other loved-ones upon your passing, we recommend that the appointed joint account owner sign a Sharing Agreement which will obligate him/her to share with other family members.

Another alternative is to retitle the account or other asset into a Living Trust. The Living Trust will avoid probate and enjoys more certain recognition from financial institutions than FPOAs.

## Other Mistakes with FPOAs

Most FPOAs prepared by other law firms are ineffective from an Elder Law perspective for various reasons:

- If a FPOA is more than four years old, there is an increased risk of rejection.
- The Law Firm drafting the FPOA neglects to explain to the appointed agent about his/her duty of loyalty to the principal and to ask the agent to sign an agreement not to use the FPOA for his/her personal benefit.
- The FPOA lacks the specificity to assure adequate recognition. Courts have consistently held that if the FPOA does not specifically authorize a certain action, the agent may not perform it.
- The FPOA fails to grant specific authority to take action permitted by law to qualify you or your spouse for Medicaid in the event of a nursing home stay, especially the power to make allowable gifts under the new Medicaid law.

The FPOAs we see only allow the agent to make gifts which are excluded from gift tax.

Also, many FPOAs prohibit the agent from making gifts to himself/herself, but this may be exactly what the elder wants his adult child to do.

- The FPOA fails to contain the word “Durable” which is needed to make sure the FPOA is not revoked upon the principal’s disability.
- The FPOA is only effective when a physician determines the principal to be “incapacitated”. This is a big mistake because of (a) the time delay in obtaining a doctor’s determination and (b) the increased chance that financial institutions will reject the FPOA until a probate judge has confirmed that the doctor’s incapacity determination meets legal muster. Instead, the FPOA should be written to be “immediately effective”.

If your FPOA fails to meet any of these recommended standards, there is an increased risk of (a) a probate guardianship/conservatorship, (b) rejection by a financial institution, (c) exploitation by an agent and (d) loss of government benefits.

### Conclusion

To be sure, a well-drafted FPOA is an essential estate planning tool. However, it may not be effective unless it is prepared by an experienced attorney with an Elder Law background, such as an

attorney active in the National Academy of Elder Law Attorneys (NAELA). Visit the NAELA website at [www.naela.org](http://www.naela.org).

This article is offered for informational purposes only and should not be construed as legal advice upon which specific action is taken.

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