



Power Of Attorney

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Background

A [POWER OF ATTORNEY](#) is a legal instrument that individuals create and sign; it gives someone else the authority to make certain decisions and act for the signer. The person who has these powers is called an "agent" or "attorney-in-fact." The signer is the "principal." Merely because the word "attorney" is used does not mean that the agent must be a lawyer.

Even if principals have delegated authority to an agent through a power of attorney, they can still make important decisions for themselves. But, their agents may act for them as well. Their agents must follow directions as long as they are capable of making decisions for themselves. A power of attorney is simply one way to share authority with someone else.

As a principal, if the principal's decisions conflict with those of the agent, the principal's decision will govern, assuming that the agent confers with the principal prior to taking an action. Be aware that if the agent has acted on the principal's behalf and acted within the scope of authority granted by the power of attorney, then the principal may be obligated by the terms and conditions of his actions. If the agent does not respect the principal's wishes, the principal should revoke the power of attorney.

Principals can revoke their agent's authority at any time if they become dissatisfied with the agent's performance. If they do not revoke a power of attorney themselves, it will automatically expire upon their death. The power of attorney is not a substitute for a will. Upon the principal's death, either the will or the state's law of [INTESTACY](#) will govern the distribution of the estate.

Agent

The person designated to be the agent assumes certain responsibilities. First and foremost, the agent is obligated to act in the principal's best interest. The agent must always follow the principal's directions. Agents are "fiduciaries," which means that the agent must act with the highest degree of [GOOD FAITH](#) in behalf of their principals.

Although an agent is supposed to make decisions in the principal's best interest and to use the principal's money and other assets only for the principal's benefit, the agent nevertheless has great freedom to act as he or she pleases. Thus, it is crucial that trustworthy individuals are chosen to execute a power of attorney. Before

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selecting an agent, principals should ask themselves the following questions:

- Do I trust the candidate for agent?
- Will the agent understand my feelings and my point of view?
- Will the agent follow my wishes if I am ever incapacitated?
- Will the agent do the necessary work and spend the time to properly handle my affairs?
- Will the agent be able to visit me or to keep in contact by phone?
- Is this person informed about finances?
- Will the agent need to seek the help of experts?

An agent's relationship with the principal is governed by several basic rules. The agent must:

- Keep his money separate from the principal's,
- Keep detailed records concerning all transactions he engages in on the principal's behalf,
- Not stand to profit by any transaction where the agent represents the principal's interests,
- Not make a gift or otherwise transfer any of the principal's money, [PERSONAL PROPERTY](#), or real estate to himself unless the power of attorney explicitly states he can do so.

Principals usually grant their agents fairly broad powers to manage their finances and to conduct financial transactions in their behalf. Even so, principals can grant their agents as much or as little authority as they think reasonable. Typical powers include the authority to do the following:

- Act for the principal with respect to inheritances or claim property to which the principal is otherwise entitled,
- Collect the principal's Social Security, [MEDICARE](#) or other governmental benefits,
- Conduct real estate transactions (purchase, sell, [MORTGAGE](#), etc.),
- Conduct transactions with banks and other financial institutions,
- File and pay the principal's state, federal, and local taxes,
- Hire a lawyer to represent the principal in court,
- Make investment decisions for the principal (purchase and sell stocks, [BONDS](#), mutual funds, etc.),
- Manage the principal's retirement funds,
- Purchase or sell insurance policies and annuities for the principal
- Run the principal's business, and
- Use the principal's money to pay the principal's living expenses.

Whatever powers the principal gives the agent, the agent must act for the principal's best interests, must maintain accurate records, keep the principal's property separate from his or hers and avoid conflicts of interest.

Agents are sometimes paid for their work on the principal's behalf. This depends on the nature of the relationship between the agent and the principal, as well as the nature of the agent's duties. In most situations where the agent's duties are fairly simple, there is no payment for the performance of those duties. If, however, the agent is saddleburdened with substantial responsibilities (such as running a business or managing a complex transaction), payment for the agent's services may be appropriate. If the principal wishes to or expects to pay the agent, the principal should clearly say so and outline the details of payment in the power of attorney. Because of the importance of the agent's duties and the potential for mistake, misunderstanding, or even outright overreaching, the agent will usually be required to maintain separate and accurate records and make them available to the principal or to persons the principal designates.

Creating a Power of Attorney

When individuals create a power of attorney they are stating what they want their agent to be able to do for them. For the power of attorney to be effective the principal must be competent to give this authority. In other words, the principal must know and understand what types of decisions need to be made. If the principal is mentally competent, but physically unable to sign his name, any mark the principal makes with the full intention that other regard the mark as the principal's signature will be acceptable.

In most cases when individuals create a power of attorney, their signature on the form should be witnessed by a [NOTARY PUBLIC](#). If the power of attorney grants the power to sell, [LEASE](#), or otherwise dispose of the principal's real estate, the principal should also have the power of attorney recorded with the Registry of Deeds. The Registry of Deeds usually will be located in the county courthouse wherein which the property is located. The principal should give the agent the original power of attorney document to show to any person, business, or organization involved in the transactions. The principal should keep a copy for his records. If the principal intends to delay the agent's ability to conduct business for the principal, he may choose to keep the original document himself until such time as he wants the power of attorney to be used.

In order to create a legally effective power of attorney, the principal must be mentally competent. The principal needs to know and understand what he is doing. A person who is mentally incapacitated cannot meet these requirements. The law does not require the principal to hire a lawyer to draft the power of attorney. However, if the principal intends to grant important powers to the agent, it is a good idea to seek legal advice before the principal signs the document. The principal should make sure that he understands the details built into the power of attorney as well as the potential for legal or financial difficulties it may present.

In most instances, all the principal needs to do to create a legally valid power of attorney is properly complete and sign (before a notary public) a fill-in-the-blanks form that's a few pages long. Besides the nearly universal requirement for a power of attorney to be witnessed by a notary republic, there are few formalities to executing a power of attorney. Some states require a certain number of competent witnesses to watch the principal sign the document before the notary, and some states recommend certain forms, but none of them are mandatory to create a valid power of attorney. But some powers can be delegated to an agent only if they are specifically mentioned in the power of attorney document. Those requiring explicit language include the power to do the following:

- Make gifts of the principal's money or other assets,
- Amend the principal's will or [COMMUNITY PROPERTY](#) agreement,
- Name beneficiaries of the principal's insurance policies.

If the principal is married and are concerned about what would happen if the principal's spouse became ill and needed nursing home care or other long-term care, the principal may want to add some additional specifically authorized powers. It may be helpful for **MEDICAID** eligibility to include the power to revoke a community property agreement and to transfer property from the disabled spouse to the principal. It is a good idea to consult with a lawyer about these more complicated issues.

When individuals create a power of attorney, they can name two or more people to serve as agents at the same time. They can also name an alternate agent to assume powers under the power of attorney under certain circumstances, such as the death or incapacity of the first agent. Before principals give authority under their power of attorney to more than one person at the same time, they should consider whether confusion or some other conflict may result. It is wise to discuss the potential advantages and disadvantages with a lawyer before giving powers of attorney to more than one person.

Types of Powers of Attorney

General Power of Attorney

A general power of attorney is one that permits the agent to conduct practically every kind of business or financial transaction—with the principal's assets—without any restraints. Because of the great harm to the principal's financial well-being that an incompetent or untrustworthy agent can cause with a general power of attorney, the principal should be extremely careful in choosing an agent. Additionally, the principal should maintain vigilance over the agent's transactions in the principal's behalf.

Special or Limited Power of Attorney

A special power of attorney, also known as a limited power of attorney, is created to empower an agent to perform a specific act or acts. For example, if the principal is unable to do it himself, he can prepare a special power of attorney so that the agent can complete the purchase or sale of real estate. Most powers of attorney carefully define and enumerate the scope of the agent's authority. Thus, most powers of attorney are limited powers of attorney.

Springing Power of Attorney

Any power of attorney can be written so that it becomes effective as soon as the principal signs it. But, the principal can also specify that the power of attorney goes into effect only upon the occurrence of some triggering event. In other words, it "springs" into effect at a later date, if ever. The triggering event can be something as simple as the principal's reaching a certain age or when a certain calendar date occurs. It can also be much more specific, such as if and when a doctor certifies that the principal has become incapacitated. These kinds of springing powers of attorney enable individuals to keep control over their affairs unless and until they become incapacitated, when it springs into effect. They are also known as durable powers of attorney.

Durable Power of Attorney

Unless a power of attorney specifically says otherwise, an agent's authority ends if the principal becomes mentally incapacitated. On the other hand, a power of attorney may state explicitly that it is to remain in effect and not be limited by any future mental incapacity of the principal. A power of attorney with this sort of clause is called a durable power of attorney. The word "durable" means that the principal's agent can continue to conduct business for the principal if the principal becomes incapacitated.

Because of their potential utility to individuals who lack capacity after executing them, durable powers of attorney are arguably the most important form of these versatile legal documents. Durable powers of attorney are intended to address cases wherein which the following applies:

- The principal intends the agent to have authority only if the principal becomes incapacitated.
- The principal intends for the power of attorney to take effect immediately and to REMAIN in effect regardless of the principal's future disability.

The principal must list the specific powers under the durable power of attorney that are given to the agent and when those powers are to take effect. The agent must still act in the principal's best interest, making decisions and using the principal's assets only for the principal's benefit. In North Carolina and South Carolina, a principal must record the power of attorney with the appropriate county authorities for it to be durable.

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The alternatives to creating a durable power of attorney may not be what the principal intends. If the principal has not executed a durable power of attorney and subsequently the principal becomes mentally incapacitated, a court may appoint a [GUARDIAN](#) or conservator for the principal. A guardianship or conservatorship must be established by a [PROBATE](#) court. It is usually easier and much less expensive to manage one's affairs with a power of attorney.

Like all powers of attorney, a durable power of attorney ends or ceases to carry authority upon the death of the principal. It is fruitless to attempt to give the agent authority to handle matters for the principal after the principal's death. Actions such as attempting to pay the principal's debts, making funeral or burial arrangements, or transferring the principal's property to the people who [INHERIT](#) it cannot be legally accomplished through a power of attorney executed by a decedent. If the principal wants the agent to have authority to conclude affairs after the principal's death, then a will must be prepared that names the agent as the principal's executor.

In addition to the principal's death, a durable power of attorney will end if any of the following applies:

- The principal revokes it. As long as the principal is mentally competent, he or she can revoke a durable power of attorney any time.
- A court invalidates the power of attorney. This does not happen very often; however, a court will declare a power of attorney invalid if the court finds that the principal lacked mental competency when the power of attorney was executed, or that the principal was the victim of [FRAUD](#) or undue influence.
- The principal gets a [DIVORCE](#). In Alabama, California, Colorado, Illinois, Indiana, Minnesota, Missouri, Pennsylvania, Texas and Wisconsin, if the principal's spouse is also the agent and the two get a divorce, the authority of principal's former spouse-agent is automatically terminated by [STATUTE](#). In any state, however, it is wise to revoke a durable power of attorney after a divorce and make a new one.
- No agent is available to serve. A durable power of attorney will terminate if no one is available to serve as agent. To avoid this dilemma, a principal can name an alternate agent in the power of attorney.

There are two general types of durable powers of attorney: a durable power of attorney for finances, and a durable power of attorney for health care. Depending on the terms of the document, the durable power of attorney for finances allows the agent to serve the interests of the principal in financial matters before, during, or after the agent becomes incapacitated. The durable power of attorney for health care authorizes the agent to make medical decisions for the principal if the principal cannot otherwise make those decisions. An agent's authority over the principal's financial and healthcare decisions can be included in the same power of attorney; however, some durable powers of attorney for finances do not give the agent the legal authority to make medical decisions for the principal. Sometimes financial and healthcare powers are combined in one document to create a durable power of attorney.

A durable power of attorney for health care differs from a [LIVING WILL](#). The durable power of attorney for health care grants a third party—the agent—the authority to make decisions for the principal about the principal's health care. In most states, though, a living will (also called a Healthcare Directive or Directive to Physicians), is a document wherein which the principal informs his doctors of his preferences about certain kinds of medical treatment and life-sustaining procedures in the event the principal cannot communicate his wishes. The living will does not mediate the principal's desires through an agent or other third party. If a living will is prepared properly, a physician is legally bound to respect the wishes in the living will. If for some reason a doctor finds he cannot honor the living will, he is obligated to transfer the principal's care to another doctor who will. Living wills are fairly simple documents, with most states now providing fill-in-the-blanks living will forms.

Revoking a Power of Attorney

All powers of attorney automatically expire upon the principal's death. Some powers of attorney expire on a particular date set by the principal. It is important to know that all powers of attorney are revocable if the right conditions are met. There are many reasons to revoke a power of attorney, an important one being loss of confidence in the agent; however, the principal does not need a reason to revoke the power of attorney.

Power of attorney can be revoked at any time, as long as the principal is of sound mind. To revoke a power of attorney, the principal must do so in writing. Typically, the principal merely needs to prepare a simple statement containing the following:

- The principal's name and date
- The principal's claim to be of sound mind
- The principal's explicit desire to revoke the durable power of attorney
- The date the original durable power of attorney was executed
- The name of the principal's agent or agents
- The principal's signature

It is important to distribute copies of this revocation statement to the agent and to any institutions and agencies, such as banks and hospitals, that may have had notice of the principal's power of attorney. If the power of attorney is on file with a county records department, the statement revoking the power of attorney should be filed in the same place. After the durable power of attorney is revoked, the principal can 1) execute a new power of attorney naming someone else as agent to handle the principal's affairs; or 2) handle the affairs independently.

Additional Resources

The financial power of attorney workbook. Irving, Shae, Nolo Press, 1997.

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<http://www.oag.state.ny.us/seniors/pwrat.html>, "Power of Attorney" Office of New York State Attorney
General Eliot Spitzer, 2002.

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Forms-Tool.com, 2002.

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