

What's a Power of Attorney?

A Power of Attorney is a legal instrument that is used to delegate legal authority to another. The person who signs (executes) a Power of Attorney is called the Principal. The power of Attorney gives legal authority to another person (called an Agent or Attorney-in-Fact) to make property, financial and other legal decisions for the Principal.

A Principal can give an Agent broad legal authority, or very limited authority. The Power of Attorney is frequently used to help in the event of a Principal's illness or disability, or in legal transactions where the principal cannot be present to sign necessary legal documents.

Are There different types of powers of attorney?

Yes. There are "Nondurable," "Durable," and "Springing" Power of Attorney. A "Nondurable" Power of Attorney takes effect immediately. It remains in effect until it is revoked by the Principal, or until the Principal becomes mentally incompetent or dies.

A "Nondurable" Power of Attorney is often used for a specific transaction, like the closing on the sale of residence, or the handling of the Principal's financial affairs while the Principal is traveling outside of the country.

A "Durable" Power of Attorney enables the Agent to act for the Principal even after the Principal is not mentally competent or physically able to make decisions. The "Durable" Power of Attorney may be used immediately, and is effective until it is revoked by the Principal, or until the Principal's death.

A "Springing" Power of Attorney becomes effective at a future time. That is, it "springs up" upon the happenings of a specific event chosen by the Power of Attorney. Often that event is the illness or disability of the Principal.

The "Springing" Power of Attorney will frequently provide that the Principal's physician will determine whether the Principal is competent to handle his or her financial affairs. A "Springing" Power of Attorney remains in effect until the Principal's death, or until revoked by a court.

Statutory Short-Form Powers of Attorney

Effective January 1, 1997, New York State has adopted statutory forms for "Nondurable," "Durable," and "Springing" Power of Attorney. That means that the State Legislature has written model forms for Powers of Attorney, and that New Yorkers can rely on these statutory "short forms" as being legal. These model forms can be found in the New York General Obligations Law, beginning at Section 5-1501.

Printed short form Powers of Attorney can also be purchased from legal stationers and office supply stores. Do not purchase a printed form that is dated earlier than January 1997. Powers of Attorney can also be typed or

written in the form found in the General Obligations Law. Again, they may be "Nondurable," "Durable," or "Springing."

Statutory "short-form" Powers of Attorney may also be customized to fit the needs of the Principal by adding to the powers that are listed on the statutory short forms.

When is it appropriate to use a "Durable" or "Springing" Power of Attorney?

"Durable" and "Springing" Powers of Attorney are frequently used to plan for a Principal's future incapacity or disability and loss of competence resulting, for example, from Alzheimer's Disease or a catastrophic accident.

By appointing an Agent under a "Durable" or "Springing" Power of Attorney, the Principal is setting up a procedure for the management of his or her financial affairs in the event of incompetence or disability.

A "Nondurable" Power of Attorney enables a Principal to decide in advance who will make important financial and business decisions in the future.

They are also helpful in avoiding the expense of having a court appoint a Guardian to handle the Principal's affairs in the event of incompetence or disability.

How can I tell if a Power of Attorney is a "Durable" one?

State law requires that the "Durable" Power of Attorney form have the title: *Durable Power of Attorney, New York Statutory Short Form*. The form also says, "The powers you grant below continue to be effective should you become disabled or incompetent." After January 1, 1997, every short-form "Durable" Power of Attorney must contain that statement following the title.

What kinds of legal authority can be granted with a Power of Attorney?

Whether "Nondurable," "Durable," or "Springing," a Power of Attorney can be used to grant any, or all, of the following legal powers to an Agent:

- Buy or sell your real estate
- Manage your property
- Conduct your banking transactions
- Invest, or not invest, your money
- Make legal claims and conduct litigation
- Attend to tax and retirement matters
- Make gifts on your behalf

Can a Power of Attorney grant an Agent the authority to make medical decisions for the Principal?

No. In New York State, the proper legal instrument for delegating health-care decisions to another is called a Health care Proxy. Here, too, there is a statutory short form approved by the State Legislature. It can be found at Article 29-C of the New York Public Health Law. A copy can be obtained by writing: Health Care Proxy. P.O. Box 2000, Albany, New York 12220.

How do I select an Agent for a Power of Attorney?

You should choose a trusted family member, a proven friend, or a professional with an outstanding reputation for honesty. Remember, signing a Power of Attorney that grants broad authority to an Agent is very much like signing a blank check.

Certainly, you should never give a Power of Attorney to someone you do not trust fully. And do not allow anyone to force you into signing a Power of Attorney.

Can I appoint more than one Agent in a Power of Attorney?

Yes. You may appoint multiple Agents. If you appoint two or more Agents, you must decide whether they must act together in making decisions involving your affairs, or whether each can act separately.

There are advantages and disadvantages to both forms of appointment. Requiring your Agents to act jointly can safeguard the soundness of their decisions. On the other hand, requiring agreement of all your Agents can result in delay or inaction in the event of a disagreement among them, or the unavailability of one of them to sign legal documents.

Allowing your Agents to act separately may ensure that an Agent is always available to act for you. But it may also result in confusion and disagreements if the Agents do not communicate with one another, or if one of them believes that the other is not acting in your best interests.

As of January 1997, the statutory short-form Power of Attorney provides space to appoint an alternate or substitute Agent. A substitute Agent can act if the first Agent is unable or unwilling to act for you. It is generally a good idea to appoint a substitute Agent.

Powers of Attorney are only as good as the Agents who are appointed. Appointing a trustworthy person as an Agent is critical. Without a trustworthy Agent, a Power of Attorney becomes a dangerous legal instrument, and a threat to the Principal's best interests.

Once I sign a Power of Attorney, may I continue to make legal and financial decisions for myself?

Yes. The Agent named in a Power of Attorney is your representative, not your "boss." As long as you have the legal capacity to make decisions, you can direct your Agent to do only those things that you want done.

What are an Agent's obligations to a Principal?

The Agent is obligated to act in the best interests of the Principal, and to avoid any "self-dealing." Self-dealing is acting to further the selfish interests of the Agent, rather than the best interest of the Principal.

An Agent appointed in a Power of Attorney is a fiduciary, with strict standards of honesty, loyalty and candor to the Principal. An Agent must safeguard the Principal's property, and keep it separate from the Agent's

personal property. Money should be kept in a separate bank account for the benefit of the Principal. Agents must also keep accurate financial records of their activities, and provide complete and periodic accountings for all money and property coming into their possession.

Make clear to your Agent that you want accurate records of all transactions completed for you, and to give you periodic accountings. You can also direct your Agent to provide an accounting to a third party—a member of your family or trusted friend—in the event you are unable to review the accounting yourself.

Is it possible for an Agent to steal my money and property?

Yes. A Power of Attorney can be abused, and dishonest Agents have used Powers of Attorney to transfer the Principal's assets to themselves and others. That is why it is so important to appoint an Agent who is completely trustworthy, and to require the Agent to provide complete and periodic accountings to you or to a third party.

Can a transfer of a Principal's assets to other people be a good thing?

Yes. A Principal may want to authorize transfers or gifts property for estate planning and other valid purposes. New statutory short-form Powers of Attorney in New York State permit Agents to make gifts to members of the Principal's family, if the Principal so authorizes in the Power of Attorney. The Principal can also customize a Power of Attorney to permit the Agent to make gifts to non-family members.

Who monitors the actions of my Agent?

There is no official or government monitoring of Agents acting pursuant to Power of Attorney. That is the responsibility of the Principal. It is therefore important to insist that your Agent keep accurate records of all transactions completed for you, and to provide you with periodic accountings. You might also direct your Agent to give an accounting to a third party in the event you are unable to review the accounting yourself.

Should a Principal, member of the Principal's family or a friend have grounds to believe that an Agent is misusing a Power of Attorney, the suspected abuse should be reported to the police or other law enforcement authority to protect the Principal from the loss of his or her property. Consider asking a lawyer for help and advice.

What can I do if my Agent does not follow my instructions?

You may revoke your Power of Attorney at any time.

You should inform your Agent, in writing, that you are revoking the Power of Attorney. Request the return of all copies of your Power of Attorney.

You should notify your bank or other financial institution where your Agent has used the Power of Attorney that it has been revoked.

You should file a copy of the revocation with the County Clerk if your Power of Attorney has been filed in the Clerk's office.

If you decide to revoke a Power of Attorney, it is probably in your best interests to consult a lawyer, and arrange to have a new Power of Attorney executed.

Am I required to file a Power of Attorney in a government office?

Not unless the Power of Attorney is used in a real estate transaction. In that case, it must be filed in the County Clerk's office. And when you file in the County Clerk's office, the Power of Attorney is a public record open to inspection by the public. A writing that revokes a filed Power of Attorney should also be filed in the County Clerk's office.

If you file a Power of Attorney in the County Clerk's office, you will be able to get additional "certified" copies from the County Clerk for a small fee. A certified copy is legally equivalent to the original document. It is often convenient to have certified copies of your Power of Attorney on hand.

How many copies of a Power of Attorney should I sign?

You are required to sign (execute) only one copy. However, it is not unusual for a Principal to sign several original copies. Banks and financial institutions, for example, generally require an original or a certified copy before allowing an Agent to transact business on the Principal's behalf. And banks frequently provide customers with their own Power of Attorney forms.

Do I need to have my signature witnessed on a Power of Attorney?

Yes. Your signature on the Power of Attorney must be witnessed by a Notary Public.

Do I need a lawyer to prepare a Power of Attorney?

No. You're not required to hire a lawyer. However, because a Power of Attorney is such an important legal instrument, the careful consumer will consult a lawyer who can:

- provide legal and other advice about the powers that are appropriate to be delegated
- provide counsel on the choice of an Agent:
- Outline the Agent's legal and fiduciary obligations while acting under a Power of Attorney; and
- ensure that the Power of Attorney is properly executed and meets all legal requirements.

The typical Fee for preparing a Power of Attorney is modest. Before engaging a lawyer to prepare a Power of Attorney, inquire about the fee, and feel free to get prices from other lawyers and law firms.

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