

The New Power of Attorney

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What is a power of attorney?

A power of attorney is a document that allows you to appoint someone to handle your financial affairs for you. The person (or people) you name to act for you is called your “agent(s).” You are known as the “principal.” New power of attorney laws became effective in New York State on September 1, 2009, and September 12, 2010.

I’m not sick, why do I need a power of attorney?

If you had a sudden illness or accident, which caused you to be unable to make your own decisions and you did not have a power of attorney, your family or someone else might have to request that the court appoint a guardian for you so that someone could take care of your financial matters. A guardianship involves filing a petition, interviews by a court evaluator, and a hearing in front of a judge. The judge may appoint someone other than the person you would have chosen to act for you as guardian. A power of attorney allows you to appoint whoever you want to be your agent. A power of attorney can also allow someone you trust to help you with financial matters such as dealing with creditors, Social Security, insurance, etc. now.

Who can make a power of attorney?

In order to complete a valid power of attorney, you must be at least 18 years of age and be able to understand what a power of attorney is and understand the consequences of giving an agent the power to act for you, as well as of revoking, amending, or modifying this authority. This is called having “capacity”. NY General Obligations Law (GOL) Section 5-1501B(1)(b), 5-1501(2)(c) and (k).

Who can be my agent?

You can appoint anyone to be your agent, as long as they are at least 18 years of age. Your agent will have a great amount of power over some of your most personal affairs. Because of this, you must make sure that the person you choose is trustworthy and honest. Do not appoint someone as your agent unless you trust them completely.

Can I have more than one agent?

Yes. You can appoint more than one agent to handle your affairs. If you do appoint more than one, then you have the option of deciding whether they will work jointly or separately. Unless you specify otherwise, co-agents must act jointly. GOL § 5-1508. If you decide that they should work “jointly”, then both agents must agree and take action together. For example, if you have two agents working jointly, with banking power, they must both sign any checks. While this ensures that both agents agree to decisions, it can also result in delays in action. “However, if prompt action is required to accomplish a purpose of the power of attorney and to avoid

This Lifeline contains general information, and does not constitute individual legal advice about your situation. You should consult with an attorney for individual legal advice about your situation and to find out how this information applies to your situation. To see if you qualify for free legal services, call the Legal Aid office nearest you.

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irreparable injury to the principal's interest and a co-agent is unavailable because of absence, illness or other temporary incapacity, the other co-agent or co-agents may act for the principal" alone.

If you decide to have your agents act "separately", either one can act without the other. For example, if you have two agents with banking powers working separately, either could sign a check (only one signature would be needed). It is best if the agents still talk to each other, so that each knows what the other is doing to avoid duplicate efforts or acting in contrary ways. For instance, if one agent writes a check for the water bill without telling the other, both may end up paying the same bill.

Whether you appoint one or more agents, you can also name "successor" agents to act if the first agent "resigns, dies, becomes incapacitated, is not qualified to serve or declines to serve". If you have more than one original agent, if one of the original agent dies, resigns, or becomes incapacitated, the remaining original agent or agents can continue to act for you, unless you state otherwise in the power of attorney. You can provide for specific succession rules, if you want. As with your original agents, you can name more than one successor, and the same rules of joint and separate duties arise. (GOL Section 5-1508).

How can I be sure that my agent is making good decisions on my behalf?

The 2009 changes to the law designed to prevent fraud and abuse allow you to appoint someone to act as "monitor." See Gen. Obl. § 5-1509. A monitor has the power to watch over the actions of your agent since he or she has the legal right to access the records of the agent and look over them on behalf of the principal in order to ensure that the agent is acting in the principal's best interest. See Gen. Obl. § 5-1509.

You can decide how often you would like the agent to report to the monitor. For example, you could include a modification to state "Unless reasonable cause exists to require otherwise, the agent shall not be obligated by the monitor to provide accountings more frequently than annually."

What can my agent do for me?

You can give your agent very broad or very limited powers. The power of attorney law includes a "statutory short form" (GOL 5-1513) which lists common things you can choose to allow your agent to do for you. These include the power to act for you in such areas as:

- real estate transactions
- personal property transactions
- bond, share and commodity transactions
- banking transactions
- business operating transactions
- insurance transactions
- estate transactions
- claims and litigation
- making gifts of up to \$500 in a calendar year
- benefits from governmental programs or civil or military service
- health care billing and payment matters, records, reports and statements
- retirement benefit transactions
- tax matters

The power of attorney law has pages defining what each of these powers mean. For example, the banking power includes the authority to open new accounts, have access to a safe deposit box or vault, and take out a loan in your name, in addition to just writing checks for you.

You can also choose to allow your agent to delegate the any or all of the powers you gave him or her to another person that the agent selects. Please remember that your agent does not have to get your permission ahead of time and the agent may choose someone you would not have chosen.

If you want to add authorization to do other specific things, you can include this under the "Modifications" section.

Notice that your agent does not have the power to make any medical or health care decisions for you. As stated above, you must fill out a separate health care proxy form if you want someone to make health care decisions for you in case you cannot do so yourself.

Where can I find the power of attorney law?

The New York Power of Attorney law is found at New York General Obligations Law, Article 5, Title 15. You can find it online at the New York State Senate or Assembly websites: www.senate.state.ny.us or www.assembly.state.ny.us.

Do I have to use the statutory short form power of attorney?

No, but all powers of attorney executed in New York State must be:

- typed or printed clearly and legibly in at least 12 point type (if printed, use a reasonable equivalent of that size.)
- signed and dated by a principal with capacity, and the signature must be acknowledged and notarized
- signed and dated by any agent acting on behalf of the principal, and this signature must also be acknowledged and notarized
- include the “Caution to the Principal” statement found in the statutory short form
- include the “Important Information for the Agent” statement found in the statutory short form.

Can my agent make gifts on my behalf?

If you have given gifts to charities, friends, family members, or others, including your agent, in the past, you can authorize your agent to continue to make such gifts up to a total amount of \$500 per calendar year by initialing power “(I) personal and family maintenance” in the statutory short form. GOL 5-1513

If you want to give larger gifts, an additional form is required. This form is called a “Statutory Gifts Rider” (SGR) and must be executed at the same time as the statutory short form power of attorney. GOL §5-1514. This document must be signed by both the principal and the agent, as well as by two other people who act as witnesses. The witnesses cannot be people who may receive gifts or other transfers under the SGR. You must also initial the section of the statutory short form dealing with “Certain Gift Transactions: Statutory Gifts Rider”.

You can decide what gifts you want your agent to make. The SGR includes some options and you can also make modifications to meet your specific needs. For example, you could include a modification stating, “In making gifts of my property, my “best interest” shall include gifts which would be likely to cause a reduction in estate tax due or which would carry out a plan for the protection of my assets against the costs of nursing home care in the foreseeable future.”

What if I don't like what my agent is doing?

Your agent is supposed to act according to your instructions or, where there are no instructions, in your “best interest.” Your agent should avoid conflicts of interest and keep your property separate from his or her own property unless otherwise permitted by law. GOL 5-1505.

As long as you are able to make your own decisions, you have the power to revoke your power of attorney. If you revoke your power of attorney, you must give written notice to your agent and any person or business where your agent acted for you. GOL 5-1511.

To avoid your agent making bad decisions, you can ask that he or she keep accurate records of all transactions he or she makes under the power of attorney, make an accounting and report to you when he or she acts on your behalf. You can request information from your agent at any time. GOL 5-1505. If your agent refuses, you can bring a lawsuit to compel him to produce the record. GOL 5-1510.

What happens if my agent steals from me?

Your agent has a fiduciary duty to act according to your wishes or in your best interest. If your agent breaches this fiduciary duty, you could bring a lawsuit against her to try to recover your damages. A court may also revoke a power of attorney if it finds that there has been a breach of fiduciary duty.

Can I revoke my power of attorney?

Yes, as long as you have the capacity to do so. You may revoke the power of attorney by delivering a written, signed and dated revocation of the power of attorney to the agent(s) and to any third party that you have reason to believe has received, retained or acted upon the power of attorney. If the power of attorney was recorded, the revocation also must be recorded. Unless you specify otherwise, the execution of a new power of attorney does not revoke a previous power of attorney. GOL 5-1511.

How long will my power of attorney last? Will it expire?

You can set an expiration date for your power of attorney if you wish. Otherwise, the power of attorney lasts until:

- 1) the principal dies;
- 2) the principal becomes incapacitated (ONLY if the power of attorney is not durable);
- 3) the principal revokes the power of attorney;
- 4) the principal revokes the agent's authority and there is no co-agent or successor agent, or no co-agent or successor agent who is willing or able to serve;
- 5) the agent dies, becomes incapacitated or resigns and there is no co-agent or successor agent or no co-agent or successor agent who is willing or able to serve;
- 6) the authority of the agent terminates (such as if the principal revokes that agent's authority or if the agent's marriage to the principal is terminated by divorce or annulment) and there is no co-agent or successor agent or no co-agent or successor agent who is willing or able to serve;
- 7) the purpose of the power of attorney is accomplished; or
- 8) a court order revokes the power of attorney. GOL 5-1511

What happens to my power of attorney when I die?

Your power of attorney ends at your death. GOL 5-1511. Your agent is only allowed to act on your behalf during your lifetime. A power of attorney does not authorize your agent to handle or distribute your estate. If you have a will, your executor would handle your estate matters. If you do not have a will, then someone can volunteer or be appointed to administer your estate for you.

Is my power of attorney valid in New York if it was executed in another state?

As long as your power of attorney was validly executed in the other state, it is valid in New York. GOL 5-1512.

Do I need to consult an attorney to make a power of attorney?

No, you can execute a power of attorney without an attorney (although you will need a notary public to notarize signatures). It is important that you read and understand all of the provisions of the power of attorney, however. It can be useful to consult an attorney to make sure that your power of attorney will take care of your needs. For example, you may need to include modifications to the gifting power or other powers.

I have a blank power of attorney form I bought several years ago. Can I still use it?

No. New York made significant changes to its power of attorney law as of September 1, 2009 and again as of September 12, 2010. The new laws require that the exact wording of specific cautions and instructions (which were not included in older forms) be included. The new form also must be signed, dated, and duly acknowledged not only by the principal, but also by the agent. If you execute an older form after September 12, 2010, it will not be valid.

Where can I get a power of attorney form?

A power of attorney form is available at legal supply stores. It is important to be sure that a form includes the 2010 changes. You can also see a private attorney to have a power of attorney drafted.

Can I change any part of the power of attorney before i sign it?

Yes. You should only initial the powers you want your agent to have. You do not need to authorize your agent to act in every area included in the statutory short form list. You can also add modifications to include authorization to do things not included in the list as long as they are not inconsistent with ones already stated. GOL 5-1503. You are only allowed to make these changes before you sign the document. Once you sign it, you cannot change anything in it.

Do I have to file my power of attorney anywhere?

You are not required to file your power of attorney unless you are using it for a real estate transaction. Real Property Law §421. You can also file a copy with the County Clerk's Office if you would like to be sure you can obtain copies if needed. Remember, your power of attorney cannot help you if it cannot be found.

I already have a will and a health care proxy. Are those documents different than a power of attorney?

Yes. Your will does not go into effect until your death. The person you named as your executor has no power while you are still living. A health care proxy only allows another to make medical and health care decisions for you if you become incapacitated or unable to make decisions. Therefore, to allow someone else to make financial decisions for you during your lifetime, you will need a power of attorney.

I am married. If my wife becomes disabled, don't I have the authority to make decisions for her?

Courts have found that "an agency between husband and wife is not to be implied from the mere fact of marriage" (Kozecke v. Humble Oil and Refining Co., 46 AD2d 986 (3d Dept., 1974)). This means that you don't necessarily have the authority to act on your spouse's behalf or make decisions for him or her if he or she became disabled or incapacitated.

If I have a power of attorney, does that mean that I can no longer write my own checks and pay bills?

No. Having a power of attorney does not mean that you are giving up any of your rights to handle your own affairs. Your agent does not become your boss. As long as you are able, you can continue managing your affairs, including writing checks and paying bills. Having an agent just means that your agent can also act for you.

I named my daughter as my agent under my power of attorney. Does she have to ask my permission or at least tell me ahead of time what she is going to do?

No. By making her your agent under a power of attorney, you have given her the authority to act on your behalf. She does not need to ask your permission to do what you have given her the power to do or inform you of her plans ahead of time. This is one of the reasons it is so important to choose your agent wisely, making sure you trust whoever it is. However, you can ask for an accounting of everything she has done. You can have her make an accurate record of any transactions she makes under your power of attorney.

I want my son to be able to pay my bills for me if I get sick, but I don't want him to have any power over my financial matters now. Can a power of attorney help me?

Yes. You can include a modification to your power of attorney stating that it only takes effect after a certain date or if a certain event (such as you getting sick) happened. You can require that a person, such as your doctor or a friend or family member, make a written statement that the specified event has occurred in order for your power of attorney to become effective. GOL § 5-1501B(3)(b)

I just want my son to be able to write checks for me. Can I make a power of attorney with just that power?

Yes. You can limit your agent's power to just one aspect of your affairs, whether it be banking, filing your taxes, or any other power. GOL § 5-1513. However, you should consider who will be able to make your financial decisions if other needs develop.

I have all my money in joint accounts. Do I still need a power of attorney?

Yes. Courts have found that each owner is only entitled to one-half of the money in the joint account during their lifetimes. See *In re Filfiley's Will*, 63 Misc. 2d 824. If any of the joint owners withdraws more than his or her share, then he or she is liable to the other people on the account for the amount overdrawn. See *In re Lifschutz's Will*, 54 Misc. 2d 289. So if someone withdrew money as a joint tenant rather than as an agent under a power of attorney, they would be withdrawing their own share only and if they withdrew more than their share, the other joint tenant could demand the money back.

I gave my bank permission to allow my daughter to make my transactions. Do I still need a general power of attorney?

This depends on what you need your agent to do for you. If you want an agent to act for you outside of that particular bank, you should consider a power of attorney.

Will my agent be paid for acting for me?

You can choose to compensate your agent if you want. If you do not specifically state that your agent is to be compensated, your agent will only be entitled to reimbursement for their reasonable out-of-pocket expenses incurred on your behalf. You can state that your agent is to receive "reasonable compensation" or you can include a modification defining what compensation you want your agent to receive, such as an hourly rate or being compensated at the same rate as the executor or administrator of an estate.

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