

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 financial matters for you. The person or people you name to act for you is/are called your “agent(s).” You are known as the “principal.” You can decide what you want your agent to do for you. Your agent is not your “boss” - you can still make decisions for yourself as long as you are able to do so.

WHAT IS NEW ABOUT THE POWER OF ATTORNEY?

New Power of Attorney laws became effective in New York State on June 13, 2021. There is a new “Statutory Short Form” for the Power of Attorney. Some of the rules about how the form can be signed have changed. For the optional sections in the Power of Attorney “Statutory Short Form” the principal does not want to authorize, those sections should be replaced by the words “Intentionally Omitted”. Third parties, such as banks, can now request an “opinion of counsel” for you to explain how your Power of Attorney complies with the law. There have also been changes to the “powers” given to an agent. These changes are discussed below.

I ALREADY HAVE A POWER OF ATTORNEY – DO I NEED A NEW ONE?

That depends. If your Power of Attorney was signed and complied with the laws in place at the time you signed it, your Power of Attorney is still effective. This type of Power of Attorney would be grandfathered in. You may want to consider whether some of the changes in the new Power of Attorney may be helpful to you, though.

WHEN SHOULD I MAKE A POWER OF ATTORNEY?

Anyone who is at least 18 years old and has the capacity to do so should consider executing a Power of Attorney. If you were to have a sudden illness or accident rendering you unable to make your own decisions, someone else may need to take care of your financial matters. Your family cannot automatically access your bank account, make arrangements for your bills, deal with creditors or insurance, handle government benefits, etc. even if you were to need help. If you do not have an agent under a Power of Attorney, your family or someone else might have to request that the court appoint a guardian to help you. The process to appoint a guardian involves filing a petition, an interview 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. Making a Power of Attorney is a much simpler process and allows you to choose who would act for you.

WHAT IF I DO NOT NEED HELP RIGHT NOW OR WANT TO CONTINUE TAKING CARE OF MY OWN FINANCIAL MATTERS?

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.

WHO CAN MAKE A POWER OF ATTORNEY?

For a Power of Attorney to be acceptable, you must be at least 18 years of age and have “capacity” when signing the document. Capacity means you can understand what a Power of Attorney is and does. You must be able to understand the consequences of giving an agent the power to act for you. You must also have the capacity to revoke the Power of Attorney.

WHAT IF I HAVE A PHYSICAL CONDITION THAT AFFECTS MY ABILITY TO SIGN THE POWER OF ATTORNEY?

The 2021 Power of Attorney law makes it clear that a person who cannot physically sign the document but otherwise has the capacity to understand the document may direct another person to sign on his or her behalf. The person signing must do so in the principal’s presence and at the principal’s direction. To effectively sign at the

direction of the principal, the person must sign or print the principal's name **and** print and sign their own name. The person signing at the principal's direction cannot be named as the agent or successor agent, however, this person may act as one of the witnesses to the principal's signing.

WHO CAN BE MY AGENT?

You can appoint anyone you trust 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. Your agent can make decisions for you without discussing them with you ahead of time. 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. An estate or trust cannot act as an agent under a Power of Attorney.

CAN I HAVE MORE THAN ONE AGENT AT THE SAME TIME?

Yes. You can appoint more than one agent to handle your affairs. You can appoint more than one agent to serve at the same time and act either separately or together.

Agents Acting Separately

The 2021 Power of Attorney law requires you to initial the section in the statutory short form to allow your agents to act separately. If your agents can act "separately," that means either one can complete a transaction 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). You should consider how the co-agents will communicate with each other, to avoid contrary actions or duplicate efforts. For instance, if one agent writes a check for the water bill without telling the other, both may end up paying the same bill.

Agents Acting Jointly

If you do not initial the option allowing the agents to work separately on the Power of Attorney form, your co-agents must act jointly. Co-agents acting jointly must act together. For example, if you have two agents with banking power working jointly, each check will require both agents' signatures. While this ensures that both agents are aware of what the other agent is doing, it can also result in delayed actions. If one of the principal's co-agents is unavailable and prompt action needs to be taken for the principal, the law may allow the other co-agent(s) to act alone in that instance.

Agent's Delegation of Authority

Please consider that an agent may delegate a co-agent to act if the principal authorized "(o) full and unqualified authority to my agent to delegate any or all of the foregoing powers to any person or persons whom my agent(s) select" under Grants of Authority. That authority to delegate gives your agent the "full and unqualified" ability to assign their responsibility to any person of the agent's choosing. Agents acting jointly may delegate his or her authority to a co-agent if the principal authorized this section.

WHAT IF MY AGENT CANNOT HELP ME ANYMORE?

If you named more than one agent and one of the agents dies, resigns, or becomes incapacitated, the remaining original agent(s) can continue to act for you. You can provide for different succession rules in the Modifications section if you prefer.

When you make your Power of Attorney, you should consider naming a "successor" agent to act if the first agent becomes unable or unwilling to do so. You can also name more than one successor agent. For successor agents to act separately, you must initial the line that states "My successor agents may act SEPARATELY." If the principal does not initial that section, the successor agents will be required to act together.

HOW CAN I BE SURE THAT MY AGENT IS MAKING GOOD DECISIONS ON MY BEHALF?

You can consider appointing a monitor. A monitor has the legal right to access the agent's records and to oversee the agent's actions. For example, they can compel the agent to show all receipts or transactions made by the agent

on behalf of the principal. A co-agent or successor agent also has the authority to review a co-agent's or predecessor agent's records of transactions made on behalf of the principal.

If you appoint a monitor, you can decide how often you would like the agent to report to the monitor. For example, you can limit the agent to providing annual reports to the monitor by using language such as, "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 broad powers or limit their ability to a specific type of transaction, such as banking transactions. In the Power of Attorney "statutory short form" under section (f), the Grant of Authority section, you will see a list of "powers" that you can authorize your agent to do for you. Although the short form has only two or three words about each power, the full definition under New York State law covers several pages. You should initial the powers you want your agent to have (do not use a check mark or X).

These are some of the powers listed on the 2021 Statutory Short Form Power of Attorney you can authorize your agent to do for you:

- * real estate transactions
- * bond, share and commodity transactions
- * banking transactions
- * business operating transactions
- * insurance transactions
- * estate transactions
- * claims and litigation
- * personal and family maintenance, which allows the agent to make gifts of up to \$5000 in a calendar year (increases gifting limit from \$500 to \$5,000)
- * benefits from governmental programs or civil or military service
- * financial matters related to health care, records, reports and statements (change in language from health care billing and payment matters; records, reports, and statements)
- * retirement benefit transactions
- * tax matters

You can also choose to allow your agent to **delegate** any or all the powers you gave them 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.

You do not need to authorize your agent to act in every area included in the statutory short form list; however, you should consider who will be able to make your financial decisions if other needs develop. Please contact an attorney if you have questions about which powers to authorize. For example, in addition to the authority to write checks for you, 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.

CAN MY AGENT MAKE GIFTS ON MY BEHALF?

The 2021 Power of Attorney law allows you to authorize your agent to continue making gifts to charities, friends, family members, or others, including your agent, if you have made such gifts in the past. This is limited to a total of \$5,000 per calendar year. To authorize this, you should initial subsection (I) "personal and family maintenance" in the statutory short form.

If you want your agent to be able to give gifts above the \$5,000 annual limit, you must initial section (g) Certain Gift Transactions and provide more details about the gifting powers in the Modifications section. If the ability to give gifts above the \$5,000 annual limit is not needed, the principal should write "Intentionally Omitted" for section (g) Certain Gift Transactions.

In the 2009 and 2010 versions of the Statutory Short Form Power of Attorney, either a “Statutory Major Gifts Rider” (SMGR) or “Statutory Gifts Rider” (SGR), respectively, was required to give larger gifts. Previous Power of Attorney forms with either SMGR or SGR forms included are still valid if they were valid when they were signed. Powers of attorney signed before 2009 have other provisions regarding gifting. You should make sure that these provisions meet your needs.

WHAT IF I WANT TO AUTHORIZE MY AGENT TO DO OTHER THINGS OR BE MORE SPECIFIC?

You can include more specific instructions in the “**Modifications**” section of the Power of Attorney document. You can add modifications to include authorization to do other things not included in the list, as long as they are consistent with ones already stated.

WHAT IF I DON'T WANT TO AUTHORIZE GIFTS, MONITORING OR OTHER MODIFICATIONS LISTED IN THE STATUTORY SHORT FORM?

If you don't want to use the optional sections in the Power of Attorney “Statutory Short Form”, like Certain Gift Transactions, Designation of Successor Agent(s), Designation of Monitor(s), or Modifications, you should replace those sections with the words “Intentionally Omitted”. Please note that the section regarding compensation is not optional because your agent is entitled to reimbursement for reasonable expenses, such as postage for mailing a letter on your behalf. Your agent is not entitled to additional compensation without explicit permission included in the Modifications section, though.

WHAT IF I WANT TO MAKE CHANGES?

You are only allowed to make these changes before you sign the document. After the document is signed, you cannot change it by making handwritten marks on the document.

CAN MY AGENT MAKE HEALTH CARE DECISIONS FOR ME?

A Power of Attorney does not authorize someone to make medical or health care decisions for you. For someone to make health care decisions for you when you cannot do so yourself, you should consider filling out a Health Care Proxy or a Living Will.

An agent with authorization to address “financial matters related to health care; records, reports and statement” has a right to “protected health information” so that the agent can pay the principal’s health care bills.

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 modify your Power of Attorney to take effect only after a certain date or after a certain event (such as you getting sick). 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 for your Power of Attorney to become effective. Please keep in mind that this may cause a delay in your agent’s ability to act and may prevent your agent from making decisions quickly.

HOW DO I MAKE A POWER OF ATTORNEY? DO I HAVE TO USE THE STATUTORY SHORT FORM POWER OF ATTORNEY?

No. You can use a separate document so long as it **substantially conforms** to the Power of Attorney statutory short form. The language in your Power of Attorney should be essentially the same as, but is not required to be identical, to the statutory short form. Do not use the old statutory short form to execute a new Power of Attorney because the old document likely does not substantially conform to the new Power of Attorney. (Note that this is different from having a grandfathered Power of Attorney).

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)
- Substantially conform to the wording of the “Caution to the Principal” statement found in the statutory short form
- Substantially conform to the wording of the “Important Information for the Agent” statement found in the statutory short form
- Be signed, initialed and dated by a principal with capacity, in the presence of notary public and two disinterested witnesses
- Be signed and dated by an agent in the presence of a notary public.

WHO NEEDS TO BE PRESENT TO SIGN?

The principal, a notary public, and two disinterested witnesses should be present when the principal signs the form. One of the witnesses can be the notary public notarizing the Power of Attorney. The agent must also sign in the presence of a notary public. The agent is not required to sign at the same time as the principal.

DO I HAVE TO FILE MY POWER OF ATTORNEY ANYWHERE?

No. You are not required to file your Power of Attorney unless you are using it for a real estate transaction. You can file a copy with the County Clerk’s Office for a fee if you would like to be sure you can obtain copies if needed. Your agent must be able to present an original form or certified copy to present to third parties when taking actions on the principal’s behalf.

IS MY POWER OF ATTORNEY VALID IN NEW YORK IF IT WAS EXECUTED IN ANOTHER STATE?

As long as your Power of Attorney was signed and executed in accordance with the other state’s laws, New York law accepts the out of state Power of Attorney.

WILL MY AGENT BE PAID FOR ACTING FOR ME?

Your agent is entitled to be reimbursed from your assets for reasonable expenses incurred on your behalf. For example, the agent would be entitled to reimbursement for postage if they mailed an envelope on the principal’s behalf. In addition to reimbursement, you can also provide the agent compensation for their time by including that in section (h), Modifications. You can state that your agent is to receive “reasonable compensation”, or you can be more specific in setting a compensation rate (for example, hourly, monthly, or yearly). By defining what reasonable compensation is, you may avoid misinterpretation and conflict.

WHAT HAPPENS IF MY AGENT STEALS FROM ME?

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. If your agent breaches this fiduciary duty, you could bring a lawsuit against them 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. If you have capacity, you can revoke the Power of Attorney at any time. You can also consider contacting law enforcement.

CAN I REVOKE MY POWER OF ATTORNEY?

Yes, if you have the capacity to do so. You may revoke the Power of Attorney by delivering a written, dated, signed and notarized document to the agent(s). You should also give a copy of the revocation to any third party that you have reason to believe has received, retained or acted upon the Power of Attorney, such as a bank you have an account with. If the Power of Attorney was recorded in the County Clerk’s office, the revocation also must be recorded. Like the 2010 Power of Attorney Statutory Short form, unless you specify otherwise, the execution of a 2021 Power of Attorney Statutory Short form does not revoke a previous Power of Attorney.

HOW LONG WILL MY POWER OF ATTORNEY LAST? WILL IT EXPIRE?

Unless you state otherwise, a Power of Attorney is durable. That means that the Power of Attorney remains effective if the principal loses capacity. You can set an expiration date for your Power of Attorney if you wish. Generally, the Power of Attorney lasts until:

- 1) the principal dies
- 2) the principal becomes incapacitated (ONLY if the Power of Attorney is not durable, which means there is language in the document that states the Power of Attorney is no longer effective if the principal becomes unable to make decisions for themselves)
- 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 able or willing to serve
- 5) the agent dies, becomes incapacitated or resigns and there is no named co-agent or successor agent, or no co-agent or successor agent able or willing 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 able or willing to serve
- 7) the purpose of the Power of Attorney is accomplished, or
- 8) a court order revokes the Power of Attorney

You should review your form every few years to make sure your Power of Attorney addresses your specific needs.

WHAT HAPPENS TO MY POWER OF ATTORNEY WHEN I DIE?

Your Power of Attorney is not effective after your death. 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, the executor named in your will would handle your estate matters. If you do not have a will, then someone can volunteer or be appointed to administer your estate.

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 in 2009, 2010, and most recently in 2021. The new law no longer requires that power of attorney include the identical or exact wording of specific cautions and instructions, but it still must “substantially conform” to the wording of law. Do not use older statutory short forms as they likely do not substantially conform to the wording of the 2021 Power of Attorney law.

I AM MARRIED. IF MY WIFE BECOMES DISABLED, DO I HAVE THE AUTHORITY TO MAKE DECISIONS FOR HER?

Not necessarily. Courts have found that an agency between spouses “is not to be implied from the mere fact of marriage.” However, if your spouse showed some “affirmative act” to demonstrate that they wanted you to conduct a transaction for them, then you could have some implied authority. Keep in mind that this is not necessarily a guaranteed form of authority.

I GAVE MY BANK PERMISSION TO ALLOW MY DAUGHTER TO MAKE MY TRANSACTIONS. DO I STILL NEED A GENERAL POWER OF ATTORNEY?

You may have added your daughter to your bank account “for convenience only.” This means that your daughter can deposit and withdraw money from your bank account. Whether you need a Power of Attorney in addition to 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 account, such as to contact Social Security or a medical insurer, you should consider a Power of Attorney.

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. A Power of Attorney document is effective when it has been executed properly. 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 an agent you can trust. Agents are required to keep a record of all transactions made on the principal's behalf. If you have concerns about your agent's actions, you can request an accounting to review all the transactions made on your behalf.

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, regardless of who deposited the money. If a joint owner withdraws more than his or her share, then he or she is liable to the other account holders for the amount overdrawn. So, if someone withdrew money as a joint tenant rather than as an agent under a Power of Attorney, they would be withdrawing his or her own share only. If a joint tenant withdrew more than their share, the other joint tenant or their heirs could demand the money back.

WHAT IF A THIRD PARTY, SUCH AS A BANK, REFUSES TO ACCEPT MY POWER OF ATTORNEY?

The 2021 Power of Attorney laws can penalize a third party that unreasonably rejects a valid Power of Attorney. Examples of a reasonable cause include when an agent does not provide an original or certified copy. Another example would be a third party's good faith referral to the local adult protective services unit.

A third party has ten days to either honor or reject a Power of Attorney. If the third party rejects the Power of Attorney, the reasons for rejection must be included in writing to the principal and agent(s). In its rejection letter, a third party may also request an opinion of counsel as to any matter of law concerning the power of attorney. The person requesting the opinion of counsel must include the reason for their request. The principal must provide the opinion of counsel at their own expense. If a lawyer helped you complete your Power of Attorney, you can ask them for a letter explaining that your Power of Attorney complies with the law.

There is no deadline for the principal to respond. However, when the third party receives a response, it must respond within seven business days to honor or finally reject the Power of Attorney. The reasons for rejection must be given in writing.

If a third-party refuses to accept a valid Power of Attorney, a party may bring a special proceeding before Supreme Court. If the Court finds the rejection of the Power of Attorney was unreasonable, the Court may award damages, including attorney's fees, to the principal.

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