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SO NOW YOU ARE AN AGENT UNDER FINANCIAL POWER OF ATTORNEY

So now you are an agent under financial power of attorney?

You have recently learned that you have been designated as an agent under a Financial Power of Attorney, also known as a General Power of Attorney or Durable Power of Attorney. You probably have many questions about your new role. What are your duties and responsibilities? What are your powers? What are your liabilities? This brochure is intended as a general guide for agents. You must read the power of attorney document. If you have more detailed questions about your role as an agent, you should consult an experienced elder law or probate attorney.

An agent, also referred to as an “attorney in fact,” is a person designated by another to manage the other person’s financial affairs. The person making the agent designation is called the “principal.”

The role of an agent is a voluntary role. You are not required to serve. However, if you choose to take any actions as agent, you will have important duties and responsibilities to the principal.

A Financial Power of Attorney is different than a Medical Power of Attorney. While a Medical Power of Attorney generally gives an agent the authority to make medical and personal care decisions on behalf of the principal, a Financial Power of Attorney gives an agent authority to manage the principal’s finances and property, and to transact business on behalf of the principal.

When does a power of attorney take effect?

The terms of a power of attorney will determine when it takes effect. In general, a power of attorney may take effect in two different ways. The first is referred to as a “springing power,” which means that the power of attorney will take effect only when an event described in the document takes place. Typically, that would occur when one or two licensed physicians who have examined the principal determine that the principal is incapacitated. The second type is a “standing power,” which takes effect as soon as it is signed by the principal. It is important for you to read the document to determine when the power of attorney takes effect.

The information provided in this document is meant for the sole use of Active Duty service members, retirees, their families, and those individuals eligible for legal assistance. The information is general in nature and meant only to provide a brief overview of various legal matters. Rights and responsibility vary widely according to the particular set of circumstances in each case. Laws can vary across states, services, and civilian jurisdictions and laws are changed from time to time. Do not rely upon the general restatements of background information presented here without discussing your specific situation with a legal professional.

What is your authority?

Your authority comes from state law and from the power of attorney document, which describe your duties and powers. Read the document with care and from time to time read it again. It may contain specific provisions that take precedence over the general rules in this pamphlet. Does a power of attorney take away a principal's rights?

A power of attorney does not take away the principal's rights to make decisions. As agent you have the power to act, along with the principal, according to the document. Only a court, through a guardianship and/or conservatorship proceeding, can take away the principal's rights to act on his or her own.

Can a principal change his or her mind?

A principal may change his or her mind and revoke a power of attorney at any time, unless a court says otherwise. All the principal needs to do to revoke a power of attorney is send a letter to the agent notifying the agent that the appointment has been revoked. From the moment you, the agent, receive a revocation letter from the principal, you can no longer act under the power of attorney. However, if the principal named a successor agent in the document, the power of attorney remains in effect for the successor agent.

What is your responsibility to the principal?

Your role as an agent under power of attorney is serious business and should not be taken lightly. You have an obligation to make decisions based upon the preferences of the principal and the authority granted in the document. You may not override the wishes of the principal. In general, you have authority to do whatever the principal may do except as expressly limited in the power of attorney. When you are transacting business on behalf of the principal, you must use the principal's finances as the principal would use them for the principal's own benefit. If you are unsure about your responsibilities, you should consult an experienced elder-law or estate-planning attorney, possibly at the principal's expense.

You must keep the principal's money and property separate from your own property to avoid "co-mingling." If accounts are retitled, you should title them in "[your name] as agent for [the principal]," rather than as a joint owner. This should also make it easier for you to track spending and prepare the required records discussed below. Record-keeping is required unless special instructions in the power of attorney state otherwise. You should try to avoid writing checks to "cash" or to yourself, but, if you do, be sure to keep careful records of the items and/or services purchased with the principal's funds. The assets you are managing must be readily identifiable as belonging to the principal and should be kept separate from your property.

You have a responsibility to preserve the principal's estate plan. This means that you should be familiar with the principal's estate plan, if possible, and should consider it, especially when handling any joint accounts, life insurance, trusts, retirement accounts, or property specifically given to a named person in the principal's will.

An agent may not revoke or amend a trust which is revocable or amendable by the principal, unless the power of attorney gives an agent authority to do so.

Should I keep any records?

As agent, you are required to keep detailed records of your actions under the power of attorney so that you are able to answer any questions raised by the principal or other interested persons. These records must include all receipts, documents, disbursements and significant actions taken by you as agent. As agent, you are required by law to provide an accounting to the principal and anyone else designated to receive an accounting. When you manage finances as an agent, you must maintain separate accounts. An agent should never co-mingle or combine the agent's own funds with those of the principal. You must keep complete and accurate records.

Can the principal or a court hold me liable for my actions as agent?

An agent is a "fiduciary," which means the agent must act with the highest degree of good faith on behalf of the principal. As agent, you must follow the lawful instructions given by the principal. If the principal's wishes are not specific, you should do what is in the best interests of the principal. As agent, you must act in accordance with the principal's best interests, not your interests.

When you are an agent under a Financial Power of Attorney, the law holds you to the "prudent person rule," which means that you must exercise "due care" and manage the principal's funds not as if they were your funds, but with the care needed for managing the funds of another. As agent, you should avoid speculative investments, even if you would be willing to take more risk with your personal funds. If an agent fails to act in accordance with these standards, or in the principal's best interests, the agent can be held liable for his or her actions.

Can an agent be reimbursed for expenses and compensated for work?

An agent may be reimbursed for expenses reasonably incurred and receive reasonable compensation for his or her work, unless the document states otherwise. "Reasonable" in this context means what is necessary and appropriate, depending on the nature and circumstances of the work or expense involved. If an agent seeks compensation, he or she should keep a log detailing the work performed, time spent and date.

How does an agent resign?

An agent may resign according to the terms and conditions stated in the power of attorney. The agent must notify, in writing, the principal, the guardian and / or conservator (if any), any successor agent named in the document and third parties as required by law. However, if the principal is incapacitated and there is no successor agent available, the agent should take steps to assure that a responsible person will take his or her place as the decision maker for the principal.

What is a successor agent?

A successor agent is the person named to serve as a backup agent if the first person named as agent cannot serve due to death, incapacity, resignation or refusal to act. If a named individual is unable or unwilling to serve as agent, the next person in line under the document becomes the agent. No one can take over as an agent under a power of attorney unless the principal names a successor agent (or agents) in the document, or if the document authorizes the agent to appoint a successor agent. If this cannot be done, and the principal has become incapacitated, it may be necessary to petition the court for appointment of a guardian and/or conservator.

What is Colorado's new power of attorney law?

Colorado adopted a new law governing financial powers of attorney, effective January 1, 2010. The following are important changes to the law that affect agents:

You may not take the following actions unless the power of attorney document expressly states that you may do so:

1. Make a gift of the principal's property to anyone
2. Create or change survivorship rights to the principal's property (including joint tenancy ownership rights)
3. Create or change beneficiary designations (including pay on death beneficiary designations)

Even if the power of attorney document authorizes you to take any of these actions, if the principal is not your parent, grandparent, spouse, sibling or child, you may not use your authority to make gifts for your benefit or for the benefit of your dependents or to change survivorship rights or beneficiary designations for your benefit or for the benefit of your dependents.

Certain people are entitled to petition a court to review your conduct as agent, including

1. the principal and you as agent
2. a guardian or conservator
3. someone authorized to make healthcare decisions for the principal
4. the principal's spouse, parent or descendant
5. an heir of the principal
6. a beneficiary of the principal or of a trust created by the principal
7. a governmental agency with regulatory authority to protect the welfare of the principal
8. the principal's caregiver or another person with demonstrated interest in the welfare of the principal
9. a person asked to accept the power of attorney

If the power of attorney does not provide a method for your resignation, you may resign by giving notice to the principal, and if the principal is incapacitated, by giving notice to the guardian or conservator if one has been appointed and to a co-agent or successor agent, if there is one. If the principal is incapacitated and there is no guardian, conservator, co-agent or successor agent, you may resign by giving notice to the principal's caregiver, another person you reasonably believe has sufficient interest in the welfare of the principal, or to a governmental agency having authority to protect the principal.

Words of Caution

This brochure cannot and does not attempt to answer every question you may have, nor does it provide you with everything you may need to know about being an agent. It is intended only to provide a simple overview of your general duties and responsibilities as an agent under power of attorney. If you have questions on how to proceed, or if you have questions about the terms or concepts used in this brochure, you should consult an experienced elder law or probate attorney before acting. Obtaining an attorney's advice before you act may help you avoid the need for more costly legal services later.

This pamphlet is published as a public service by the Colorado Bar Association. Its purpose is to inform citizens of their legal rights and obligations and to provide information regarding the legal profession and how it may best serve the community. Changes may have occurred in the law since the time of publication. Before relying on this information, consult an attorney about your individual case. More information can be found at www.cobar.org