


Understanding Powers of Attorneys and How They Can Help or Harm Clients

ERNIE REGULY

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POA's can be good but those aren't the ones that we deal with.

I said it so, now let's talk about the ones we do see, the bad ones.

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Exam Question_____

What is the MOST important thing that you must do when dealing with a Power of Attorney?

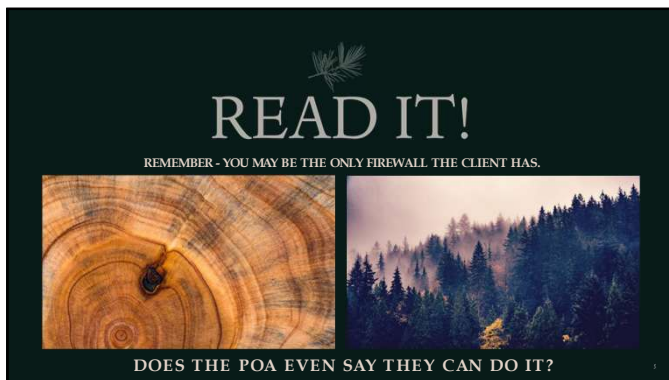




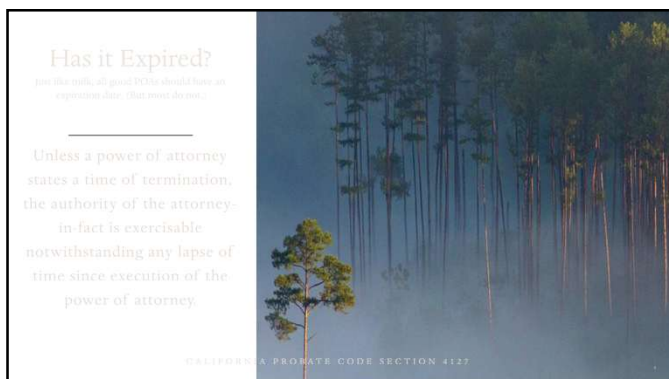
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You Can Should Say Prove It.

When requested to engage in transactions with an attorney-in-fact, a third person, before deciding any duty to comply with the power of attorney, may require the attorney-in-fact to:

1. provide identification;
2. specimens of the signatures of the principal and the attorney-in-fact; and
3. any other information reasonably necessary or appropriate to identify:
 - The principal and
 - The attorney-in-fact and
 - To determine the accuracy of the third person's transacting business with the attorney-in-fact.

A third person may require an attorney-in-fact to provide the current and permanent residence addresses of the principal before agreeing to engage in a transaction with the attorney-in-fact.

Is this a third person's RIGHT or LEGAL DUTY to verify?

CALIFORNIA PROBATE CODE SECTION 4101

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Presumption of Capacity

The Legislature finds and declares the following:

- (a) For purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions.
- (b) A person who has a mental or physical disorder may still be capable of consenting, marrying, marrying, making medical decisions, executing wills or trusts, and performing other actions.
- (c) A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder.

CALIFORNIA PROBATE CODE AND
CALIFORNIA EVIDENCE CODE AND HEALTH CARE

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It is a Judge's Decision, Based Upon Evidence.

			
Capacity	The In-Betweens	The In-Betweens	No Capacity
... to make decisions and to be responsible for their acts or decisions	Marrying? (But Grammy will spend all her money on the Wedding and Honeymoon! She must be N—ts. Right?)	Medical Decisions? Other Acts?	... so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act

WHAT ELSE CAN YOU THINK OF?

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Don't Just Believe Dr. B

Section 810(c) should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder;

and

Section 811(d): The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act.

CALIFORNIA PROBATE CODE SECTION 810 & 811
POWERS OF ATTORNEY FOR HEALTH CARE

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You Can't Change Their Religion

Nothing in this division authorizes an agent under a power of attorney for health care to make a health care decision if the principal objects to the decision. If the principal objects to the health care decision of the agent under a power of attorney, the matter shall be governed by the law that would apply if there were no power of attorney for health care. *(They still have right to refuse a life-saving blood transfusions and more.)*

CALIFORNIA PROBATE CODE 5401
POWERS OF ATTORNEY FOR HEALTH CARE

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Have They Been Fired? (It can be on the Spot!)

Revocation of Authority of the Person

(a) The AUTHORITY of an attorney-in-fact under a power of attorney may be revoked or follows:

(1) Revocation by the principal

(b) Where the principal intends the attorney-in-fact orally or in writing that the attorney-in-fact's authority is revoked, or when and under what circumstances it is revoked. This paragraph is not subject to limitation in the power of attorney.

(2) Revocation by the court

(3) Revocation by the agent

YOU ARE FIRED: This relates to the AUTHORITY of the person NOT the document. So, ask the client if what she is saying is what she wants. They have the right to make that call until a judge says otherwise.

CALIFORNIA PROBATE CODE SECTION 5411

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 **Remember!**

A POA allows another person to perform authorized acts in a Principal's name, but the Principal does NOT cease to exist, and they retain the right to continue to act in their own capacity.

The Client is still a person with legal rights who can say NO!

ASK THE CLIENT WHAT THEY WANT, PLEASE!




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PLEASE DON'T LOCK UP OUR MOMMY IN THAT AWFUL MEMORY CARE UNIT - WE CAN'T OPEN OUR FOOD

Remember!

PLEASE DON'T BECOME AN ENABLER TO THE VIOLATION OF YOUR CLIENT'S RIGHTS!



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 **They Can Be You Forever!**

PROB 4125 - All acts done by an attorney-in-fact pursuant to a durable power of attorney during any period of incapacity of the principal have the same effect and inure to the benefit of and bind the principal and the principal's successors in interest as if the principal had capacity




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What happens to me if a DPOA Expires?

1. The Court that declared them to lack capacity can appoint a conservator.
- Or
2. If the A-in-F bypassed the Court the first time they get to do things correctly this time. (Contract with Oneself).

(An A-in-F can Act, but they DO NOT have to Act. They can abandon the Principal).

CALIFORNIA PROBATE CODE SECTION 4127



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Ok, I Heard That Stuff and It Made as Much Sense as You Explaining Legal Stuff at a CARE Team Meeting.

Please Tell Me What Is a POA?




IF YOU THINK I AM BAD LISTEN TO THE OTHER ATTORNEY AT PAYC

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What is a Power of Attorney?

(Finally! - Time to Wake up Your Neighbor)

PROB 4022 - "Power of attorney" means a written instrument, however denominated, that is executed by a natural person having the capacity to contract and that grants authority to an attorney-in-fact. A power of attorney may be durable or nondurable.

PROB 4014 - (a) "Attorney-in-fact" means a person granted authority to act for the principal in a power of attorney, regardless of whether the person is known as an attorney-in-fact or agent, or by some other term.

(b) "Attorney-in-fact" includes a successor or alternate attorney-in-fact and a person delegated authority by an attorney-in-fact.

PROB 4026 - "Principal" means a natural person who executes a power of attorney.

CALIFORNIA PROBATE CODE
SECTIONS 4000 - 4545





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WHAT IS REQUIRED TO CREATE A POA?

PROB 4120 - A natural person having the capacity to contract may execute a power of attorney. - *(Remember the Presumption)*

PROB 4121 - A power of attorney is legally valid if it is signed and acknowledged as follows:

- (1) The power of attorney contains the date of its execution; +
- (2) The power of attorney is signed either (i) by the principal or (ii) on the principal's name by another adult in the principal's presence and at the principal's direction; +
- (3) The power of attorney is either: (i) acknowledged before a notary public or (ii) signed by at least TWO WITNESSES who satisfy the requirements of Section 4122.

PROB 4122 - If the power of attorney is signed by witnesses, as provided in Section 4121, the following requirements shall be satisfied:

- (1) The witnesses shall be adults;
- (2) The attorney-in-fact may not act as a witness;
- (3) Each witness signing the power of attorney shall witness either the signing of the instrument by the principal or the principal's acknowledgment of the signature or the power of attorney. - (Just say Yes Grandma - This could never be abused, Right?)



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Types of POAs – General or Limited

(a) In a power of attorney under this division, a principal may grant authority to an attorney-in-fact to act on the principal's behalf with respect to all lawful subjects and purposes or with respect to one or more express subjects or purposes. The attorney-in-fact may be granted authority with regard to the principal's property, personal care, or any other matter.

(b) With regard to property matters, a power of attorney may grant authority to make decisions concerning all or part of the principal's real and personal property, whether owned by the principal at the time of the execution of the power of attorney or thereafter acquired or whether located in this state or elsewhere, without the need for a description of each item or parcel of property.

(c) With regard to personal care, a power of attorney may grant authority to make decisions relating to the personal care of the principal, including, but not limited to, determining where the principal will live, providing meals, hiring household employees, providing transportation, handling mail, and arranging recreation and entertainment.



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Types of POAs

Springing

"Springing power of attorney" means a power of attorney that by its terms becomes effective at a specified future time or on the occurrence of a specified future event or contingency, including, but not limited to, the subsequent incapacity of the principal. A springing power of attorney may be a durable power of attorney or a nondurable power of attorney.



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Types of POAs

Durable

A durable power of attorney is a power of attorney by which a principal designates another person as attorney-in-fact in writing and the power of attorney contains any of the following statements:

- (a) "This power of attorney shall not be affected by subsequent incapacity of the principal;"
- (b) "This power of attorney shall become effective upon the incapacity of the principal;"
- (c) Similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent incapacity.



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of Conflicting POAs

(The Last One Wins But You May End Up With 2 POAs)

(a) If a principal grants inconsistent authority to one or more attorneys-in-fact in two or more powers of attorney, the authority granted last controls to the extent of the inconsistency.

(b) This section is not subject to limitation in the power of attorney.



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Revocation of POAs

- (a) A principal may revoke a power of attorney as follows:
- (1) In accordance with the terms of the power of attorney.
 - (2) By a writing. This paragraph is not subject to limitation in the power of attorney. (You can follow the form from the Sacramento Law Library.)
- (b) An attorney-in-fact or third person who does not have notice of the revocation is protected from liability as provided in Chapter 5 (commencing with Section 4300).



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[illegible][illegible]

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Must You Do What the A-in-F Says? – Maybe Not

A third person shall accord an attorney-in-fact acting pursuant to the provisions of a power of attorney the same rights and privileges that would be accorded the principal if the principal were personally present and seeking to act. However, a third person is not required to honor the attorney-in-fact's authority or conduct business with the attorney-in-fact if the principal cannot require the third person to act or conduct business in the same circumstances.

(Not shirt, no shoes no service!)



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Where Does The POA Say About Payment?

PROB 4204 – An attorney-in-fact is entitled to reasonable compensation for services rendered to the principal as attorney-in-fact and to reimbursement for reasonable expenses incurred as a result of acting as attorney-in-fact.

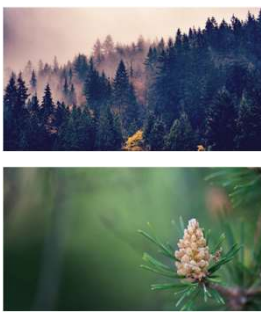
WHAT DOES THE POA SAY ABOUT PAYMENT?

 Makes Sense-Right, But ...

PROBLEM

If the principal becomes wholly or partially incapacitated, or if there is a question concerning the capacity of the principal to give instructions or to supervise the attorney-in-fact, the attorney-in-fact may consult with a person, previously designated by the principal for this purpose, and may also consult with and obtain information needed to carry out the attorney-in-fact's duties *from the principal's spouse, physician, attorney, accountant, a member of the principal's family, or other person, business entity, or government agency with respect to matters to be undertaken on the principal's behalf and affecting the principal's personal affairs, welfare, family, property, and business interests.* A person from whom information is requested shall disclose relevant information to the attorney-in-fact. Disclosure under this section is not a source of any privilege that may apply to the information disclosed. (Remember the A or F is wrong is the Principal)

SEE A PROBLEM HERE WITH AN AN ...



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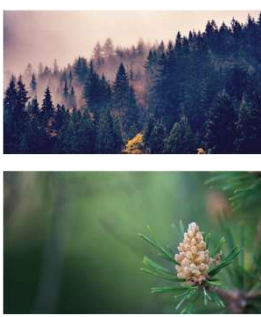
 Uniform Statutory Form Power of Attorney Act

Fill out the form / fill in the blanks correctly. You are good-to-go.

PROBLEM A statutory form power of attorney under this part is legally sufficient if all of the following requirements are satisfied:

- The wording of the form complies substantially with Section 4401. A form does not fail to comply substantially with Section 4401 merely because the form does not include the provisions of Section 4401 relating to designation of co-agents. A form does not fail to comply substantially with Section 4401 merely because the form uses the sentence, "Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation," in which case the form shall be interpreted as if it contained the sentence, "Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation."
- The form is properly completed.
- The signature of the principal is acknowledged.

EXAMPLE FORM



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 Uniform Statutory Form Power of Attorney Act

You can be rejected receiving the A or F's Statutory form power act does to fill them a form

PROBLEM (a) If a third person to whom a properly executed statutory form power of attorney under this part is presented either to bring the agent's authority under the power of attorney within a reasonable time, the third person may be compelled to bring the agent's authority under the power of attorney to an agent brought against the third person for this purpose. (b) If the third person is not the intended agent, the third person is not to be compelled to bring the agent's authority to an agent brought against the third person to act in the same circumstances. (Remember, the A or F is wrong is the Principal)

- If an action is brought under this section, the court shall accept attorney's fees to the agent if the court finds that the third person acted reasonably in refusing to accept the agent's authority under the statutory form power of attorney.
- For the purposes of subsection (b), and without limiting any other grounds that may constitute a reasonable refusal to accept an agent's authority under a statutory form power of attorney, a third person that may be deemed to have acted reasonably in refusing to accept an agent's authority if the refusal is authorized or required by state or federal statute or regulation.
- For the purpose of subsection (b), a third person is not to accept an agent's authority under a statutory form power of attorney, unless the third person has been notified in writing of the power of attorney is valid and is not provided by the third person to whom the power of attorney is presented.
- The remedy provided in this section is cumulative and nonexclusive.

EXAMPLE FORM



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 **Only If It Is Expressly Granted.**

PROB 4265 –
An attorney-in-fact under a power of attorney may perform any of the following acts on behalf of the principal or with the property of the principal, **ONLY** if the power of attorney expressly grants that authority to the attorney-in-fact.

- (1) Create, modify, revoke, or terminate a trust, or when so to part, if a power of attorney under this chapter requires the attorney-in-fact to create, modify, or revoke a trust created by the principal, the trust may be modified or revoked by the attorney-in-fact only as provided in the trust instrument.
- (2) Deal with the principal's property interest owned by the principal or a person authorized to create a trust on behalf of the principal.
- (3) Make or revoke a gift of the principal's property to any or otherwise.
- (4) Exercise the right to make, exercise, release, or consent to a release in, or modification of, either an, or personal injury, an estate, death, or other loss to behalf of the principal. This subsection does not limit the attorney-in-fact's authority to execute a document transfer to the principal with the approval of the court.
- (5) Create or change surviving interests in the principal's property to or property in which the principal may have an interest.
- (6) Acquire or change the designation of beneficiary of annuity and property interests, as contract right on the principal's death.
- (7) Make a loan to the attorney-in-fact.

PROB 4266

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 **No Authority Over Will**

PROB 4265 –
A power of attorney may not authorize an attorney-in-fact to make, publish, declare, amend, or revoke the principal's will.

(SO JUST STICK IT IN A TRUST BEFORE THEY DIE.)

PROB 4266

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 **Standard of Care and Breaches?**

PROB 4267 –
(1) Except as provided in subsection (2), in dealing with property of the principal, an attorney-in-fact shall observe the standard of care that would be observed by a prudent person dealing with property of another and acting in good faith, using ordinary prudent person's judgment.

(2) An attorney-in-fact who has special skills or expertise as designated in the power of attorney shall observe the standard of care that would be observed by others with similar skills or expertise.

PROB 4268 – An attorney-in-fact with special skills or expertise to apply the full extent of those skills. (But "What's recommended" **PROB 4269**? The one that says they do not have to act.)

PROB 4270

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**A or F Can't Always Just Quit
But Remember They Don't Have to
Act)**

PROB 407:

(a) An attorney at law that resigns by one of the following means:

- Is the principal is incompetent, the giving notice to the principal;
- If a conservator has been appointed, by giving notice to the conservator;
- The nearest appropriate of a business who is designated in the power of attorney or principal in the event of the power of attorney to occur in accordance with;
- Principal by a will or will;
- The agreement has subject to business in the power of attorney.

PROB 408:

(a) Except as provided in subsection (b), and (c), a person who is designated from business to act has no duty to exercise the authority granted in the power of attorney, and is not subject to the other duties of an attorney at law, regardless of whether the principal has become incompetent, is missing, or is otherwise unable to act.

(b) Acting for the principal to act in such transactions that are obligated to attorney at law, or as an attorney at law as a subsequent transaction for the attorney, or that is that is subject to a conservator that the attorney at law had not consented.

(c) If an attorney at law has expressly agreed in writing – by law the principal, the attorney at law has a duty to act pursuant to the terms of the agreement. This agreement to act is based on the principal is incompetent, either the principal is that is subject to a conservator of which a third person conservatorship supports a significant obligation.

EXAMPLE 1000

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A or F Accountable to Other Fiduciaries

PROB 409:

(a) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator of the estate, guardian of the estate, or other fiduciary charged with the management of all of the principal's property in all of the principal's proper capacity, the attorney at law is accountable to the fiduciary as well as to the principal.

(b) Except as provided in subsection (a), the fiduciary has the same power to revoke or amend the durable power of attorney that the principal would have had if not incapacitated, subject to any required court approval.

(c) If a conservator of the estate is appointed by a court of this state, the conservator can revoke or amend the durable power of attorney with it the court in which the conservatorship proceeding is pending has first made an order substantiating or requiring the fiduciary to modify or revoke the durable power of attorney and the modification or revocation is in accord with the order.

(d) This section does not subject to business in the power of attorney.

EXAMPLE 1000

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**A Certified Copy Is As Good As The Original
Ugh!**

PROB 410:

(a) A copy of a power of attorney certified under this section has the same force and effect as the original power of attorney.

(b) A copy of a power of attorney may be certified by any of the following:

- An attorney authorized to practice law in this state. (Bad: yes. I'm an attorney)
- A notary public in this state. (Worse than Bad)
- An official of a state or of a political subdivision who is authorized to make certifications. (A politician? No comment)

(c) The certification shall state that the certifying person has examined the original power of attorney and the copy and that the copy is a true and correct copy of the original power of attorney.

(d) Nothing in this section is intended to create an implication that a third person may be liable for acting in good faith reliance on a copy of a power of attorney that has not been certified under this section.

EXAMPLE 1000

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Buy It On Amazon Or
Go To Hallmark.
(\$8.99 to \$29.99 -
What could go
wrong?)

(WHAT YOU MEAN, SHE'S OWNERS IS
WRONG, AND IT WON'T TALK?)



(a) Subject to subdivision (b), a printed form of a durable power of attorney that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall contain, in not less than 10-point boldface type or a reasonable equivalent thereof, the following warning statements:

(b) Nothing in subdivision (a) invalidates any transaction in which a third person relied in good faith on the authority created by the durable power of attorney.

(c) This section does not apply to a statutory form power of attorney under Part 3 (commencing with Section 4400).

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Thank you

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ESQ. MEANS I REALLY AM A LAWYER



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