

NORTHERN CALIFORNIA POWERS OF ATTORNEY AND YOUR ESTATE PLAN

*Many Estate Plans Employ More Than
One Power of Attorney, and Knowing How These
Documents Work Is Essential If You Plan On Using Them*

ESTATE PLAN

- * Administrative Instructions
- * Document Signature Instructions
- * Living Trust Agreement
- * Pour-Over Wills
- * Community Property Agreement
- * Durable Powers of Attorney and Property

TIMOTHY P MURPHY

NORTHERN CALIFORNIA CENTER FOR ESTATE PLANNING AND ELDER LAW

One of the key documents in any good estate plan is a properly drafted power of attorney. Many estate plans employ more than one power of attorney, and knowing how these documents work is essential if you plan on using them.

PRINCIPALS AND AGENTS



A power of attorney is a document in which you, the principal, give another person the right to make decisions on your behalf, or otherwise represent your interests. The person whom you select as your representative is called your agent or your attorney-in-fact. The power of attorney document creates what is known as a principal—agent relationship, where the agent has the legal duty to do what is in the principal’s best’s interests.

To create a power of attorney you have to be a capable adult of sound mind. You are never under any legal obligation to create a principal—agent relationship, nor do you have to accept the offer to serve as someone’s agent. Powers of attorney are entirely voluntary, and as long as you remain mentally capable you can modify them whenever you like.

ATTORNEYS IN POWERS OF ATTORNEY

The term “power of attorney” is often a confusing one to people who have not used these documents in the past. Any capable adults can create a power of attorney. You don’t need to be a lawyer, also known as an attorney at law, or have any kind of legal training to either create these documents or use them.



While it’s a good idea to have a lawyer prepare the power of attorney document for you so you can be sure it contains what you want it to contain and meets all California legal requirements, powers of attorney otherwise have nothing to do with lawyers or the ability to practice law.

The same goes for the person you choose as your attorney-in-fact. You do not have to choose a lawyer to represent your interests, nor does the person whom you select gain the ability to practice law if you name that person as your agent under a power of attorney.

TYPES OF POWERS

No two powers of attorney are identical, and understanding the different types available to you as you create your estate plan is essential if you want to use these documents. There are several different types or categories of powers of attorney you need to know about.

- **Subject Matter-Specific Powers.** As a principal you have the right to delegate your decision-making authority to others. You also have the right to limit what kinds of powers you transfer. Powers of attorney typically come in two different types, each of which is limited by subject matter: financial powers and health care powers. Financial powers of attorney give your agent the ability to manage your property and look after your financial affairs. On the other hand, health care powers give your agent the ability to make medical decisions for you when you are no longer capable of making them yourself. (In California, medical or health care powers of attorney are included as a part of a statutorily authorized California Advance Health Care Directive.)
- **Durable Powers.** Another way to differentiate between different powers of attorney is by identifying when they terminate. With a general power of attorney, a principal retains the ability to revoke or modify powers of



attorney for as long as he or she is mentally capable. Once the principal loses the ability to make choices and can no longer choose to revoke a power of attorney, those powers are automatically revoked. On the other hand, if you create a **durable** power of attorney, your agent retains the ability to act for you even if you become incapacitated. Durable powers are especially important if, for example, you want someone to manage your affairs if you become seriously ill or injured.

- **Springing Powers.** Many people create powers of attorney that take effect immediately, giving the agent the ability to make decisions on your behalf as soon as you sign the document. Other people, however, don't want the agent to be able to act immediately. In this situation you can create what is known as a springing power of attorney. A springing power, as its name implies, takes effect or "springs" into effect only if some condition is met. For example, you might create a springing power of attorney that only gives your agent decision-making abilities if you become seriously ill or injured. Such powers typically include provisions that give the agent the ability to sign a written declaration declaring under penalty of perjury that the necessary conditions have been met.
- **General or Limited Powers.** When you grant power of attorney you have to decide what kind of powers you want your agent to have. A general power of attorney typically gives your agent the broadest possible powers you can transfer. You essentially give your agent all your decision-making rights when you create a general power of attorney. Any power of attorney that limits the kinds of decisions your agent gets to make is known as a limited power. Some limited powers are still very broad, while

others can be limited to very specific actions or decisions, or even limited by location or time period.

USING POWERS OF ATTORNEY CORRECTLY

By their nature, powers of attorney are very powerful documents that you must use carefully. Con artists and other criminals can sometimes try to convince people to sign over their decision-making authority by presenting them with powers of attorney. Once granted, the criminals can then take advantage of their newfound powers.

Before you create, sign, or use any power of attorney, you need to understand your rights and obligations under these legal documents. Always first talk to an experienced and qualified estate planning lawyer whenever you have a question or need advice about powers of attorney. Never try to create a power of attorney on your own, and it would be prudent to have a review of any document you're asked to sign by your attorney before, not after, you do so.

About the Author



Timothy P Murphy

Timothy P. Murphy is an estate planning and elder law attorney whose practice emphasizes helping people to build, preserve and pass on their wealth. He works with his clients to accomplish their goals while avoiding unnecessary court proceedings and minimizing or eliminating exposure to death taxes. Mr. Murphy also assists families facing the myriad of problems associated with dealing with a loved one's declining health and rising needs for care. He has practiced law in the Sacramento area for 29 years, first with a large firm, and then with his own firm since 1987.

Tim has written a regular column on legal issues for Senior Magazine. He also was a regular featured guest on the Money Experts radio program heard locally on KFBK (AM 1530). Tim has been featured in the Sacramento Bee, Sacramento Business Journal, Sacramento Magazine, Comstock's Magazine and other publications on estate planning and related topics. He also assisted local Channel 3 (KCRA) in an investigative report on the trust mill problem in the Sacramento area and was featured on Channel 10 (KXTV) in its series on personal financial planning.

Northern California Center for Estate Planning and Elder Law

www.norcalplanners.com

SACRAMENTO

2277 Fair Oaks Boulevard

Suite 150

Sacramento, CA 95825-5599

Phone: (916) 437-3500

ROSEVILLE

3017 Douglas Blvd.

Ste. 300

Roseville, CA 95661

Phone: (916) 437-3500