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Power of Attorney Handbook

- ✓ Different Uses of Powers of Attorney
- ✓ Limited Power of Attorney
- ✓ “Do Not Resuscitate” Orders
- ✓ Living Wills

Edward A. Haman
Attorney at Law

5th edition

POWER OF ATTORNEY HANDBOOK

Fifth Edition

Edward A. Haman
Attorney at Law



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USING SELF-HELP LAW BOOKS

Before using a self-help law book, you should realize the advantages and disadvantages of doing your own legal work and understand the challenges and diligence that this requires.

The Growing Trend

Rest assured that you won't be the first or only person handling your own legal matter. For example, in some states, more than seventy-five percent of divorces and other cases have at least one party representing him or herself. Because of the high cost of legal services, this is a major trend and many courts are struggling to make it easier for people to represent themselves. However, some courts are not happy with people who do not use attorneys and refuse to help them in any way. For some, the attitude is, "Go to the law library and figure it out for yourself."

We at Sphinx write and publish self-help law books to give people an alternative to the often complicated and confusing legal books found in most law libraries. We have made the explanations of the law as simple and easy to understand as possible. Of course, unlike an attorney advising an individual client, we cannot cover every conceivable possibility.

Cost/Value Analysis

Whenever you shop for a product or service, you are faced with various levels of quality and price. In deciding what product or service to buy, you make a

cost/value analysis on the basis of your willingness to pay and the quality you desire.

When buying a car, you decide whether you want transportation, comfort, status, or sex appeal. Accordingly, you decide among such choices as a Neon, a Lincoln, a Rolls Royce, or a Porsche. Before making a decision, you usually weigh the merits of each option against the cost.

When you get a headache, you can take a pain reliever (such as aspirin) or visit a medical specialist for a neurological examination. Given this choice, most people, of course, take a pain reliever, since it costs only pennies; whereas a medical examination costs hundreds of dollars and takes a lot of time. This is usually a logical choice because it is rare to need anything more than a pain reliever for a headache. But in some cases, a headache may indicate a brain tumor and failing to see a specialist right away can result in complications. Should everyone with a headache go to a specialist? Of course not, but people treating their own illnesses must realize that they are betting on the basis of their cost/value analysis of the situation. They are taking the most logical option.

The same cost/value analysis must be made when deciding to do one's own legal work. Many legal situations are very straight forward, requiring a simple form and no complicated analysis. Anyone with a little intelligence and a book of instructions can handle the matter without outside help.

But there is always the chance that complications are involved that only an attorney would notice. To simplify the law into a book like this, several legal cases often must be condensed into a single sentence or paragraph. Otherwise, the book would be several hundred pages long and too complicated for most people. However, this simplification necessarily leaves out many details and nuances that would apply to special or unusual situations. Also, there are many ways to interpret most legal questions. Your case may come before a judge who disagrees with the analysis of our authors.

Therefore, in deciding to use a self-help law book and to do your own legal work, you must realize that you are making a cost/value analysis. You have decided that the money you will save in doing it yourself outweighs the chance that your case will not turn out to your satisfaction. Most people handling their own simple legal matters never have a problem, but occasionally people find that it ended up costing them more to have an attorney straighten out the situation than it would have if they had hired an attorney in the beginning. Keep

this in mind if you decide to handle your own case, and be sure to consult an attorney if you feel you might need further guidance.

Local Rules

The next thing to remember is that a book which covers the law for the entire nation, or even for an entire state, cannot possibly include every procedural difference of every county court. Whenever possible, we provide the exact form needed; however, in some areas, each county, or even each judge, may require unique forms and procedures. In our *state* books, our forms usually cover the majority of counties in the state, or provide examples of the type of form that will be required. In our *national* books, our forms are sometimes even more general in nature but are designed to give a good idea of the type of form that will be needed in most locations. Nonetheless, keep in mind that your *state*, county, or judge may have a requirement, or use a form, that is not included in this book.

You should not necessarily expect to be able to get all of the information and resources you need solely from within the pages of this book. This book will serve as your guide, giving you specific information whenever possible and helping you to find out what else you will need to know. This is just like if you decided to build your own backyard deck. You might purchase a book on how to build decks. However, such a book would not include the building codes and permit requirements of every city, town, county, and township in the nation; nor would it include the lumber, nails, saws, hammers, and other materials and tools you would need to actually build the deck. You would use the book as your guide, and then do some work and research involving such matters as whether you need a permit of some kind, what type and grade of wood are available in your area, whether to use hand tools or power tools, and how to use those tools.

Before using the forms in a book like this, you should check with your court clerk to see if there are any local rules of which you should be aware, or local forms you will need to use. Often, such forms will require the same information as the forms in the book but are merely laid out differently, use slightly different language, or use different color paper so the clerks can easily find them. They will sometimes require additional information.

**Changes in
the Law**

Besides being subject to state and local rules and practices, the law is subject to change at any time. The courts and the legislatures of all fifty states are constantly revising the laws. It is possible that while you are reading this book, some aspect of the law is being changed or a court is interpreting a law in a different

way. You should always check the most recent statutes, rules and regulations to see what, if any changes have been made.

In most cases, the change will be of minimal significance. A form will be redesigned, additional information will be required, or a waiting period will be extended. As a result, you might need to revise a form, file an extra form, or wait out a longer time period; these types of changes will not usually affect the outcome of your case. On the other hand, sometimes a major part of the law is changed, the entire law in a particular area is rewritten, or a case that was the basis of a central legal point is overruled. In such instances, your entire ability to pursue your case may be impaired.

To help you with local requirements and changes in the law, be sure to read the section in Chapter 3 on “Legal Research.”

Again, you should weigh the value of your case against the cost of an attorney and make a decision as to what you believe is in your best interest.

INTRODUCTION

This book is designed to enable you to prepare your own power of attorney without hiring a lawyer. It will explain the different types of powers of attorney, guide you in deciding which type you need, and show you how to prepare it. Be sure to read the previous section on “Using Self-Help Law Books.”

The difficulty in covering any area of law on a national scale is that the law is different (and ever changing) in each state. However, the general type of information found in most powers of attorney is very similar in each state. Appendix A of this book will give you some information about the specific laws of your state. Many states have officially approved forms. These forms and forms for use in states without official forms are located in Appendix C.

The old saying that knowledge is power is especially true in the law. This book will give you a fair amount of that knowledge. By reading this book, you will be able to know as much about powers of attorney as most recent law school graduates. If you become unsure at any time, Chapter 2 will help you work with a lawyer.

Read this entire book (including the listing for your state in Appendix A) before you prepare any papers. This will give you the information you need to decide what forms you need, and how to fill them out. You may also want to visit your local law library to get more information. Chapter 3 will help you with this.

To complete the necessary forms, you will need to use the general instructions in the main part of this book, consult the listing for your state in Appendix A, and use the information from any additional reading and research you do. Chapter 1 is a general overview, while Chapters 4 through 6 are more specific. Many of the official state forms also contain detailed instructions and valuable information. If you need to refer back to this book for answers to specific questions, use the table of contents, the glossary, and the index to help locate the answers you need.

I

POWERS OF ATTORNEY, GENERALLY

A *power of attorney* is simply a paper giving another person (the *agent*) the legal authority to represent you and act on your behalf. This is necessary when some third person is asked to rely on that authority.

In the case of *financial matters*, this third party could be a bank, utility company, securities and investment broker, insurance company, mortgage lender, a company that provides materials or services to a business you own; or numerous other individuals, business entities, or government agencies with whom you conduct personal or professional business.

In the case of *health care matters*, this third party could be various types of health care providers such as doctors, hospitals, physical therapists, dentists, and home health agencies.

Of course, a power of attorney is not necessary every time someone does something for you.

Example: If you ask me to get a gallon of milk for you from the supermarket, I can do it without a power of attorney. I will be paying for it with cash at the time I get it and the grocer has no concern about our arrangement.

It is an entirely different matter, however, if you ask me to go to your bank and borrow \$5,000 in your name. The bank will want to be sure that you are legally obligated to repay the loan, and they will not just take my word for it. The bank will want to protect itself, so it will require some kind of proof that you have authorized me to obligate you to repay the money. A power of attorney could provide the bank with the assurance it needs.

NOTE: *To understand a power of attorney, it is necessary to know a few terms. Most terms will be defined throughout this book. These terms are also included in the Glossary.*

Uses of Powers of Attorney

In general, you need a power of attorney whenever you want someone else to act on your behalf in a matter of legal significance.

Finances

You need a *financial power of attorney* any time you want someone else to conduct business for you. This may be necessary if you need to conduct business long-distance or if you want your spouse or another family member to be able to conduct your business if you become physically or mentally unable to do so. Of course, some ability to act on your behalf can be created through *joint* bank accounts and brokerage accounts, but this will not work with all types of property. Furthermore, adding someone to your account can create other types of legal and tax problems that do not arise with a power of attorney.

Example 1: Adding your spouse to the account may change presumptions about whether it is separate or joint property in the event of divorce.

Example 2: Adding a child to your account might be considered by the IRS as a gift, subjecting the *transaction* to the federal gift tax.

Health Care

You need a *health care power of attorney* if you want someone else to be able to make decisions about your health care in the event you are unable to make, or communicate, such decisions.

Child Care If you are sending your child to live with someone else, either on a long-term basis or for a week or two, it may be a good idea to give that person the authority to make certain decisions regarding your child. This will typically include authority relating to whatever purpose you have in sending your child to live with the other person, as well as authority to make decisions in emergency situations.

Avoiding Guardianship One important reason to have a power of attorney is to avoid having to go through a *guardianship proceeding* in the event you become incapacitated. A *durable financial power of attorney* and a *health care power of attorney* can allow someone you trust to take care of your affairs immediately in the event of your incapacity. Without these documents, it will be necessary for someone to hire a lawyer (ultimately at your expense) and go through a court proceeding in order to be able to carry on your affairs by being named a guardian. The expenses of a guardianship reduces the assets available to be used on your behalf.

Being named a guardian places additional burdens upon that person. While an *agent* under a power of attorney does owe a duty to act in the *principal's* (your) best interest, the agent is relatively free to conduct business and account for his or her actions as he or she thinks appropriate. With a guardianship, the guardian is under the continued observation of the court. The guardian must provide a specific type of *accounting* to the court on a periodic basis and may need to first get the judge's permission to do certain things.

You as the Agent

All of the situations above focus on you giving someone else authority to act for you. However, there is one common situation where you need to suggest to someone that he or she give you (or some other responsible person) authority.

Aging Parents Many people today are facing the prospect of caring for their aging parents. Various ailments such as stroke, Alzheimer's Disease, and Parkinson's Disease can render an elderly person unable to handle his or her financial affairs or to make intelligent, informed decisions regarding medical care.

If your parent has not become aware of the possible need for a power of attorney, it may be necessary for you to take the initiative and suggest it. Too often, by the time it becomes obvious that a power of attorney is needed, the elderly person is no longer mentally competent to make one.

Whether your parent will be willing to execute a power of attorney at your suggestion will depend upon many things. These can include:

- ✪ your parent's attitude toward powers of attorney and giving up sole control;
- ✪ their attitude about life-prolonging procedures and someone making health care decisions for them;
- ✪ your relationship with your parent; and,
- ✪ whether they are even willing to think about and discuss such issues.

It will be easiest if you have maintained a good and close relationship with your parent and have earned their trust and confidence.

You may need to consider the possible reaction of your brothers or sisters. In some families the siblings are close and on good terms, so that these matters can be discussed and agreed upon. In other families, one sibling attempting to get a parent to sign a power of attorney can be viewed by the others as trying to take advantage and get control of the money or of trying to deprive the others of their inheritance. In still other families, it is like pulling teeth to get any siblings to share in the responsibility of caring for an elderly parent.

If you anticipate such family problems, you should still use a power of attorney. However, you may want to consider filing for *guardianship* in the long run. Even though there are many disadvantages to a guardianship proceeding, it would give you the added support of the court in the event of complaints about the decisions you are making. See the next section for a discussion of some of these disadvantages.

Questions to Ask Yourself

You also need to be prepared for the burden of serving as an agent.

- ✪ Will you be reasonably comfortable making the types of decisions that may become necessary?
- ✪ Are you confident in your ability to manage your parent's financial affairs?

- ✦ Are you emotionally equipped to deal with making tough, possibly life-and-death, medical treatment decisions?
- ✦ Are you aware of your responsibilities as an agent?

(Be sure to read the section on “Choosing Your Agent” later in this chapter, the section on “Your Agent” in Chapter 4, and the section on “Your Health Care Agent” in Chapter 5.)

Guardianship

One good reason to have a power of attorney is to avoid having to put your parent through the *guardianship* procedure. It can be a traumatic experience for an elderly person to have a sheriff’s deputy serve him or her with guardianship papers, appear in court and hear people talk about how whether he or she is incompetent, and then have to see mental health professionals for a competency examination.

Many people with Alzheimer’s Disease simply and comfortably allow a spouse, child, or other family member to take over their affairs through a power of attorney. Putting that person through a guardianship procedure might not only be expensive and traumatic to the person, but also might permanently damage the relationship with family members. There is also the very real possibility that the judge will decide a guardian is not necessary, even though it is clear to everyone who knows your parent that he or she is not able to manage without one. Now your relationship is seriously damaged and your parent is not better off than before.

Financial Power of Attorney

A *financial power of attorney* gives a person you designate the authority to act on your behalf in financial matters. This can be limited to one financial transaction, certain types of transactions, or can include all types of transactions. You will need a financial power of attorney if you want someone to be able to act for you in some or all of your financial dealings. This is usually done when you have distant or numerous financial matters to attend to and cannot be there personally to transact all of the business. Chapter 4 will discuss the financial power of attorney in more detail.

Springing Power of Attorney

Some states provide for a financial power of attorney that does not become effective until the principal becomes mentally or physically incapacitated. Such a document is called a *springing* power of attorney because it "springs" into effect upon the determination of one or more physicians that the principal has become incapacitated. This allows the principal to have a power of attorney in place for emergencies, without having to give the agent authority immediately.

(The listing for your state in Appendix A will indicate whether a springing power of attorney is permissible in your state.)

Living Trust

One alternative to a power of attorney you may want to consider is a revocable *living trust*. This is true especially if your state does not provide for a springing power of attorney. Living trusts are beyond the scope of this book, but are mentioned here so that you are aware of this alternative. A living trust is a document in which you set up a separate legal entity, called a *trust*, and designate a *trustee* to manage the property. Ownership of your property is transferred to the trust. (For example, you would execute a deed to your real estate that transfers title from you to your trust.)

A *revocable* trust is one that you can cancel at any time, and transfer the property back to your own name. An *irrevocable* trust is one in which you give up some control once you set it up. These distinctions are not important for purposes of our discussion here.

In a *revocable living trust* you can designate yourself as the trustee and provide for a successor trustee to take over in the event you become incapacitated. This accomplishes the same thing as a springing power of attorney in that you do not have to give someone else *immediate authority* to act on your behalf. Like a springing power of attorney, the other person can only act if you become incapacitated.

A living trust has other advantages, including avoiding probate upon death. On the other hand, a living trust is more complicated to set up, it may require that a separate tax identification number be obtained and separate tax returns be filed, and may not be subject to any deadline for creditors' claims. Also, in some states, it may result in the loss of classification as homestead property or the loss of a property tax homestead exemption.

Health Care Powers of Attorney and Living Wills

Documents expressing a person's desires regarding health care generally fall into two categories—health care powers of attorney and living wills. It is important to understand the difference between these two types of documents, as well as how they compliment each other.

Health Care Power of Attorney

A *health care power of attorney* is a special type of power of attorney that allows the agent to make decisions about the medical treatment for the principal. The agent may only act if the principal is unable to make such decisions for himself or herself. A health care power of attorney is most often used by a husband and wife or close family members; although it can also be used between good and trusted friends.

Without a health care agent, doctors and hospitals may be reluctant to provide certain medical care if you are unable to give consent or help make decisions about various treatment options. Many states have an official form in their laws. The forms are included in Appendix C. As mentioned in the following section, it is a good idea to have a living will, as well as a health care power of attorney. (More about the health care power of attorney and other health care matters will be discussed in Chapter 5.)

Living Wills

A *living will* is a document in which a person states his or her desires regarding medical treatment in certain circumstances. You may see this called by other names, such as a *declaration regarding life-prolonging procedures*, an *advance directive*, or simply a *declaration*. Without a living will, doctors and hospitals may decide they are legally obligated to perform certain procedures (which you may not desire) in the event you become seriously ill and are unable to communicate your desires. The first living wills created simply provided a basic statement that the person did not want to be kept alive by machines or other artificial means if they had a terminal illness or injury. These documents did not include the appointment of any kind of agent. Since the person was expressing his or her wishes in writing, there was no need to appoint an agent to present the person's wishes.

As living wills developed, they came to include other serious situations, such as where the person is in a permanent coma. They also sometimes include the appointment of another person to assure that the living will is carried out. This

person does not have the same powers as under a health care power of attorney, because their authority is limited to the types of medical conditions specified in the living will.

It is a good idea to have a living will *and* a health care power of attorney. If you only have a health care power of attorney and end up in one of the conditions listed earlier, your agent will be relying on what you have said about what you want. If another family member disagrees with your agent's decision, your ultimate fate can end up in the hands of a judge. However, if you have expressed your wishes in a living will, your agent has written evidence to support his or her decision. (More about the living will, the health care power of attorney, and the withholding or withdrawal of life-prolonging procedures will be discussed in Chapter 5.)

The All-In-One Power of Attorney

NOTE: *This section will only apply to you if you live in one of the following states: Alaska, Connecticut, Indiana, Kentucky, Louisiana, Missouri, New Jersey, New Mexico, Ohio, Pennsylvania, South Dakota, Utah, Washington, or Wyoming. These states either have a statutory all-inclusive form (Alaska, Connecticut, Indiana, and New Mexico) or do not have any statutory form for either a financial or health care power of attorney. If you live in any state not listed, you should use the specific statutory form (or forms) for your state. (See the table at the beginning of Appendix C for assistance in determining which form or forms to use.)*

If you intend to designate the same person as your agent for both financial and health care matters, you can do so in a single document. This works best if you are fairly certain that you will not want to change the agent, such as if you are naming your spouse or an adult child. The advantage is that this avoids any confusion that might occur in dealing with the preparation, signing, witnessing, notarizing, and storing of separate documents. However, there are two possible drawbacks to using a single document.

1. If you later decide you want a different agent for financial or health care matters, trying to clearly indicate the change you want may get confusing. This is because you would be revoking only part of the original power of attorney. Some third party might conclude that the entire doc-

ument was revoked, and refuse to honor it. It may be necessary to revoke the entire original, and create two new documents at that time.

2. If your agent uses the power of attorney for one purpose, the third party involved will know more than he or she needs to know.

Example 1: If your agent uses the power of attorney to open a bank account for you, the bank officer will also be able to read the part of the power of attorney regarding your medical care (which may have information revealing various medical conditions you have).

Example 2: If you give your doctor a copy of the power of attorney so he or she knows who to contact in an emergency, your doctor will also be able to read the part relating to financial matters (which may contain information about your financial holdings that you would prefer to keep confidential).

If you live in Alaska and decide that you want such an all-inclusive power of attorney, you can use form 11 in Appendix C. If you live in Connecticut, you can use form 19. In Indiana, use form 31. In New Mexico, use form 46. If you live in one of the other states listed at the beginning of this section and want an all-inclusive power of attorney, you can use form 1. Instructions for form 1 are provided in Chapter 4.

Power of Attorney for Child Care

A *power of attorney for child care* allows someone to make decisions regarding the care of your minor child or children. You may want to have this type of power of attorney if your child will be spending prolonged periods of time living with a friend or relative, where you may not be able to be reached in an emergency. Doctors or hospitals may be reluctant to give medical treatment to a child without the consent of the parent. A power of attorney authorizing your friend or relative to consent to medical treatment for your child may resolve this problem. Also, if your child will be living with someone else, that person may need a power of attorney in order to enroll your child in school. You can use form 6 in Appendix C for this purpose.