

THE C & D NEWSLETTER



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A LAW CORPORATION

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NEW RULES FOR A POWER OF ATTORNEY

This Newsletter shall discuss the provisions of California's new Power of Attorney law, which became effective January 1, 1995. The new law provides rules for the creation of a Power of Attorney, who can qualify to be an attorney-in-fact, the duties of an attorney-in-fact, the authority of an attorney-in-fact, and the termination of a Power of Attorney.

Definition

A Power of Attorney is a written instrument by which one person, called the "principal," grants another person, called an "attorney-in-fact," the power to act on behalf of the principal.

Creation of a Power of Attorney

A Power of Attorney must be in writing, must be dated, must be signed by the principal, and must be either acknowledged before a notary public (required if the transaction involves real property) or signed by two witnesses.

Types of Powers of Attorney

A General Power of Attorney grants the attorney-in-fact the right to take virtually all action on behalf of the principal, with specified exceptions such as the right to make or amend a will, to create or modify a trust, or to make a loan to the attorney-in-fact. A Special Power of Attorney limits the authority of the attorney-in-fact to certain specified transactions. A Durable Power of Attorney is one that survives the principal's incapacity. A Durable Health Care Power of Attorney permits the attorney-in-fact to make decisions relating to medical treatments for the principal.

Qualifications of an Attorney-In-Fact

An attorney-in-fact can be any person or entity that has the capacity to make a contract. Thus, any mentally competent adult person, and any corporation or other business entity, can be an attorney-in-fact.

Duties of an Attorney-In-Fact

An attorney-in-fact has a duty of loyalty to the principal, a duty to keep the principal's property separate and identified, a duty to keep the principal informed and to follow instructions, a duty to keep records of transactions, and a duty to use the standard of care that would be observed by a prudent person dealing with the property of another. If the attorney-in-fact is not compensated, the attorney-in-fact is not liable for losses to the principal's property unless the losses result from the attorney-in-fact's bad faith, intentional wrongdoing, or gross negligence. However, if the attorney-in-fact has special skills, or was appointed as attorney-in-fact on the basis of representations of special skills, the attorney-in-fact is held to the standard of care of persons with similar skills.

Multiple Attorneys-In-Fact

The new law provides that multiple attorneys-in-fact may be named, and that they must act unanimously, unless the Power of Attorney provides otherwise.

Refusal to Act

An attorney-in-fact can refuse to act because of personal inconvenience or for any other reason, even if the principal has become incapacitated, is missing or is otherwise unable to act, unless the attorney-in-fact has expressly agreed in writing to act for the principal in certain situations. However, once the attorney-in-fact acts under the Power of Attorney in a particular transaction, the attorney-in-fact has a duty to complete the transaction.

Compensation

There is no requirement that an attorney-in-fact receive any compensation; however, if the principal becomes incompetent and the attorney-in-fact is expected to incur substantial time and money, reasonable compensation and reimbursement of expenses is authorized by the new law. In practice, an attorney-in-fact may refuse to continue in such circumstances without compensation.

Termination of a Power of Attorney

A Power of Attorney may be terminated by any of the following methods: (a) orally, (b) in writing, (c) by expiration of the stated term, (d) fulfillment of its purpose, (e) death of the principal, (f) resignation by the attorney-in-fact, (g) incapacity or death of the attorney-in-fact, or (h) dissolution or annulment of marriage between the principal and the attorney-in-fact.

Relations With Third Persons

A third person has a duty to accept the actions of the attorney-in-fact as if the principal were personally present and acting. For this reason, it is important to place any limitations on the powers of the attorney-in-fact on the face of the Power of Attorney. Alternatively, the Power of Attorney may specifically state that it is revoked as of a certain date. An attorney-in-fact or a third person who does not have knowledge of an event terminating the Power of Attorney is protected from liability for acting under the Power of Attorney.

Refusal to Honor Power of Attorney

A third person who is given an affidavit by the attorney-in-fact concerning the Power of Attorney is liable for attorneys' fees in any judicial proceeding necessary to confirm the authority of the attorney-in fact.

Copy of the Original Power of Attorney

The new law provides that a copy of a Power of Attorney has the same force and effect as the original if it is certified by a California notary public, an attorney, or by an official of any state who is authorized to make certifications.

This complimentary newsletter is intended to provide general information. Because of the complexities and constant changes in the law, it is important to seek professional advice before acting on any of the matters covered herein.

