



Office of the
Public Advocate

Guide for attorneys

For attorneys appointed under
an enduring power of attorney
in Victoria





Contents

Your powers as an attorney	3
Types of matters you can make decisions about	3
Conditions and instructions	3
Things you cannot do	4
When your role starts	4
Notifying other parties	4
If the role starts immediately	4
If the role starts when the principal does not have decision-making capacity for the matter	4
How you act and make decisions	5
When the principal has decision making capacity for the matters	5
When the principal does not have decision making capacity for the matters	5
Making decisions with more than one attorney	6
When attorneys disagree	6
Your duties	6
Keeping records	6
Keeping property separate	7
An attorney is not entitle to be paid unless this is authorised	7
How an attorney signs documents	8
Conflict transactions	8
Gifts	9
Providing for the principal's dependants	9
Compensation orders and offences	9
If you want to resign	9

Office of the Public Advocate March 2018.

Disclaimer: The information in this guide is of a general nature and readers may require legal advice for specific circumstances. The Office of the Public Advocate expressly disclaims any liability howsoever caused to any person in respect of any action taken in reliance on the contents of this publication.

Guide for attorneys



As an attorney under an enduring power of attorney, you have obligations under the *Powers of Attorney Act 2014*.

When you formally accept your appointment as an attorney or alternative attorney, you state that you understand your obligations under the Powers of Attorney Act and the consequences of failing to comply with those obligations.

Only someone who is eligible to be an attorney can be appointed. (See page 10 for information about who is eligible to be an attorney.)

This guide is to help you understand your role as an attorney or alternative attorney.

It includes hypothetical case examples from the Office of the Public Advocate (OPA) publication *Your voice — Trust your choice*.

Your powers as an attorney

You have been appointed by another person, called the 'principal', to have legal authority to make decisions for them.

You can only make decisions:

- about matters for which the principal has appointed you
- once your role starts.

Refer to the enduring power of attorney appointment form, to find out the types of decisions you can make and when your role starts.

Types of matters you can make decisions about

You will have been appointed to make decisions about:

- financial and personal matters
- financial matters only
- personal matters only or
- specific financial or personal matters.

A financial matter is any matter relating to the financial or property affairs of the principal, and includes any legal matter that relates to these affairs. For example, paying expenses, undertaking a real estate transaction for the principal, and making money available to the principal for their personal use.

A personal matter is any matter relating to the principal's personal or lifestyle affairs, and includes any legal matter that relates to the principal's personal or lifestyle affairs. For example, engaging a service provider for the principal, and where and with whom the principal lives.

Personal matters do not include matters that relate to medical treatment or to medical research procedures. Only the principal's medical treatment decision maker has authority to make these decisions on behalf of the principal, and can only do so when the principal does not have capacity to make the decision.

For more examples of financial and personal matters, see the information for attorneys page of the OPA website.

Conditions and instructions

The appointment form will state whether the principal placed conditions on the exercise of your power, or gave instructions.

Case study — Misunderstanding the scope of the role

Anthony is attorney for financial matters for his mother, Margaret.

As Margaret's care needs increase, her partner, Clara, is no longer able to care for her at home and Margaret moves into residential care.

Anthony has never respected Margaret and Clara's relationship. Anthony tells the facility not to let Clara visit Margaret.

In this example, Anthony has acted outside the scope of his role.

An attorney with authority to make decisions about only financial matters, cannot make decisions about who you spend time with.

Even if Anthony did have authority, he must act to promote Margaret's personal and social wellbeing and consider Margaret's wishes.

Things you cannot do

You cannot make decisions about medical treatment for the principal, unless you are also their medical treatment decision maker.

You cannot delegate your power. If you are no longer able to carry out the role, only an alternative attorney already appointed is able to step in.

The Powers of Attorney Act includes a list of things you cannot do on behalf of the principal, for example, vote. Find this list at the end of this Guide.

When your role starts

The enduring power of attorney may specify that the power starts at different times for different matters. For example, this could be immediately for financial matters, and, for personal matters, could be when the principal ceases to have decision-making capacity for these matters.

Notifying other parties

The enduring power of attorney may identify people or organisations that you should notify before exercising the power for the first time because the principal does not have decision-making capacity for that matter.

If the role starts immediately

If your role starts immediately, you will only need to assist the principal when they ask for your help.

While the principal has decision-making capacity for the matter, you must act according to their instructions.

The principal can still make their own decisions while they have decision-making capacity for that matter, even after they have appointed you as attorney. For example, if you pay the principal's bills this does not mean that the principal is unable to withdraw money from their bank account.

If the role starts when the principal does not have decision-making capacity for the matter

The principal may have chosen for the power to start in the future when they are not able to make the relevant decision.

If they chose this option, there may be a time when they have decision-making capacity to make decisions about some things, but not others, depending on how complex the decision is.

Your role could start by making one or two decisions on behalf of the principal. You may need to make more decisions later depending on the principal's capacity to make each decision.

If your role starts when the principal ceases to have decision-making capacity for the matter(s), you may be asked to show evidence of this before you act, for example a medical certificate.

It is also possible that in the enduring

power of attorney the principal specified a time, circumstance, or occasion from when the power is able to be used, for example, if they knew that they were going to hospital.

Case study — Misunderstanding the obligations of an attorney and when a power can be used

Peter appointed his son, Michael, as his attorney for financial and personal decisions. Michael's power starts when Peter ceases to have decision-making capacity.

Peter suffers a stroke and is hospitalised, but he retains decision-making capacity.

Michael doesn't understand that the power has not yet started because Peter still has decision-making capacity. Without consulting Peter, he tells the hospital staff that he is Peter's attorney and arranges for him to be discharged to an aged care facility.

In this example, Michael breached a number of his obligations as an attorney.

He acted on a power that he did not yet have. Even if the power had started, Michael is obliged to support Peter to participate in making the decision to the greatest extent possible.

How you act and make decisions

When the principal has decision-making capacity for the matters

If the power has commenced immediately (while the principal still has decision-making capacity for the matters) the principal oversees your actions and you act at the direction of the principal.

The principal may have decision-making capacity for some matters and not for others.

When the principal does not have decision-making capacity for the matters


If, and when, the principal ceases to have decision-making capacity for the matters, you must apply principles set out in the Act.

You must:

- act in a way that is as least restrictive of the principal's ability to decide and act as is possible in the circumstances
- ensure that the principal is given practicable and appropriate support to enable the principal to participate in decisions as much as possible.

When you make a decision about a matter on behalf of the principal, you must:

- give all practicable and appropriate effect to the principal's wishes
- take steps (reasonably available) to encourage the principal to participate in decision making
- act in a way that promotes the personal and social wellbeing of the principal.



Promoting the personal and social wellbeing of the principal includes recognising their inherent dignity, having regard to their existing supportive relationships, religion, values and cultural and linguistic environment, and respecting confidential information relating to the principal.

Making decisions with more than one attorney

The appointment form will state if more than one attorney has been appointed for any or all matters.

If the principal has appointed more than one attorney for any or all matters, refer to the appointment form to see how attorneys make decisions.

The principal will have appointed the attorneys to act:

- jointly — the attorneys must make decisions together (and all sign any document)
- jointly and severally — the attorneys can make decisions together or independently (and either all can sign any document, or one attorney alone can sign any document)
- severally — the attorneys can make decisions independently (and one attorney alone can sign any document)
- by a majority — a majority need to agree to make a decision (and the majority who agree sign any document).

If the principal has not specified how the attorneys are appointed, the attorneys act jointly.

When attorneys disagree

There may be occasions when attorneys disagree. OPA's Advice Service can provide advice about what to do if this happens.

Your duties


You must:

- Act honestly, diligently and in good faith.
- Exercise reasonable skill and care.
- Not use the position for profit (though an enduring power of attorney may authorise an attorney to be paid).
- Not disclose confidential information (unless authorised by the enduring power of attorney or by law).
- Keep accurate records and accounts of all dealings and transactions, for example in a book or spreadsheet.
- Keep your property separate from the principal's property. This does not apply to property owned jointly by the principal and you.
- Avoid acting where there is, or may be, a conflict between your duty to the principal and your interests (or the interests of your relative, business associate or close friend), unless the principal or the Victorian Civil and Administrative Tribunal (VCAT) has authorised this.

If you act when you have a conflict and the principal has not authorised this, you may be liable to pay compensation. If you act dishonestly, you could be charged with an offence. A principal can only authorise a conflict transaction when they have the decision-making capacity to do so. If the authorisation is not in the enduring power of attorney, you may be asked to show evidence of this.

Keeping records

You must keep accurate records and accounts of:

- all dealings and transactions made for financial matters
 - all material dealings and transactions made for personal matters.
- 

Keeping property separate

If you are an attorney for financial matters, you must keep your property separate from the principal's property. This does not apply to property owned jointly by the principal and you.

Case study — Misunderstanding obligations part 1

Martin is financial attorney for his father, Luis.

He regularly does Luis' grocery shopping when he does his own.

He puts all the groceries through together.

Sometimes he pays using his money, and on other occasions, he uses Luis' funds.

He thinks that this is all right because it all works out in the end.

In this example, Martin has breached his obligations to keep his property separate from Luis' property.

Martin must keep his shopping basket separate from Luis' and pay for his own shopping separately from Luis'.

Case study — Misunderstanding obligations part 2

Martin throws the receipt in the bin and does not keep a record of what he purchased with Luis' money.

In this example, Martin has breached his obligations to keep accurate records about the decisions he has made on behalf of Luis.

Martin must keep receipts for the items bought for Luis.

An attorney is not entitled to be paid unless this is authorised

You are not entitled to any remuneration (to be paid from the principal's property) unless the principal has specifically authorised this in the enduring power of attorney.

Case study — Misunderstanding entitlement to payment

Pat has appointed her niece, Jenny, as her personal and financial attorney.

Pat now has advanced dementia and her care needs have increased.

Jenny arranges for the sale of Pat's property and her admission to an aged care facility. Jenny ensures that Pat's bills are paid and visits her regularly.

Jenny transfers funds from Pat's account each month as compensation for all of the work that she has done for Pat.

She thinks that Pat would have wanted her to be paid for her efforts. However, there is no provision authorising this in the enduring power of attorney.

In the example above, Jenny has breached her obligations as attorney. Jenny is not entitled to be paid from Pat's money, unless Pat has specifically authorised this in the enduring power of attorney.

This is the case even if it is likely that Pat would have authorised payment when she had decision-making capacity.

How an attorney signs documents

You may need to execute an instrument (sign a document) for the principal. This must be done in a way that shows that you execute (sign) it as an attorney for the principal.

For example:

Signed by [insert name of principal] by their attorney, [insert your name], appointed by [insert name of principal] by enduring power of attorney made on [date power made]

..... (Signed)

.....(Dated)

Conflict transactions

If you are an attorney for financial matters, you must not enter into a transaction where there is, or may be, a conflict between your duty to the principal and your interests (or the interests of attorney's relative, business associate or close friend), unless authorised by the principal or VCAT to do so. This type of transaction is known as a 'conflict transaction'.

A principal can only authorise a conflict transaction when they have the decision-making capacity to do so. If the authorisation is not in the enduring power of attorney, an attorney may be asked to show evidence that a conflict transaction was properly authorised.

If you wish to engage in a conflict transaction that has not been authorised by the the principal, you will need to make an application to VCAT.

An attorney who enters into a conflict transaction that the principal or VCAT has not properly authorised may be liable to pay compensation or, if the attorney acts dishonestly, could be charged with an offence. An attorney who has any concerns that a conflict of interest may arise should contact OPA's Advice Service for more information about conflict transactions.

Depending on the circumstances, an attorney may be able to sell property held jointly by the attorney and the principal even if the principal has not authorised this. Call OPA's Advice Service for more information about this complex area.

Case study — Lack of understanding of conflicts of interest

Kosta is financial attorney for his father, Vasili.

Kosta's son, Jim, had a car accident and needed money to repair his car.

Kosta withdrew money from Vasili's account to pay for the repairs because Vasili had always helped Jim when he got into trouble. Kosta also thought that his father would have wanted to help Jim.

However, there is no provision authorising a transaction involving a conflict of interest in the enduring power of attorney.

In this example, by paying for the repairs from Vasili's account, Kosta has breached his obligation to avoid acting where there is a conflict of interest.

Kosta has no authority to withdraw the money to help Jim, even if Vasili had provided similar help to Jim in the past.

It also makes no difference if Kosta feels sure that Vasili would agree to help if he could make the decision. As an attorney, Kosta cannot use Vasili's money in this way.

Gifts

If you are an attorney for financial matters, keep in mind that you may only give a gift from the principal's property (including a gift of money) if:

- the gift is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances and
- the gift is
 - » to a relative or a close friend of the principal and is of a seasonal nature or for a special event (such as a birth or marriage) or
 - » a type of donation that the principal made (when the principal had decision-making capacity for the matter) or that the principal might reasonably be expected to make.

Before making any gifts, you should check that the principal did not include any condition or restriction on the giving of gifts in the enduring power of attorney.

You must keep a written record of any gift made to the attorney, a relative or close friend of the attorney, or an organisation with whom the attorney has a connection where the total value of the gift is over \$100. You must record the amount and the person or organisation to whom the gift was given.

Please note that gifts that meet the above-listed criteria are permitted, even if it is a conflict transaction.

Providing for the principal's dependants

If you are an attorney for financial matters, you can provide from the principal's property for the needs of a dependant of the principal if the principal authorised this in the enduring power of attorney.

This must not be more than what is reasonable unless the principal has stated otherwise. You should take into account the principal's financial circumstances.

Note, if the principal has authorised maintenance of their dependants, you are permitted to do this even if it is a conflict transaction. For example, if the principal's relative is also a relative of yours.

Compensation orders and offences

If you fail to properly undertake your duties or obligations, and this results in a loss to the principal, you may be ordered by VCAT or the Supreme Court to compensate the principal for the loss.

You can be charged with a criminal offence if you dishonestly use the enduring power of attorney to obtain financial advantage for yourself (or for another person) or cause loss to the principal (or another person).

If you want to resign

Under the Powers of Attorney Act, there are steps you must take to resign, or if you are no longer eligible to be the principal's attorney.

See the OPA website for more information about this.

Contact OPA on 1300 309 337 for more information or at:

www.publicadvocate.vic.gov.au

Things you cannot do on behalf of the principal

The Powers of Attorney Act specifies things that you cannot do on behalf of the principal.

These are:

- vote
- make decisions about the care or wellbeing of children
- make (or revoke) a will
- make (or revoke) an enduring power of attorney
- consent to a marriage or a sexual relationship or the dissolution of a marriage
- make decisions about adoption of a child
- enter into surrogacy arrangements
- manage the principal's estate on their death
- consent to an unlawful act.

Eligibility to be an attorney

A person is eligible to be an attorney if the person is:

- 18 years of age or older
- not insolvent under administration and
- not a care worker, a health provider or an accommodation provider for the principal.

Note: Someone who is an undischarged bankrupt is an example of a person who is 'insolvent under administration'.

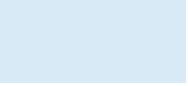
Additional requirement for attorneys for financial matters

A person is eligible to be an attorney for financial matters if, in addition to the above requirements, the person also has not been convicted or found guilty of an offence involving dishonesty.

Or if the person has been convicted or found guilty of an offence involving dishonesty, the person is eligible if they:

- have disclosed the conviction or finding of guilt to the principal and
- the disclosure of the conviction or finding of guilt has been recorded in the enduring power of attorney.

If you become no longer eligible to be an attorney, you complete a 'notification of revocation' form. (See the information for attorneys page of the OPA website for this form.)





Office of the
Public Advocate

Office of the Public Advocate
Level 1, 204 Lygon Street, Carlton, Victoria 3053
Phone: 1300 309 337
TTY: 1300 305 612 NRS: 133 677
Fax: 1300 787 510
www.publicadvocate.vic.gov.au