

**MINNESOTA ASSOCIATION FOR
GUARDIANSHIP AND CONSERVATORSHIP
MAGiC**
An Organization to Explore Substitute Decision-Making

**STANDARDS OF PRACTICE:
PROFESSIONAL POWER OF ATTORNEY**

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MAGiC MISSION STATEMENT

The Minnesota Association for Guardianship and Conservatorship, MAGiC, is a non-profit membership organization focused on the practice and issues of substitute decision-making for vulnerable persons. MAGiC promotes best practices and ethical provision of service in the least restrictive manner possible through education and advocacy for its members and the community.

We affirm the following values:

1. We believe services are to be provided in the least restrictive manner possible, respecting the rights and dignity of vulnerable persons.
2. We strive for the highest professional standards and ethics in providing service.
3. We are committed to the education and training of our members.
4. We believe in professional collaboration and legislative advocacy in working toward the well-being of vulnerable persons.

I. INTRODUCTION

The powers granted in a power of attorney can be broad and sweeping, with significant risk for abuse; therefore, a power of attorney should not be entered into without legal advice and protections in place.

Because the actions of an attorney-in-fact are subject to significantly less scrutiny than those of a court supervised trustee or conservator, these Standards of Practice were developed to guide involved parties toward appropriate service provision and billing practices. A brief glossary of terms is found in section V.

A Power of Attorney (POA) is a legally binding document that authorizes a person (or persons) to act on an individual's behalf. The person authorized to act in a POA is typically referred to as *attorney-in-fact* (also, sometimes is referred to as agent). The powers granted to this person can be limited to particular activities, to a specific time frame, or can be general and wide in scope.

A POA can be *durable* (continues to be in effect after the *principal* becomes incapacitated or incompetent) or *nondurable* (is no longer effective after the principal becomes incapacitated or incompetent). It can follow the form set out in the statute (MN Stat. 523.23), often called a Statutory Short Form Power of Attorney, or it can be a document drafted under *common law*. Both forms are legally valid. Even so, an attorney-in-fact (AIF) will often encounter entities which will not recognize a POA (such as the Social Security Administration) or will be hesitant to accept any POA that does not use their form (such as banks). It is the Statutory Short Form Power of Attorney that is primarily addressed in these Standards.

There is no duty for the AIF to act, but if the AIF accepts the responsibility to act, the AIF must follow the statute. The AIF shall exercise the power as a *prudent person* would and in full consideration of the interests of the principal. Prudent person is used in the statute to describe how the AIF must exercise his/her powers: "...in the same manner as an ordinarily prudent person of discretion and intelligence would exercise in the management of the person's own affairs..." (MN Stat. 523.21) An AIF is serving in a role of a *fiduciary*, and therefore must uphold certain standards of behavior.

The responsibilities granted under a POA are limited to areas regarding finances. This is an important distinction as there is often confusion because of language in the MN Statutory Short Form Power of Attorney. The last power listed on that form states: "all of the powers listed...and all other matters". Frequently, when this power is checked, individuals believe the phrase "all other matters" extends to areas of health care decision-making. A further opportunity for confusion is the reference in common language to "durable power of attorney for health care" or "health care power of attorney". The document that provides for the appointment of an agent to make health care decisions in Minnesota is called a Health Care Directive and is not included in these Standards.

An AIF acting under the authority granted in a POA might have the authority to enter into contracts on behalf of the principal, such as hiring home care providers and entering into payment agreements with these and other health care and housing providers. To that degree, the AIF has significant impact in areas of personal decision-making for the principal. However, the AIF needs to take care to not act outside of the bounds of the POA authority. For the principal who has declined in abilities to recognize and arrange for assistance, it is advisable that the AIF work with the principal's family or trusted friends, contact a care manager, or seek a guardian where appropriate, to assume the role of determining care needs and arranging for service providers.

II. ESTABLISHING A POWER OF ATTORNEY

A. Introduction

A Power of Attorney (POA) is an important legal document that can give the Attorney-in-Fact the ability to control and deplete the Principal's assets and the ability to obligate the Principal. As a result, a POA should only be entered into by a competent Principal who has received legal advice. The Attorney-in-Fact (AIF) should not prepare the document or otherwise facilitate the completion of it. Rather, the Principal should be referred to an attorney who practices in this area if the Principal does not already have an attorney to advise him or her. An attorney will be able to advise the Principal regarding the different types of Powers of Attorney (statutory vs. common law; durable vs. nondurable), and the effect of signing a POA. The attorney will also be able to determine if the Principal has sufficient understanding and capacity to enter into the arrangement.

B. Protections for the Principal

The Principal should make an informed decision regarding the following safeguards when considering a Power of Attorney:

1. Bond. It is recommended that the AIF be bonded, the cost of which is paid by the Principal. If the Principal declines to purchase a bond despite being advised to do so, efforts must be made to put other protections into place for the Principal. Those protections could include the requirement that the Attorney-in-Fact submit regular accounts to a third party, such as the Principal's attorney. A partial bond or bond of limited duration is another alternative to be considered. If a bond is not obtained, the AIF should have the principal indicate the declination in writing, with the principal's signature. The AIF may also want to consider obtaining liability insurance.
2. Accounting. The AIF should be required to account to the Principal, and/or a third party, on a regular basis. It is especially important that accounts be given to a third party if the Principal becomes incompetent or is otherwise unable to understand the accounts. The accountings should include all income received, expenses paid and other transactions entered into by the AIF.
3. Transfers Prohibited. The POA should specifically prohibit the Attorney-in-Fact from transferring the Principal's assets to the AIF.
4. Powers Granted. The POA should give the Attorney-in-Fact only those powers that are needed by the AIF. Powers given to the AIF allow the AIF to act for the

Principal in the same way the Principal could act.

The powers that can be given to an AIF in a Statutory Power of Attorney include the following (MN Stat. 523.24):

- a. Real estate transactions. This power can be limited to specific parcels of real estate;
- b. Tangible personal property transactions;
- c. Bond, share, and commodity transactions;
- d. Banking transactions;
- e. Business operating transactions;
- f. Insurance transactions;
- g. Beneficiary transactions;
- h. Gift transactions, subject to the restrictions in Minn. Stat. Sec.523.24;
- i. Fiduciary transactions;
- j. Claims and litigation;
- k. Family maintenance;
- l. Benefits from military service;
- m. Records, reports, and statements; including the power to file tax returns, or hire or fire an attorney or accountant;
- n. All of the powers listed above and all other matters.

More expansive powers can be given to an AIF in a Common Law Power of Attorney. Unlike the statutory form, a Common Law Power of Attorney can give the AIF the power to change the Principal's beneficiary designations or make gifts on the Principal's behalf which exceed the gift giving restrictions under the statutory form. A Common Law Power of Attorney can also grant the power to make or amend the Principal's estate planning documents. Any gifting or changes in the beneficiary designations, or any other estate planning activities should only be completed after seeking the opinion of the principal's attorney.

5. Contract for Services. When possible a separate contract for services should be entered into between the Principal and AIF. The contract should spell out the duties the Principal wants the AIF to undertake, the Attorney-in-Fact's acceptance of duties, as well as the agreed upon payment terms for the Attorney-in-Fact's services. See Appendix for sample Contracts for Services.
6. Legal Representation. The attorney who prepared the document represents the principal, and the AIF should have separate attorney representation. However, if the principal's attorney continues to represent both the principal and the AIF at their request and a conflict later arises, the principal and the AIF need to seek separate counsel.
7. Revocation of Previous Powers of Attorney. Previously executed Powers of Attorney should be revoked by the Principal to avoid their misuse and the confusion that will result in having multiple Attorneys-in-Fact acting on behalf of

the Principal. A POA must be revoked in writing by the Principal and served upon or delivered to the previously appointed AIF. A Revocation of Power of Attorney is effective upon receipt.

8. Specimen Signature. To increase acceptance and enforceability of the POA, the principal should have the AIF provide a specimen signature at the end of a Statutory Short Form POA by signing his or her name in the space provided.

C. Power Of Attorney Documents

It is advisable to have at least three original POA forms completed. Some financial institutions will need originals and if selling real estate, an original will be needed for recording. The client should keep an original, one should be in the attorney-in-fact's file, and the remaining should be filed with the attorney.

If additional "original" POA documents are needed, certified copies can be obtained by recording an original POA with the office of the County Recorder.

III. SERVING AS AN ATTORNEY-IN-FACT

A. Initial Inventory

At the time the attorney-in-fact begins acting under the authority granted in the POA, an initial inventory should be completed. Steps needed to complete an inventory include:

1. Meet with the client to determine how much information can be gleaned from him/her.
2. Complete a search of the personal papers with permission from the client.
3. Obtain the last three years of income tax filings either through the client, the client's accountant, or the IRS.
4. Write to all known sources of assets with a copy of the POA papers to verify the existence and value of the asset.
5. Complete an inventory sheet of all known assets and give a copy to the client and the attorney of record.

B. Accountings

An accounting should be provided to the principal and to anyone else required to receive it as specified in the POA document (MN Stat. 523.21). The frequency of accountings is determined by the principal as indicated in the document and is also required any time the principal requests one. The attorney-in-fact shall provide the accountings in a reasonable time frame and not to exceed 45 days of the request.

An accounting is also required if an AIF has reimbursed him/herself for expenditures made on behalf of the principal (MN Stat. 523.21); however, an AIF should not advance personal funds on behalf of the principal.

Unless otherwise requested by the principal, the accounting must show all expenditures made by the AIF. Accountings should also include receipts of income and any asset transactions.

The AIF must make certain that all financial transactions have a documented paper trail (MN Stat. 523.21). The AIF should keep receipts for all purchases so that cancelled checks can be compared to receipts to verify expenditures.

The AIF should consider having the principal sign the accounting and date it when it is reviewed with the principal.

C. General Practices

1. Asset Management

- a. Title the accounts to list both the principal and the attorney-in-fact, if appropriate.
- b. Where possible, retain the beneficiary or joint ownership character of the principal's accounts and assets.
- c. If the AIF is the only one making transactions on behalf of the principal, establish a bank account to receive all deposits and for all disbursements.
- d. If the AIF and principal are both making transactions, as a protection for both the AIF and the principal the AIF should notify the principal in writing that the POA is unable to adequately safeguard assets under this arrangement. If the principal's actions are detrimental to the principal, the AIF should also consider the following actions:
 - i. attempt to move the principal's assets to prevent the principal from dissipating them;
 - ii. attempt to get the asset holders to assist in the protection of the principal's assets by obtaining a physician statement that the principal is no longer able to manage finances and send the statement to the asset holders; and/or
 - iii. resign as AIF and consider petitioning the court for the appointment of a conservator for the principal.

2. Bill Payment

- a. Retain original or copies of bank account statements, cancelled checks, investment account statements, asset information, receipts for purchases, and tax returns for at least 7 years after termination of the POA.
- b. Pay the principal's vendors directly from his/her funds. Do not advance personal funds on behalf of the principal.
- c. Refrain from using credit cards to pay the principal's expenses when possible.

3. The AIF shall not engage in estate planning by designating or changing beneficiaries previously executed by the principal. The AIF may act at the direction of the principal after obtaining legal advice from the principal's attorney.

4. It is sometimes the case that a POA, although legal and valid on its face, is not accepted by asset holders. If this occurs, consider sending written notice of potential liability to the person refusing to accept the AIF's authority under the Statutory Short Form POA. See MN Stat. Sec. 523.20.
5. While an AIF may delegate, hire, or contract with other professionals for the completion of his/her fiduciary duties (MN Stat. Sec. 523.24 Sub. 9(3)(5)(6)), the AIF is ultimately responsible for the actions of others engaged in such capacity and therefore must exercise caution in doing so.

D. Client File

The purpose of this Standard is to ensure immediate access of the principal's important financial information and to facilitate continuity of care by any successor fiduciary. The AIF shall maintain a separate file for each principal.

1. Depending on the Attorney-in-Fact's powers, the file should include the following information and documents:
 - a. A face sheet indicating the principal's name, date of birth, address, telephone number and social security number.
 - b. Pertinent legal documents involving the principal, including the original POA, the contract for services and other relevant documents.
 - c. List of key contacts and contact information, including person(s) listed on power of attorney document, attorney of record, family members and interested others as appropriate to the situation.
 - d. Documentation of all client and collateral contacts, including date, time and activity. Include documentation reflecting the work done on behalf of principal.
 - e. List of all persons and institutions who received a copy or original POA document.
2. The following, kept either with the above information or in a separate format/file should include pertinent financial information including:
 - a. The inventory and accountings where appropriate, including all backup information such as bills, investment statements, and any records of personal property.

- b. Insurance documents, including the bond coverage, if any, and real estate or personal property coverage as appropriate.
 - c. All tax returns that have been filed during the term of the power of attorney and, if possible, three years prior to the establishment of the power of attorney.
3. As appropriate to the situation, consider including documents and information about vital records, service providers, and a photograph of the client.

E. Liability of Attorney-in-Fact

The AIF has no duty to act if appointed by a principal under a POA, and therefore no liability for failure to act. However, if the AIF exercises any power granted by the POA, the attorney-in-fact must exercise the power in the same manner as an ordinarily prudent person of discretion and intelligence would exercise in the management of the person's own affairs. Additionally, the AIF must act in the best interests of the principal. (MN Stat. 523.21)

The AIF is personally liable to any person, including the principal, who is injured by an action taken by the AIF in bad faith under the POA. The AIF is also personally liable for failure to account when there is a duty to account, as required by the POA document, as requested by the principal, or if the AIF has reimbursed the AIF for any expenditure the AIF has made on behalf of the principal. (MN Stat. 523.21)

There are no limitations to the rights of the principal against the AIF for any fraudulent or negligent actions in executing affidavits or signing or acting on behalf of the principal as AIF. An AIF who knowingly executes a false affidavit or, knowingly signs on behalf of the principal after the termination of a POA is liable for triple the amount of damages suffered by the principal. (MN Stat. 523.21-22)

Further, certain actions by an AIF may constitute financial exploitation under the Minnesota Vulnerable Adults Act, and may result in criminal and civil penalties (MN Stat. 626.5572, Subd.9). These actions include:

- engaging in unauthorized expenditure of funds entrusted by a principal who is legally a *vulnerable adult*, which results or is likely to result in detriment to that principal
- failing to use the financial resources of a principal who is legally a vulnerable adult to provide food, clothing, shelter, health care, therapeutic conduct or supervision for that principal, and the failure results or is likely to result in detriment to that principal.

F. Protection for the Attorney-in-Fact

1. The AIF should consider obtaining liability insurance for the AIF's own protection. However, this would be at the AIF's cost.
2. To prevent any conflicts of interest, the Principal's attorney should not also represent the Attorney-in-Fact relating to the Power of Attorney.
3. Even if the principal elects in the POA document to allow the AIF to transfer funds to the AIF, this activity should nevertheless be avoided.

G. Contract for Services

The contract for services should be reviewed annually and updated as appropriate, with a principal who has capacity

IV. TERMINATION OF POWER OF ATTORNEY

A. Termination

A durable POA terminates at the death of the principal or the expiration date of termination specified in the document, whichever comes first (MN Stat. 523.08).

A nondurable POA terminates upon the death of the principal, the date of termination specified in the document, or at a determination of incapacity or incompetence of the principal, whichever comes first (MN Stat. 523.09). While there is no specified formula for an incapacity or incompetence determination, this is typically advised, in writing, by the principal's attending physician, or other physician after an evaluation regarding capacity/competence.

B. Revocation (MN Stat. 523.11)

A POA may be revoked only by a written instrument of revocation signed by the principal; and, in the case of a signature by another on behalf of the principal or a signature by a mark, acknowledged before a notary. A POA may also be revoked, suspended, or terminated by a court appointed conservator.

The written revocation must be received by a party to be effective as a legal revocation of the attorney-in-fact's authority.

C. Resignation of Attorney-in-Fact

Upon resignation, the AIF should inform, in writing, the following:

1. The principal.
2. The principal's attorney.
3. All individuals and institutions who received a copy or original POA document.
4. If the AIF believes that the principal is questionably capacitated and in danger of being exploited or otherwise in danger financially, the AIF should refer the matter to any of the following, or others, as appropriate to the situation: the principal's family, the principal's attorney, an involved financial professional, a social service organization, and/or county adult protection. Consider the need for conservatorship.

D. Fiduciary Responsibilities

Upon termination or revocation of the power of attorney, the AIF shall:

1. Conduct no further transactions as of the date of receiving the written revocation document, declaration of incapacity/incompetence, or notification of death of the principal.
2. Complete accounting and documentation of activities through the date of receipt of termination/revocation. The final accounting should be provided to the successor AIF, conservator, or personal representative in the case of a termination, or the principal in the case of a revocation, as appropriate.
3. Provide the successor AIF, conservator, or executor in the case of a termination, or the competent principal in the case of a revocation, all assets, and any documents, as appropriate. Have the principal sign a receipt.
4. Maintain and store, for at least seven years, a file documenting relevant documents and transactions made on behalf of the principal.
5. Consider requesting that the court order a supervised probate if the AIF is to serve as the personal representative of the principal's estate.
6. If the POA relationship is terminated due to a revocation, and it is believed by the AIF that the principal is questionably capacitated and in danger of being exploited or otherwise in danger financially, the AIF should refer the matter to any of the following, or others, as appropriate to the situation: the principal's family, the principal's attorney, an involved financial professional, a social service organization, and/or county adult protection. Consider the need for conservatorship.

V. GLOSSARY

Attorney-in-fact (AIF): The individual appointed in a power of attorney document to act on behalf of the principal regarding financial affairs. Also sometimes referred to as “agent”.

Common Law Power of Attorney: Any power of attorney that differs from the Minnesota Statutory Short Form Power of Attorney. Prior to the introduction of the statutory form in 1984, a common law power of attorney was the traditional one used. Either form is valid. Because the wording and content of the Statutory Short Form Power of Attorney is prescribed by statute, a common law power of attorney allows for more flexibility by giving the principal the ability to grant more restricted or more expansive powers than the statutory form. The two forms also differ in their enforcement. The statute provides penalties for people who fail to honor a Statutory Short Form Power of Attorney which contains a specimen signature. No statutory penalties exist for persons who fail to honor a common law power of attorney.

Durable Power of Attorney: The POA continues to be in effect after the principal becomes incapacitated or incompetent.

Fiduciary: From the Latin term meaning trust, a fiduciary is a person who has the power and obligation to act for another under circumstances which require total trust, good faith and honesty. Guardians, conservators, attorneys-in-fact, and trustees are all fiduciaries. A fiduciary is held to a standard of conduct and trust above that of a family member or casual businessperson. A fiduciary must avoid self-dealing or conflicts of interests in which the potential benefit to the fiduciary is in conflict with what is best for the principal.

Generally, the law recognizes three major fiduciary duties:

1. Loyalty: a fiduciary must not place his own interests ahead of the beneficiary's interest;
2. Care: a fiduciary must exercise an amount of care appropriate to manage the beneficiary's interest; and
3. Disclosure: a fiduciary must disclose certain information to the principal.

Additionally:

1. Fiduciaries are responsible for ensuring that they have the necessary knowledge to perform in accordance with their capacity.
2. Fiduciaries must disclose any limitations, conflicts of interest, or barriers to performing their duties.
3. Fiduciaries must comply with any legal and professional requirements pertaining to their roles, and also with any relevant moral strictures.

4. Fiduciaries must not take unfair advantage of their relationship (e.g., misuse information) in a way that could have detrimental effects on those who place their confidence in them.¹

Nondurable Power of Attorney: The POA is no longer effective after the principal becomes incapacitated or incompetent.

Prudent: careful, diligent, judicious, sensible, attentive

Prudent person: Statutory description regarding how the AIF must exercise his/her powers: "...in the same manner as an ordinarily prudent person of discretion and intelligence would exercise in the management of the person's own affairs..."

Principal: The individual granting a power of attorney; the person who owns the income and assets.

Vulnerable Adult (MN Stat. 626.5572, Subd. 21):

Categorical Vulnerable Adult: Any person 18 years of age or older who: 1) is a resident or inpatient of a facility; 2) receives services at or from a facility required to be licensed by the State of MN, including home care agencies.

Functional Vulnerable Adult: Any person 18 years of age or older, regardless of residence or service received, who: possesses a physical or mental infirmity or other physical, mental or emotional dysfunction that impairs the individual's ability to provide adequately for care (food, clothing, health care, supervision) without assistance and because of the dysfunction or infirmity and the need for assistance, the individual has an impaired ability to protect self from maltreatment.

¹ Michael E. Berumen *Do No Evil: Ethics with Applications to Economic Theory and Business*

APPENDIX

SAMPLE

CONTRACT FOR SERVICES

AS

ATTORNEY-IN-FACT

CONTRACT FOR SERVICES AS ATTORNEY-IN-FACT

_____, Principal, and _____, Attorney-in-Fact, agree to the following:

1. _____ will act as Attorney-in-Fact (AIF) for Principal beginning _____, pursuant to the Power of Attorney dated _____, a copy of which is attached.
2. Principal will pay to AIF as consideration for acting as his/her AIF \$ _____ per hour for work performed pursuant to the Power of Attorney. Principal understands that this rate may change in the future, and that principal will be informed of such change. AIF shall also be paid for mileage and out of pocket expenses incurred. This contract does not prohibit the parties from renegotiating the payment terms. AIF will provide periodic billing statements every _____ or as requested
3. AIF will obtain a fiduciary surety bond payable to Principal in the amount of \$ _____ in the first year. The annual premium for said bond shall be paid from the assets of Principal, and may change with the size of the estate.
(Alternate) The principal acknowledges that he/she has declined to obtain a fiduciary surety bond.
4. The Principal acknowledges that if Principal continues to enter into financial transactions after the date of the Power of Attorney, the AIF has no responsibility to protect and conserve the Principal's assets at issue.
5. In the event Principal revokes the attached Power of Attorney, this agreement shall become null and void, except that those amounts due and owing AIF at the time of said revocation shall be paid immediately to AIF.
6. AIF may, at his/her option, refuse to act as AIF for Principal as of the date written notice is received by Principal.
7. The primary tasks that AIF shall be performing for Principal are to include the following: (Cross out those that do not apply.)
 - A. AIF shall assist to bring Principal current in his/her financial affairs and obligations. AIF shall assist with the transition to allow Principal to take back the responsibility of handling his/her financial affairs.
 - B. AIF shall review Principal's mail that relates to Principal's finances.

C. AIF shall prepare an inventory and statement indicating the nature and extent of the financial assets, income and liabilities of Principal.

D. AIF shall assist Principal in applying for government benefits.

E. AIF shall assist Principal with making the appropriate elections regarding health insurance coverage and employment benefits which have accrued as a result of Principal's employment and shall apply for any benefits due Principal.

F. AIF shall assist in the preparation of the Principal's income taxes and other required tax filings.

G. AIF shall identify and follow-up on actions needed to preserve and protect the Principal's financial estate.

H. AIF shall provide annual accounts to the Principal within 30 days of the anniversary date of the AIF appointment. (Alternate) AIF shall provide (monthly) (quarterly) (semi annual) accounts to the principal. Upon the Principal's request, copies of accountings shall be sent to the following: _____

I. Other: _____

8. This agreement authorizes the AIF to disclose the Principal's information to the following people in the following manner: _____

9. The parties may negotiate amendments to this agreement as necessary to effectuate the goals of the agreement.

The parties have read the foregoing contract, understand and accept it, acknowledge receipt of a copy of this agreement.

Dated this _____ day of _____, 20_____.

Principal
Address
Phone

Attorney-in-Fact
Address
Phone

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