

PLANNING FOR YOUR FUTURE

Acting as Attorney-In-Fact? Here's what you need to know

By Bernard A. Krooks, Certified Elder Law Attorney

When you act as an Attorney-in-Fact under a power of attorney, you are acting as an agent for the person who signed that document (the Principal). When you are named as Agent, you become subject to a set of legal rules known as "fiduciary duties." That means you must act in the Principal's best interests with the highest duties of care, honesty and loyalty to your Principal. If you are appointed as someone's Agent under a power of attorney, here are some things you should know:



1. *Keep Good Records.* When you keep complete and contemporaneous records, it will be much easier for you to answer any questions that may be asked of you in the future. Keep a written history of all financial transactions. Keep a journal of all actions you take as an Agent. Keep cash transactions to a minimum and record those transactions in detail. Every dollar received, spent and otherwise transferred should be accounted for by you. You may be required to provide a full accounting many years down the road, so it is prudent to complete those accountings as you go. You should establish a checking account set up in the Principal's name, with you as an authorized agent. Do not use an account that is held jointly between the Principal and anyone else for this purpose.

2. *Compensation of Agent.* We often see situations where a Principal wants to compensate an Agent for the time and effort spent acting as an Agent. Your Principal may direct you to pay yourself for those services. Often, a power of attorney is silent as to compensation. If that is the case, then the agent is not entitled to be paid for his efforts. If you want the agent to be compensated, then the power of attorney document should specifically state those wishes. If the power of attorney does not authorize compensation, it should not be taken by the Agent.

3. *Estate Planning and Gifts.* Agents are not permitted to make gifts of the Principal's property unless that power is specifically authorized in the power of attorney document. Gifts may be an important part of the Principal's overall estate and elder law plan. Thus, it is critically important for the power of attorney to be clear on this point.

4. *Don't Mix Assets.* Keep your assets and your Principal's assets separate. Do not commingle your assets with the Principal's assets-ever. It's that simple. If you and the Principal have held assets jointly before you begin to act under the Power of Attorney, you may continue to maintain those joint assets (as well as continuing to maintain assets held jointly with others).

5. *Investing the Principal's Assets.* You may continue to maintain the Principal's investment strategy, whether it is investing in certificates of deposit, real estate, stocks and bonds, or other investments. You do, however, have a duty to see that the Principal's assets are not depleted or wasted. If the Principal's portfolio contains investments that are subject to market risk, you should consult with a financial advisor (including the Principal's financial advisors) with respect to the maintenance of such assets. You also need to manage the Principal's assets in a way that will provide sufficient cash flow to pay for the Principal's living expenses. This may necessitate use of investment income or even liquidation of some investment assets.

Conclusion

Be smart about your position as an Agent. You have the utmost duty of care and loyalty to the Principal and are not allowed to put your interests above your Principal's interests. If you keep detailed and accurate records and provide regular accountings, you will find that there is less likelihood that your actions will be challenged by others.

Bernard A. Krooks, J.D., CPA, LL.M (in taxation), CELA, is a founding partner of the law firm Littman Krooks LLP with offices in Fishkill, White Plains and New York City. Mr. Krooks is past President of the National Academy of Elder Law Attorneys (NAELA), past President, and a founding member, of the NY NAELA Chapter, and is past Chair of the Elder Law Section of the New York State Bar Association. He is the president of the Special Needs Alliance (www.specialneedsalliance.org), a national not-for-profit organization dedicated to special needs planning. Mr. Krooks may be reached at (845) 896-1106, or visit the firm's website at www.littmankrooks.com.