



THE UNIVERSITY
of ADELAIDE

South Australian Law Reform Institute

Powers of Attorney

Fact Sheet 4 – The Role of the Attorney in South Australia

Who should be appointed as an Attorney?

An attorney is appointed by a principal to manage the principal's financial affairs in the event that the principal has legal incapacity.

An attorney is required to perform his or her duties 'with reasonable diligence to protect the interests of the principal' but is provided very little guidance under the law as to the specific requirements of this role.

The principal-attorney relationship is subject to potential exploitation. At the point of activation of the Power of Attorney (POA), the principal is incapacitated and the attorney may abuse or misuse their powers. Therefore, it is imperative that the principal has confidence that the person can fulfil their duties in a trustworthy and reliable manner.

The principal should ideally nominate a trusted individual, who understands the principal's interests and is capable of appropriately managing financial affairs. In South Australia, a principal may appoint multiple attorneys to act. The attorneys may be:

- Joint: all attorneys must act together to reach an agreed decision; or
- Joint and several: decisions can be made together or separately.

Duties of an Attorney

In South Australia, an attorney has authority to make financial decisions for the principal, in effect as if the principal had made that decision themselves. Once authority has been conferred, the attorney may act on behalf of the principal, according to the legal boundaries of the attorney's powers.

The authority of POAs do not extend to medical, personal or accommodation decisions.

Under the *POA Act*, the law imposes a number of duties on an attorney. In relation to enduring powers of attorney, an attorney has an obligation to exercise their duties with 'reasonable diligence', promoting the interests of the principal.

Failure to do so may result in liability on behalf of the attorney to compensate the principal for any loss resulting from this failure. Further, the attorney must retain records of transactions.

In addition, the POA document itself can impose limitations on an attorney's authority. This commonly takes the form of conditions to mandate actions of the attorney under specific circumstances. For example, in cases where there are two or more attorneys appointed, the principal may include a condition which requires the attorneys to unanimously agree on a financial decision before it can be made (the attorneys must act jointly). This confers a duty on the attorneys to act together in the best interests of the principal. The attorney has a duty to obey the terms and conditions of the powers set out by the principal in the POA document.

The attorney has what in law are called 'fiduciary obligations' which arise as the underlying premise of a principal-attorney relationship and require that the attorney 'display undivided loyalty to his or her principal'. Most notably, an attorney must adhere to a duty to act in good faith.

An attorney is also required to maintain their own financial and property affairs separately from the principal to prevent 'mixing'.

The attorney has a duty to preserve the confidentiality of the principal's affairs. Misuse of confidential information, unless deemed necessary constitutes an offence. Confidential information may be used under certain circumstances, including, upon authorisation by the principal, a court or tribunal: to prevent 'serious risk to a person's life, health or safety', to obtain financial or legal advice, in relation to a police investigation or to assist a public guardian or advocate.

Discussion Questions

1. Who is an appropriate attorney?
2. How many attorneys should a principal be able to appoint?
3. What are the issues arising with multiple and alternative attorneys?
4. What are the powers and duties of attorneys and are they understood by the public?
5. How can attorneys' understanding of their role, powers and duties be increased?
6. Should there be requisite competencies that an attorney should demonstrate prior to appointment?
7. Should it be mandatory to appoint two attorneys - one of whom is a professional (allied health)?
8. Should any of the following become statutory limitations of an attorney's power?
 - a. the principal and/or another nominated individual, receive copies of account statements on a regular basis;
 - b. prior to certain transactions, such as sale of property, the attorney consult with nominated persons;
 - c. that the principal's finances be audited annually, with a report sent to nominated persons;
 - d. that the principal undertake a capacity assessment, once deemed legally incapacitated;
 - or
 - e. other?

<p>Please note: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice we encourage you to speak to a lawyer and/or contact a community legal service.</p>
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