



Voting in State and Federal Elections Under a Power of Attorney in Massachusetts

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It seems as though the modern election cycle is perpetual. One election cycle ends just as the next begins, and politicians appear to be in a permanent state of campaigning. This is especially true this year, as the State of New Hampshire was inundated with campaign staffers, volunteers, candidates, and media well prior to the 2016 New Hampshire primary. With other primaries and the general election ahead, including in the Commonwealth of Massachusetts, this article examines an issue that arises in connection herewith: in Massachusetts ("MA") may an attorney-in-fact ("Agent") vote in the stead of the principal ("Principal") in public local, state, and/or federal elections (collectively, the "Elections," and each individually, an "Election") pursuant to a general durable power of attorney ("DPA")?

In brief, an Agent may not vote in the stead of the Principal in Elections in MA; however, an Agent may assist a Principal in voting in a MA Election.

An Agent appointed pursuant to a DPA may be authorized to do whatever one can lawfully do individually, *except* those acts so *peculiarly personal* that their performance cannot be delegated.¹ The authorities and decisional case law are in general accord that the act of voting in an Election is of such personal character that it may not be delegated to an agent, in the absence of statutory authority.²

¹ *See* Rich Printing Co. v. McKellar's Estate, 330 S.W.2d 361, 380 (Tenn. Ct. App. 1959) ("It is axiomatic that an agency may be created for any lawful act and that whatever a person may lawfully do, if acting in his own right and in his own behalf, he may delegate that authority to an agent. It is also axiomatic that authority cannot be lawfully delegated which is illegal, immoral or opposed to public policy, nor can one delegate an act which is personal in its nature, such as designating an agency to perform a personal duty or a personal trust. Of course an elected officer cannot delegate one to hold the office to which he has been elected in the absence of statutory authority so to do, nor to cast his vote for him.");

² *See* O'Brien v. Fuller, 39 A.2d 220, 224 (N.H. 1944) ("Voting is generally held to be a personal act which cannot be performed by an agent, and it is a fair inference from the language of section 60 that 'personal execution' of the duty thereby imposed was intended."); *see also* Zeeb v. Atlas Powder Co., 87 A.2d 123, 127 (Del. 1952) ("Except as to acts so peculiarly personal that their performance may not be delegated, or except as to acts regulated by statute which are required to be performed personally, as a general rule an individual may do all acts through an agent which he could do himself.")

A number of states explicitly prohibit an Agent voting for a Principal in Elections.

Title 16-102 of the Arizona statutes provides that "a power of attorney or other form of proxy is not valid for use by a person in any procedure or transaction concerning elections, including voter registration, petition circulation or signature, voter registration cancellation, early ballot request or voting another person's ballot."

According to the Minnesota Secretary of State, "a person with power of attorney cannot vote on your behalf. You do not lose the right to vote when you give someone power of attorney."³

Similarly in Iowa:

An individual who has power of attorney does not have the authority to sign a voter registration form, request an absentee ballot, or cast an absentee ballot on behalf of the voter. If a voter is unable to sign, the voter can use a rubber stamp or mark to sign. The voter may also ask for assistance and have someone sign the form on the voter's behalf as long as it is done in the voter's presence and with the voter's permission.⁴

According to the Wisconsin Government Accountability Board:

A Power of Attorney can request an absentee ballot for an elector. No person (not even a POA) may "vote" a ballot for another elector. If the elector requires assistance in completing the ballot, the elector may designate another person to assist the elector in marking the ballot. In the presence of the elector, the ballot is marked according to the elector's direction. The assisting elector must sign their name on the ballot under the section entitled "Signature of Assisting Individual."⁵

S. 6.82(2)(a) of the Wisconsin Statutes provides that the assisting elector cannot be the elector's employer or an agent of that employer or an officer or agent of a labor organization which represents the elector.

Also, in Wisconsin, an Agent acting under a DPA may request an absentee ballot on behalf of Principal, but "no person (not even a P[ower] O[f] A[ttorney]) may vote a ballot for another elector."

In Florida and pursuant to Advisory Legal Opinion – AGO 78-79 from the Office of the Florida Attorney General ("FL AG"), a daughter who has been granted a power of attorney for her mother may not sign the application for voter registration on behalf of her mother. In Florida, absent statutory authority, an Agent may not be appointed to register a person to vote. In AGO 78-79, the FL AG stated that the state Constitution, as construed by the courts, provides for universal suffrage of all Florida residents who have reached the required age if they have registered to vote. Although this Opinion of the FL AG addresses voter registration, it supports the notion that one cannot delegate his or her voting power to another in their stead.

³ Office of the Minnesota Secretary of State: "Voters with Cognitive Impairment": www.sos.state.mn.us

⁴ Office of the Iowa Secretary of State: Absentee Voting FAQ:
<https://sos.iowa.gov/elections/voterinformation/absfaq.html>

⁵ State of Wisconsin, Government Accountability Board: <http://www.gab.wi.gov/node/95>

In MA, M.G.L. ch. 51, sec. 1, provides, in part, that every citizen eighteen years of age or older, not being a person under guardianship or incarcerated, or temporarily disqualified, may vote in an election in his or her city or town, if they meet the registration and other requirements. Voting is held as an essential and "basic right of citizenship."⁶

Although there does not appear to be law on point in MA, according to the Office of the Secretary of the Commonwealth, Elections and Voting Division, no person may vote in the stead of another, regardless of the Agent and Principal relationship. This comports with the laws, rules and practices of many other states.

Although one cannot vote in the place of another, MA permits certain persons to "assist" a voter in exercising his or her right to vote. A person who has completed a DPA may be able to vote via Absentee Ballots. MA allows voters to vote by absentee ballot in certain instances, such as having a physical disability that prevents voting at the polling place. Absentee ballots must be requested in writing by either the voter or the voter's family member by submitting the appropriate MA Absentee Ballot Application. Once the absentee ballot is completed, it is mailed back to the Secretary's Office in the brown envelope provided, which also has printed on it an affidavit for signature which requires that the person assisting the voter in completing the ballot attest to same and sign the affidavit prior to returning the ballot for counting. Such Agent will attest to certain items, including the following: the ballot was marked at the voter's direction and that there are no other votes cast on behalf of the voter.

All requests for absentee ballots must be received by the local election official no later than 12 p.m. on the day before the election for which the ballot is being requested. Further, the absentee ballot must be returned prior to poll closing on the date of the election.

This communication is intended to provide general information about an area of law. It is not legal advice and does not create an attorney-client relationship. You should consult with legal counsel for advice specific to your circumstances.

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⁶ See *Boyd v. Bd. of Registrars of Voters of Belchertown*, 368 Mass. 631, 633 (1975).