

## **EXPLORING THE UNIFORM POWER OF ATTORNEY ACT**

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*The following provides an overview of the current draft of the Uniform Power of Attorney Act and highlights a number of the key drafting issues considered by the drafting committee. These comments reflect a work-in-progress and have not been reviewed, debated or approved by the National Conference of Commissioners on Uniform State Laws. A full text of the working draft may be obtained from the NCCUSL website at [www.nccusl.org](http://www.nccusl.org). The Reporter may be contacted at [linda.whitton@valpo.edu](mailto:linda.whitton@valpo.edu).*

### ***Introduction***

The catalyst for the new Uniform Power of Attorney Act (“the Act”) was a national study in 2002 which revealed growing divergence in state power of attorney legislation. The original Uniform Durable Power of Attorney Act (“Original Act”), last amended in 1987, was at one time followed by all but a few jurisdictions. Despite initial uniformity, the study found that a majority of states had enacted non-uniform provisions to deal with specific matters upon which the Original Act is silent. The topics about which there was increasing divergence included: 1) the authority of multiple agents; 2) the authority of a later-appointed fiduciary or guardian; 3) the impact of dissolution or annulment of the principal’s marriage to the agent; 4) activation of contingent powers; 5) the authority to make gifts; and 6) standards for agent conduct and liability. Other topics about which states had legislated, although not necessarily in a divergent manner, included: successor agents, execution requirements, portability, sanctions for dishonor of a power of attorney, and restrictions on powers that have the potential to dissipate a principal’s property or alter a principal’s estate plan.

To ascertain whether there was actual divergence of opinion about default rules for powers of attorney or only the lack of a detailed uniform model, the Joint Editorial Board for Uniform Trust and Estate Acts (JEB) conducted a national survey. The survey was distributed to probate and elder law sections of all state bar associations, to the fellows of the American College of Trust and Estate Counsel, the leadership of the ABA Section of Real Property, Probate and Trust Law and the National Academy of Elder Law Attorneys, as well as to special interest listserves of the ABA Commission on Law and Aging. Forty-four jurisdictions were represented in the 371 surveys returned.

The survey responses demonstrated a consensus of opinion in excess of seventy percent that a power of attorney statute should:

- (1) provide for a confirming affidavit to activate contingent powers;

- (2) revoke a spouse-agent's authority upon the dissolution or annulment of the marriage to the principal;
- (3) include a portability provision;
- (4) require gift making authority to be expressly stated in the grant of authority;
- (5) provide a default standard for fiduciary duties;
- (6) permit the principal to alter the default fiduciary standard;
- (7) require notice by an agent when the agent is no longer willing or able to act;
- (8) include safeguards against abuse by the agent;
- (9) include remedies and sanctions for abuse by the agent;
- (10) protect the reliance of other persons on a power of attorney; and
- (11) include remedies and sanctions for refusal of other persons to honor a power of attorney.

Informed by the study and survey results, the Conference drafted the Act to reflect both state legislative trends and collective best practices. While the Act is primarily a set of default rules that can be altered by specific provisions within a power of attorney, the Act also contains certain safeguards for the protection of an incapacitated principal. The Act was drafted to strike a balance between the need for flexibility and acceptance of an agent's authority and the need to prevent and redress abuse.

Among the provisions that enhance flexibility are the statutory definitions of powers in Article 2 which can be incorporated by reference in an individually drafted power of attorney or selected for inclusion on the optional statutory form provided in Article 3. The statutory definitions of enumerated powers are an updated version of those in the Uniform Statutory Form Power of Attorney Act (1988), which the Act supersedes. The national study found that seventeen jurisdictions had adopted some type of statutory form power of attorney. The decision to include a statutory form power of attorney in the Act was based on this trend and the proliferation of power of attorney forms currently available to the public.

Sections 119 and 120 of the Act address the problem of persons refusing to honor an agent's authority. Section 119 provides protection from liability for persons who in good faith accept the agent's authority. This section also prohibits such persons from requiring a different form of power of attorney. Section 120 sanctions refusal to accept an agent's authority unless the refusal meets limited statutory exceptions.

In exchange for mandated acceptance of an agent's authority, the Act does not require persons who deal with an agent to investigate the agent or the agent's actions. Instead, safeguards against abuse are provided through heightened requirements for delegating authority that could dissipate the principal's property or alter the principal's estate plan (Section 201(c)), provisions that set out the agent's duties and liabilities (Sections 114 and 117) and by specification of the categories of persons who have standing to request judicial review of the agent's conduct (Section 116). A provision that gives the reviewing court discretion to award attorney's fees to the prevailing party (Section 116(c)) serves to both deter frivolous actions and facilitate redress where warranted.

## *Overview of the Uniform Power of Attorney Act*

The Act consists of 4 articles. The basic substance of the Act is located in Articles 1 and 2. Article 3 contains the optional statutory form and Article 4 consists of miscellaneous provisions dealing with general application of the Act and repeal of certain prior acts. The following is a brief overview.

**Article 1 – General Provisions and Definitions** – Section 102 lists definitions which are useful in interpretation of the Act. Of particular note is the definition of “incapacity” which replaces the term “disability” used in the Original Act. The definition of “incapacity” is taken from the Uniform Guardianship and Protective Proceedings Act as amended in 1997. Another significant change in terminology from the Original Act is the use of “agent” in place of the term “attorney in fact”. The term “agent” was also used in the Uniform Statutory Form Power of Attorney Act and is intended to clarify confusion in the lay public about the meaning of “attorney in fact.” Section 103 provides that the Act is to apply broadly to all powers of attorney, but excepts from the Act powers of attorney for health care and certain specialized powers such as those coupled with an interest or dealing with proxy voting.

Another innovation is the presumption of durability contained in Section 105. This change reflects the view that most principals prefer their powers of attorney to be durable rather than non-durable. No longer must a durable power of attorney include language indicating that the authority conferred is exercisable notwithstanding the principal’s subsequent disability or incapacity. A power of attorney executed under the Act is durable unless it contains express language indicating otherwise. While the Original Act was silent on execution requirements for a power of attorney, Section 106 requires the principal’s signature and provides that an acknowledged signature is presumed genuine. Section 107 is a portability provision for powers of attorney not executed under the Act and Section 108 states the guidelines for interpretation of such powers.

Section 109 addresses the relationship of the agent to a later court-appointed fiduciary. The Original Act conferred upon a conservator or other later-appointed fiduciary the same power to revoke or amend the power of attorney as the principal would have had prior to incapacity. In contrast, the Act reserves this power to the court and states that the agent’s authority continues until limited, suspended, or terminated by the court. This approach reflects greater deference for the previously expressed preferences of the principal and is consistent with the Uniform Guardianship and Protective Proceedings Act.

The default rule for when a power of attorney becomes effective is stated in Section 110. Unless the principal specifies that it is to become effective upon a future date, event, or contingency, the authority of an agent under a power of attorney becomes effective when the power is executed. Section 110 permits the principal to designate who may determine when contingent powers are triggered. The determination of a person

designated by the principal may be considered conclusive by those relying on the power of attorney. If the trigger for contingent powers is the principal's incapacity, Section 110 provides that the person designated to make that determination has the authority to act as the principal's personal representative under the Health Insurance Portability and Accountability Act (HIPAA) for purposes of accessing the principal's health care information and communicating with the principal's health care provider. This provision does not, however, confer upon an agent the authority to make health care decisions for the principal. If the trigger for contingent powers is incapacity but the principal has not designated anyone to make the determination, or the person authorized is unable or unwilling to make the determination, the statute provides for determination by a physician or licensed psychologist as a default position.

The bases for termination of a power of attorney are covered in Section 111. In response to concerns expressed in the JEB survey, the Act provides as the default rule that authority granted to a principal's spouse is revoked upon the commencement of proceedings for legal separation, marital dissolution or annulment and not only upon entry of the final order.

Sections 112 through 118 address matters related to the agent, including default rules for compensation, reimbursement, agent duties and liability. Section 115 provides that a principal may lower the standard of liability for agent conduct subject to a minimum level of accountability for actions taken dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney. Section 116 sets out a comprehensive list of persons who may petition the court to review the agent's conduct. An agent may resign by following the notice procedures described in Section 118.

Sections 119 and 120 are included in the Act to address the frequently reported problem of persons who refuse to accept an agent's authority. Section 119 protects persons who accept an agent's authority without knowledge that a power of attorney is revoked, terminated, or invalid or that the agent is exceeding or improperly exercising the agent's powers. A person who accepts an agent's authority in good faith is not required to make inquiry into the extent of the agent's powers or the propriety of their exercise, and may rely on an agent's certification as to any matter concerning the power of attorney or the principal. In exchange for this protection, Section 120(a) imposes liability for refusal to accept an agent's authority subject to limited exceptions in Section 120(b).

Section 121 clarifies that the Act is supplemented by existing bodies of law, including the common law and principles of equity. While the principles of common law and equity may supplement the provisions of the Act, the Uniform Power of Attorney Act preempts principles of common law and equity that are inconsistent with either its provisions or its purposes and policies. Section 122 clarifies that the remedies under the Act are not exclusive and do not abrogate any other cause of action or remedy that may be available under the law of the enacting jurisdiction.

**Article 2 – Powers** – The Act offers the drafting attorney enhanced flexibility whether drafting an individually tailored power of attorney or using the statutory form. Like the Uniform Statutory Form Power of Attorney Act, Article 2 of the Act sets forth detailed descriptions of powers that can be conveyed to an agent. Section 202 provides that these powers can be incorporated by reference using the short descriptive captions or section numbers in Article 2. These definitions also provide the meaning for the powers enumerated on the optional statutory form in Article 3. Section 202 further states that these powers may be modified in the power of attorney.

Article 2 also addresses concerns about the grant of specific powers that could be used to dissipate the principal’s property or alter the principal’s estate plan. Section 201(c) lists the powers that cannot be implied from a general grant of authority, but which must instead be delegated through express inclusion in the power of attorney. Section 201(b) clarifies that unless a power of attorney otherwise provides, an agent may not create in the agent or in a person to whom the agent owes a legal obligation of support an interest in the principal’s property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

**Article 3 – Statutory Form Power of Attorney** – The optional form in Article 3 is designed for use by lawyers as well as lay persons. It contains, in plain language, instructions to the principal and agent. Step-by-step prompts are given for designation of the agent, successor agents, and the grant of powers. In the grant of powers section, the principal must initial the powers that the principal wishes to delegate to the agent. There is a separate list of the Section 201(c) powers, preceded by a warning to the agent about the extraordinary scope of those powers. The form also clarifies that the agent may not use the principal’s property to benefit the agent or a person to whom the agent owes a legal obligation of support unless the principal includes special instructions to permit such actions.

**Article 4 – Miscellaneous Provisions** – The miscellaneous provisions in Article 4 clarify that the Act is intended to have the widest possible effect within constitutional limitations. Enacting jurisdictions should repeal their existing power of attorney statutes, including, if applicable, the Uniform Durable Power of Attorney Act, The Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code.

### ***Key Drafting Issues***

#### ***Creation of a POA: How much formality?***

*Tension–Ease of creation versus safeguards against fraud and forgery*

Present Act: requires only a designation in writing

Proposed New Act: requires the principal’s signature and, if a statutory presumption of the signature’s validity is desired, an acknowledgment before a notary public or other person authorized to take acknowledgements (**Sec. 106**)

Comment: Under the proposed Act, acknowledgment of the principal’s signature is encouraged by according a statutory presumption of validity to acknowledged signatures, but the Act does not consider unacknowledged powers of attorney *per se* invalid. Acknowledgement is desirable both as a deterrent to fraudulently obtained powers and because most, if not all, states require acknowledgment for documents to be placed of record.

***Powers: How much specificity?***

*Tension–Convenience of broad grant versus requiring certain powers to be delegated with specificity*

Present Act: silent on requirements for delegating authority or the scope of powers

Proposed New Act: contains extensive definitions of powers that can be incorporated by reference (**Article 2**); prohibits the agent from exercising the authority under a power of attorney to create in the agent or a person to whom the agent owes a legal obligation of support any interest in the principal’s property unless the power of attorney otherwise provides (**Sec. 201(b)**); and requires express authorization for the power to:

- (1) create, amend, or revoke an inter vivos trust;
- (2) make a gift of the principal’s property;
- (3) create or change rights of survivorship;
- (4) designate or change the designation of a beneficiary;
- (5) delegate to another person the agency authority granted under the power of attorney; or
- (8) disclaim property, including a power of appointment over property

**(Sec. 201(c))**

Comment: The requirement of a specific grant of authority in a power of attorney for the foregoing powers reflects the concern that powers which have the potential of dissipating the principal’s property or altering the principal’s estate plan should not be granted casually or by mistake in a general grant of authority.

***Conduct of Agent: What standard of care?***

*Tension–Protection provided by a trustee-type standard which forbids all conflicts of interest versus a more flexible standard to permit relatives or close friends to serve notwithstanding inherent conflicts*

Present Act: silent on agent standard of conduct

Proposed New Act: recognizes that an agent who accepts authority under a power of attorney is a fiduciary who must act loyally with the care, competence, and diligence normally exercised by agents in similar circumstances. The agent is expected to conduct the affairs of the principal according to the reasonable expectations of the principal and, in the absence of reasonably communicated expectations, in the best interest of the principal. The agent is to avoid conflicts of interest that would impair an agent's ability to act in the best interest of the principal, but it is recognized that an agent who otherwise meets fiduciary responsibilities to the principal will not be liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal. Other statutory agent duties include: the duty to keep a complete record of all receipts, disbursements, and transactions conducted on behalf of the principal, to cooperate with a person who has authority to make health care decisions for the principal, to take the principal's estate plan into account to the extent known to the agent, and to attempt to preserve the plan if consistent with the principal's best interest based on all relevant factors. An agent is protected from liability to any beneficiary of the principal's estate plan if the agent acts in good faith. **(Sec. 114)**

The principal may include an exoneration provision in the power of attorney for the benefit of the agent provided that the provision is not inserted as a result of the agent's abuse of the fiduciary or confidential relationship with the principal and does not relieve the agent of conduct committed dishonestly, with an improper motive or with reckless indifference to the purposes of the power of attorney or the interests of the principal. **(Sec. 115)**

Comment: The Act recognizes that the principal, by choosing to utilize a power of attorney for surrogate decision making, may desire more flexible standards for the agent's conduct than would be permitted under trust or guardianship law. Often the person best suited to serve as an agent also has an independent familial or confidential relationship with the principal that includes certain inherent conflicts of interest such as inheritance, beneficiary or shared property

interests. The Act strikes a balance between setting baseline protections for the principal and recognizing that it may be possible for an agent to act in the principal's best interest despite the agent's individual or conflicting interests. The Act recognizes that a principal's reasonable expectations should control the agent's conduct to the extent communicated or known to the agent, and that when the agent does not have sufficient information or direction to exercise substituted judgment for the principal the agent is to act in the principal's best interest.

***Report of Agent Transactions: Who may request?***

*Tension—Minimizing power of attorney transaction costs versus the protections afforded by agent accountability*

Present Act:	silent on agent record keeping and reporting requirements
Proposed New Act:	agent has duty to keep a complete record of all receipts, disbursements and transactions conducted on behalf of the principal ( <b>Sec. 114(b)(3)</b> ), but no affirmative duty to make reports unless required in the power of attorney, ordered by a court, or requested by one of the following: the principal, a guardian, conservator, or other fiduciary acting for the principal, any governmental agency having regulatory authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. ( <b>Sec. 114(h)</b> )
Comment:	Although the agent has no affirmative reporting duty under the Act, the Act provides a list of those who have standing to request a report as a check and balance on the agent's conduct.

***Judicial Review of Agent's Conduct: Who may petition the court?***

*Tension—Safeguarding an incapacitated or questionably competent principal versus inviting harassment from contentious family members or beneficiaries*

Present Act:	silent on judicial review of agent's conduct
Proposed New Act:	proposes a broad list of those who have standing to petition the court, including: the principal or agent; the principal's spouse, parent or descendant; a conservator, guardian, or other fiduciary acting for the principal; a person who would qualify as a presumptive heir of the principal; a person named as a beneficiary to receive any property, benefit, or

contractual right on the principal's death, or as a beneficiary of a trust created by or for the principal; any governmental agency having regulatory authority to protect the welfare of the principal; and the principal's caregiver or another person who demonstrates sufficient interest in the principal's welfare. The court has discretion to award reasonable attorney fees and expenses to the prevailing party in an action to review the agent's conduct. **(Sec. 116)**

Comment: The list of persons who have standing to request judicial review of an agent's conduct is intentionally broader than the categories of persons who have standing to request from the agent a report of transactions. This distinction is based on a desire to protect the privacy of the principal's financial affairs on the one hand, and on the other, a need to protect the incapacitated or questionably competent principal from an abusive agent. The provision for discretionary award of attorney fees and expenses to the prevailing party is designed to both deter harassment of the agent and to encourage legitimate action by those who have a reasonable belief that the principal's interests are endangered by the agent's conduct.

***Reliance of Third Persons: What level of protection?***

*Tension—Bolstering enforceability and acceptance of durable powers versus the benefit of third party scrutiny as a safeguard against forgery, fraud, and abuse*

Present Act: only a narrow provision permitting reliance on the agent's affidavit as conclusive proof of nonrevocation or nontermination

Proposed New Act: a person who accepts an agent's authority in good faith (*i.e.*, without knowledge that the power of attorney is terminated or invalid, that the agent's authority has been terminated, or that the agent is exceeding or improperly exercising the agent's authority) is protected from liability. A person who accepts an agent's authority in good faith has no duty to inquire into the extent of the agent's powers or the propriety of their exercise and may rely on the agent's certification as to any matters concerning the power of attorney. **(Sec. 119)**

Comment: The new Act seeks to provide maximum assurances to persons dealing with agents that they may rely on the agent's representations and the power of attorney without risk of liability unless there is knowledge that the power of

attorney or the agent's authority is invalid or insufficient. This broad-based protection is aimed at promoting acceptance of powers of attorney and facilitating transactions by an agent on behalf of the principal without costly delays or litigation.

***Liability for Refusal to Accept Agent's Authority: Should there be statutory sanctions?***  
*Tension—Promoting acceptance of durable powers versus recognizing legitimate bases for refusal as a safeguard on abuse*

Present Act: silent on third party liability

Proposed New Act: Persons who are presented with a power of attorney face sanctions (actual damages or \$1000, whichever is greater, plus costs and reasonable attorney's fees) for refusing the agent's authority unless:

- the person has knowledge of the termination of the power of attorney or the agent's authority
- the person reasonably believes that the power of attorney is not valid or that the agent does not have the authority to perform the act requested and provides a written explanation for the refusal not more than 5 business days after refusal of the power of attorney
- the person has filed or has knowledge that someone else has filed a report with the local adult protective services unit alleging abuse or neglect of the principal by the agent.

A person with which an agent seeks to act may not require an additional or different form of power of attorney for the authority granted in the power of attorney presented. A photocopy or electronically transmitted copy of an original power of attorney is to be considered as genuine as the original. The decision to accept or refuse the power of attorney must be made within 5 business days of presentment.

**(Sec. 120)**

Comment: The proposed Act seeks to address problems with dishonor of powers of attorney by organizations such as financial institutions, brokerage houses and insurance companies. In exchange for providing statutory protection to persons who rely on the agent's authority in good faith, the Act sanctions refusals which fall outside of the enumerated safe

harbors. However, the Act does permit a person who suspects abuse by an agent to refuse the agent's authority if the person or someone else has filed a report with an adult protective services unit. This provision addresses the problem of an agent misusing otherwise valid authority granted by a power of attorney.

***Use of a Statutory Short Form: Should this practice be encouraged?***

*Tension—facilitating uniformity among power of attorney documents and acceptance of powers of attorney versus increasing misuse of powers of attorney through easy access to the documents by the uneducated or those seeking to defraud vulnerable principals*

Present Act: Although the Uniform Durable Power of Attorney Act does not contain a statutory form, one was created by the Uniform Statutory Form Power of Attorney Act.

Proposed New Act: The New Act includes an optional statutory short form which incorporates by reference definitions of the various powers which a principal can elect to give the agent. The form is written in layperson friendly language and intended for use by drafting attorneys as well as the public. **(Art. 3)**

Comment: Currently 17 states have statutory forms of some type. Feedback to the drafting committee from states such as New York and Illinois, where form practice has existed for a considerable period of time, supports the adoption of a standard form power of attorney. Given that internet forms for almost all types of legal transactions are readily available to the public, the committee concluded that it would better serve the public interest to promote a form which has undergone careful scrutiny. Counsel who represent financial institutions have also indicated support for a widely adopted statutory form.