

AMERICAN BAR ASSOCIATION  
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS  
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

- 1 RESOLVED, That the American Bar Association approves the Uniform Power of
- 2 Attorney Act, promulgated by the National Conference of Commissioners on Uniform
- 3 State Laws in 2006 as an appropriate Act for those states desiring to adopt the specific
- 4 substantive law suggested therein.



## REPORT

### UNIFORM POWER OF ATTORNEY ACT (2006)

A “power of attorney” is an authorization for one person to act on someone else’s behalf in a legal or business matter. The person authorized to act is the “agent” and the person granting the authorization is the “principal.” A durable power of attorney is a power that continues or initiates the agency after the principal becomes incapacitated. The concept of a durable power of attorney was first incorporated into the Uniform Probate Code in 1969 to offer an inexpensive method of surrogate decision making to those whose modest assets did not justify pre-incapacity planning with a trust or post-incapacity property management with a guardianship. After more than three decades, the durable power of attorney is now used by both the wealthy and the non-wealthy for incapacity planning as well as convenience. The **Uniform Power of Attorney Act** (2006) (UPOAA) is necessary because many states had incorporated numerous non-uniform provisions that, while helpful, caused great divergence and confusion in the states. The UPOAA enhances the usefulness of durable powers of attorney while protecting the principal, the agent and those who deal with the agent.

A national study of durable powers of attorney, conducted in 2002, revealed the need to address numerous issues not contemplated in the original Uniform Durable Power of Attorney Act such as multiple agents, the authority of later-appointed guardians, and the impact of dissolution or annulment of the principal’s marriage to the agent. The study also found that other topics about which the states had legislated, although not necessarily in a convergent manner, included: successor agents, execution requirements, portability, sanctions for dishonor of a power of attorney, and restrictions on powers that alter a principal’s estate plan. In a national survey, trust and estate lawyers’ responses demonstrated a high degree of consensus about the need to improve portability and acceptance of powers of attorney as well as the need to better protect incapacitated principals.

The UPOAA, which supersedes 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, consists of four articles. The first contains all of the general provisions that pertain to creation and use of a power of attorney. While most of these provisions are default rules that can be altered by the power of attorney, certain mandatory provisions in Article 1 serve as safeguards for the protections of the principal, the agent, and persons who are asked to rely on the agent’s authority. Article 2 provides default definitions for the various areas of authority that can be granted to an agent. The genesis for most of these definitions is the Uniform Statutory Form Power of Attorney Act (1988); however, the language is updated where necessary to reflect modern day transactions. Article 2 also identifies certain areas of authority that must be granted with express language because of the propensity of such authority to dissipate the principal’s property or alter the principal’s estate plan. Article 3 contains an

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optional statutory form that is designed for use by lawyers as well as lay persons. Step-by-step prompts are given for designation of the agent, successor agents, and the grant of authority. Article 3 also contains a sample agent certification form. Article 4 contains miscellaneous provisions concerning the relationship of the Act to other law and pre-existing powers of attorney.

The UPOAA seeks to preserve the durable powers of attorney as a low-cost, flexible, and private form of surrogate decision making while trying to prevent financial abuse of incapacitated individuals. It also encourages the use of powers of attorney by trustworthy agents who are reluctant to serve for fear of liability in contentious family situations. The UPOAA includes provisions that encourage acceptance of powers of attorney by third persons, safeguard incapacitated principals, and provide clearer guidelines for agents.

The UPOAA provides broad protection for good faith acceptance or refusal of an acknowledged power of attorney, consequences for unreasonable refusal of an acknowledged power of attorney and recognition of the portability of powers of attorney validly created under other law. The Act seeks to address the problem of arbitrary refusals of powers of attorney by entities such as banks, brokerage houses, and insurance companies. With respect to sanctioned refusals of a power of attorney, the Act provides adopting states with two choices. Section 120, Alternate A, sets out liability parameters for refusal of any acknowledged power of attorney not excluded by the statutory safe harbors. Section 120, Alternate B, applies only to refusals of acknowledged statutory form powers of attorney. As an additional protective measure for the principal, both alternative Sections 120 allow refusal to an otherwise valid power of attorney if the person believes that “the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent” and makes or knows that another person has made a report to Adult Protective Services (or the equivalent governmental agency).

Protecting the principal from potential abuse under the UPOAA is multi-faceted and provides the following: mandatory as well as default fiduciary duties for the agent; liability for agent misconduct; broad standing provisions for judicial review of the agent’s conduct; and, the requirement of express language to grant certain authority that could dissipate the principal’s property or alter the principal’s estate plan. Mandatory duties include acting in good faith, within the scope of the authority granted and according to the principal’s reasonable expectations (or, if unknown, the principal’s best interest). The UPOAA also contains a number of default duties that can be varied in the power of attorney such as preservation of the principal’s estate plan (subject to certain qualifications) and the duty to cooperate with the person who has the principal’s health-care decision making authority.

The UPOAA recognizes that many agents are family members who have inherent conflict of interest, but that these conflicts do not, in and of themselves, prevent an agent from acting competently for the principal’s benefit. While it is well-accepted that an agent

under a power of attorney is a fiduciary, most state statutes and the previous Uniform Durable Power of Attorney Act specifies what it means. The UPOAA addresses this dilemma in a default provision which recognizes that an agent who acts with care, competence and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has conflicting interests. Furthermore, the Act permits the principal to include in the power of attorney an exoneration clause for the benefit of the agent. Another provision that operates to the benefit of both the principal and the agent is one requiring notice of an agent's resignation. If the agent cannot effectively notify the principal because the principal is incapacitated, the provision gives a hierarchy of persons to whom the agent may give notice.

Incapacitated individuals are, unfortunately, uniquely vulnerable to financial abuse, but the surrogate decision making needs of our aging society are greatly aided by the use of powers of attorney by trustworthy agents. Naturally, third parties such as banks and insurance companies are concerned about potential fraud. The UPOAA balances the competing interests at stake with reforms that enhance the usefulness of durable powers while at the same time protecting the principal, the agent, and those who deal with the agent. It should be enacted in every state as soon as possible.

The work of the Drafting Committee is available at [www.nccusl.org](http://www.nccusl.org), the website of the Conference.

Respectfully submitted,

Howard J. Swibel  
President

NATIONAL CONFERENCE OF  
COMMISSIONERS ON UNIFORM

STATE LAWS

February 2007

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## GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations  
(Please refer to instructions for completing this form.)

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted by: John M. McCabe, Legal Counsel

1. Summary of Recommendation(s).

The National Conference of Commissioners on Uniform State Laws requests approval of the Uniform Power of Attorney Act, by the ABA House of Delegates. The Uniform Power of Attorney Act, has been approved by the National Conference in 2006.

2. Approval by Submitting Entity.

The National Conference of Commissioners on Uniform State Laws approved it in July, 2006.

3. Has this or a similar recommendation been submitted to the House or Board previously?

Yes. This Act supersedes the Uniform Durable Power of Attorney Act, the applicable sections in the Uniform Probate Code on durable powers of attorney and the Uniform Statutory Form Power of Attorney Act, all of which have been considered and approved by the House.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

None known, But the Association has approved the earlier acts the new Uniform Act supersedes.

5. What urgency exists which requires action at this meeting of the House?

After a Uniform Act is approved by the National Conference, Commissioners work for adoption of the proposal by the States. Legislatures are urged to adopt Uniform Acts exactly as written, to "promote uniformity in law among the several States." Approval of the Uniform Power of Attorney Act at the Mid-Year Meeting in February 2007 is desired to encourage swift enactment of the Uniform

Act in the state legislatures.

6. Status of Legislation. (If applicable.)

None.

7. Cost to the Association. (Both direct and indirect costs.)

Not applicable.

8. Disclosure of Interest. (If applicable.)

None.

9. Referrals.

Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project and those that expressed interest were provided with tentative drafts, as well as the final Act and Report. The work of the Drafting Committee is available at [www.nccusl.org](http://www.nccusl.org), the website of the Conference.

The ABA Advisor was William P. LaPiana.

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

Howard J. Swibel, President  
National Conference of Commissioners on Uniform State Laws  
120 S. Riverside Plaza, Suite 1200  
Chicago, IL 60606

12. Contact Persons Regarding Amendments to This Recommendation.

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## EXECUTIVE SUMMARY

1. Summary of the Recommendation.

That the ABA approves the Uniform Power of Attorney Act, as an appropriate “Act for those States desiring to adopt the substantive law suggested therein.”

2. Summary of the issue which the recommendation addresses.

The Uniform Power of Attorney Act provides for durable and springing powers of attorney, and provides a simplified form for executing powers of attorney. It clarifies fiduciary obligations of an agent under a power of attorney and mandates third parties to accept a power of attorney in statutory form. It provides disclosure to principals and provides penalties for abuse of a power conferred.

3. Please explain how the proposed policy position will address the issue.

The Uniform Act provides appropriate rules for the objective as stated in 2. above.

4. Summary of any minority views or opposition which have been identified.

The NCCUSL is not aware of any minority views or opposition to the Uniform Act.