THE UNIFORM POWER OF ATTORNEY ACT[+]

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Editors' Synopsis: Historically, laws relating to durable powers of attorney were based primarily on the common law of agency, but because of the increased use of durable powers of attorney and the resulting litigation, states have begun to enact detailed statutes. In this Article, the Authors give an overview of the Uniform Power of Attorney Act and examine the Act's individual sections. The Authors recommend several revisions to the Act and encourage states to adopt the Act to bring uniformity to this area of the law.

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I. SCOPE NOTE

The laws relating to durable powers of attorney (DPAs) have largely evolved from the common law of agency and are steadily moving toward a statutory framework. The statutory law is moving from relatively short statutes amending the common law of agency to comprehensive frameworks supplemented by the common law.[1] The driving force behind this trend is the desire for increased acceptance and use of DPAs. DPAs are, however, still relatively new legal tools. Case law and statutes regarding their interpretation and construction continue to develop and vary from state to state.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Power of Attorney Act (UPOAA) in 2006 to facilitate the use of the DPA, which is rapidly emerging as a significant, if not vital, estate planning tool.[2]

II. INTRODUCTION

People are living longer. Due to medical advances, the fastest growing segment of the U.S. population is individuals over the age of sixty-five.[3] However, with increased age comes the increased likelihood that individuals will suffer some sort of disability or incapacity during which they will require assistance with the management of their affairs. As such, many people will eventually face a situation in which they will have to assist an aging parent with the management of his or her affairs. Most attorneys advise of the importance of planning for the management of one's own affairs in the case of disability or incapacity, often suggesting a DPA. A DPA is an essential disability and incapacity planning tool that allows a principal to appoint an agent to manage his or her property, finances, and personal affairs.[4] DPAs "are considered an inexpensive and easy-to-create alternative to guardianship or conservatorship," and they have become a standard tool in estate planning and elder law.[5]

No single appropriate DPA form exists. Instead, DPAs are "extremely complex, powerful and flexible legal instruments that create significant le-

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[1] *See* Andrew H. Hook & Thomas D. Begley, Jr., *The New Uniform Power of Attorney Act: From Infancy to Adolescence*, EST. PLAN., Oct. 2007, at 36.

[2] *See* Unif. Law Comm'rs, The Nat'l Conference of Comm'rs on Unif. State Laws, Why States Should Adopt the Uniform Power of Attorney Act (2006), http://www.nccusl.org/update/uniformact_why/uniformacts-why-upoaa.asp.

[3] *See* WAN HE ET AL., U.S. CENSUS BUREAU U.S. DEP'T OF COMMERCE, P23-209, 65+ IN THE UNITED STATES: 2005, at 1 (U.S. Government Printing Office 2005).

[4] *See* Andrew H. Hook, *Durable Powers of Attorney*, 859-2d TAX MGMT. EST. GIFTS & TR. PORTFOLIOS, at A-1 (2008).

[5] *Id.*

gal authority, duties, and obligations."[6] While forms may make creating a DPA easier, a single form often does not take into account the substantial differences among individual clients.[7] To meet specific client needs, "attorneys should spend time educating themselves, as well as their clients, about the various drafting options available in order to customize the DPA."[8] This is especially important with ever-changing family dynamics in today's society.[9]

A. Early History

Under the common law, a power of attorney became ineffective upon the principal's incapacity.[10] It was not a useful tool to manage the affairs of an incapacitated principal because the principal's loss of capacity terminated the agent's authority.[11] In 1954, states began to change this common law rule by statute. Virginia was the first state to provide for the continuation of the agency relationship if the instrument expressly stated that it survived the principal's incapacity.[12] With the promulgation of the Uniform Probate Code in 1969[13] and the Uniform Durable Power of Attorney Act (UDPAA) in 1979,[14] the adoption of DPA statutes became widespread.

B. Recent Developments

There has been an explosion in the use of DPAs and resulting litigation. Many states have responded to the increase in litigation by revising their DPA statutes to address perceived problem areas. In 2005, the American Law Institute adopted and promulgated the Restatement (Third) of Agency, which recognizes DPAs.[15] Today, all fifty states and the District of Columbia have enacted DPA statutes.[16] However, "most of these statutes are brief and rely heavily on the common law of Agency for the construction and interpretation of DPAs."[17]

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[6] *Id.* at A-2.
[7] *See* Hook & Begley, Jr., *supra* note 1, at 37.
[8] *Id.*
[9] *See id.*
[10] RESTATEMENT (THIRD) OF AGENCY § 3.08(1) (2006).
[11] *See id.*
[12] *See* VA. CODE ANN. § 11-9.1 (2006) (originally enacted in 1954) (repealed 2010).
[13] *See generally* UNIF. PROBATE CODE §§ 1-101 to 2-1010 (amended 2006), 8 U.L.A. 1 (1998 & Supp. 2009).
[14] *See generally* UNIF. DURABLE POWER OF ATTORNEY ACT §§ 1–10 (amended 1987), 8A U.L.A. 246 (2003).
[15] *See* RESTATEMENT (THIRD) OF AGENCY § 3.08(2), cmts. b, c (2006).
[16] *See* Hook, *supra* note 4, at A-2.
[17] *Id.* at A-1 to A-2.

In 2002, NCCUSL conducted a national study comparing state DPA statutes.[18] The study revealed that, despite initial uniformity among state DPA statutes, a growing divergence existed.[19] Specifically, the study found that a majority of states had begun to enact nonuniform provisions to deal with specific matters upon which the UDPAA was silent.[20] These matters included execution requirements, successor agents, portability provisions, and sanctions for third-party refusal to accept DPAs.[21] Responses to the NCCUSL survey demonstrated a high degree of consensus about many issues that DPA statutes should address, including: (1) improving portability; (2) safeguards, remedies, and sanctions for abuse by an agent; (3) protecting the reliance of other persons on a power of attorney; and (4) remedies and sanctions for third-party refusal to honor a DPA.[22]

As a result of the survey, NCCUSL adopted and promulgated the UPOAA in 2006.[23] The UPOAA "codifies both state legislative trends and collective best practices, and strikes a balance between the need for flexibility and acceptance of an agent's authority [by third parties] and the need to prevent and redress financial abuse."[24] The UPOAA is basically "a set of default rules that preserve a principal's freedom to choose both the extent of an agent's authority and the principles to govern the agent's conduct."[25] Where the UPOAA is silent, the common law rules of agency apply.[26] The UPOAA is similar to the Uniform Trust Code (UTC) in that it is a comprehensive statute providing few mandatory rules and many default rules that can be altered by the draftsman. One significant feature of the UPOAA is the inclusion of an optional statutory form DPA, an attempt to add simplicity to the process of creating a DPA.[27]

As of 2010, Idaho, New Mexico, Nevada, Maine, Virginia, Colorado, Maryland,[28] Wisconsin, and the U.S. Virgin Islands had adopted the

[18] *See* LINDA S. WHITTON, NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, NATIONAL DURABLE POWER OF ATTORNEY SURVEY RESULTS AND ANALYSIS (2002), http://www.law.upenn.edu/bll/archives/ulc/dpoaa/surveyoct2002.pdf.

[19] *See id.* at 1. *See also* UNIF. POWER OF ATTORNEY ACT prefatory note, 8B U.L.A. 33 (Supp. 2010).

[20] *See* UNIF. POWER OF ATTORNEY ACT prefatory note.

[21] *See id.*

[22] *See id.*

[23] *See id.*

[24] *Id.*

[25] *Id.*

[26] *See id.* § 121 cmt.

[27] *See id.* § 301.

[28] Although listed by NCCUSL as having enacted the UPOAA, the Maryland statute has been heavily amended from the uniform law.

UPOAA.[29] Ohio, West Virginia, and Minnesota introduced UPOAA bills into their state legislatures in 2010.[30] In addition, the AARP supports the enactment of the UPOAA to prevent abuses.[31]

C. Current Trends

Most states currently have very limited statutes dealing with powers of attorney. Where state statutes are silent, the common law of agency applies.[32] Prior to the development of the UPOAA, legislators in many states had never fully considered what default rules should be in place to protect principals and third parties and encourage acceptance of powers of attorney. As both the use of powers of attorney and litigation surrounding their use continue to rise, all states should have a comprehensive set of laws in place to define the scope and limits of powers of attorney. Several states already have comprehensive statutes pertaining to powers of attorney.[33] As such, the need for legislation, such as the UPOAA, may not be as great in those states. However, as more states continue to enact the UPOAA, every state should consider its adoption to facilitate uniformity.

III. OVERVIEW OF THE UPOAA

A. Article 1: General Provisions

1. Section 101: Short Title

The title *Uniform Power of Attorney Act* does not contain the word *durable* in it.[34] This signals that the Act governs both durable and nondurable powers of attorney.

2. Section 102: Definitions

Several terms that are defined in the UPOAA are worth mentioning. For example, the term *agent* replaces *attorney in fact*.[35] This change addresses

[29] *See* Unif. Law Comm'rs, The Nat'l Conference of Comm'rs on Unif. State Laws, A Few Facts About the Uniform Power of Attorney Act (2010), http://www.nccusl.org/update/uniformact_factsheets/uniformacts-fs-upoaa.asp.

[30] *See id.*

[31] *See* AARP, *AARP Report Urges Adoption of Stronger State Laws to Prevent Power of Attorney Abuse*, Dec. 4, 2008, http://www.aarp.org/aarp/presscenter/pressrelease/articles/Power_of_Attorney_Abuse_.html.

[32] *See* Hausenfluck v. Commonwealth, 8 S.E. 683, 684 (1889).

[33] *See, e.g.*, N.Y. GEN. OBLIG. LAW §§ 5-1501 to 5-1506 (McKinney 2006); N.C. GEN. STAT. §§ 32A-1 to 32A-43 (2009).

[34] *See* UNIF. POWER OF ATTORNEY ACT § 101, 8B U.L.A. 39 (Supp. 2010).

[35] *See id.* § 102.

public confusion about the difference between an attorney in fact and an attorney-at-law.[36] Additionally, the term *incapacity* is used in the UPOAA instead of *disability*.[37] A disability does not necessarily render an individual incapable of managing his or her property or business affairs.[38]

The UPOAA does not require that a power of attorney be in paper form. The UPOAA defines a *power of attorney* as a writing or other record that grants an agent authority to act for the principal.[39] The term *record* is defined as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."[40] Therefore, a power of attorney may be in electronic form.

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[36] *See id.* prefatory note.

[37] "(5) 'Incapacity' means inability of an individual to manage property or business affairs because the individual:

> (A) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or
> (B) is:
> (i) missing;
> (ii) detained, including incarcerated in a penal system; or
> (iii) outside the United States and unable to return." UNIF. POWER ATTORNEY ACT § 102(5).

[38] Maine further defined *incapacity* in its UPOAA, stating that incapacity means:

> [I]nability of an individual to effectively manage property or business affairs because the individual [i]s impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause to the extent that the individual lacks sufficient understanding, capacity or ability to receive and evaluate information or make or communicate decisions regarding the individual's property or business affairs.

ME. REV. STAT. ANN. tit. 18-A, § 5-902)(e) (Supp. 2009) (effective July 1, 2010). Colorado added language to its UPOAA which states:

> It shall not be inferred from the portion of the definition of "incapacity" in section 15-14-702(5)(b) that an individual who is either incarcerated in a penal system or otherwise detained or outside of the United States and unable to return lacks the capacity to execute a power of attorney as a consequence of such detention or inability to return.

COLO. REV. STAT. ANN. § 15-14-706 (2.5) (West 2006).

The UPOAA also defines the following terms: *durable*, *electronic*, *good faith*, *person*, *power of attorney*, *presently exercisable general power of appointment*, *principal*, *property*, *record*, *sign*, *state*, and *stocks and bonds*. UNIF. POWER OF ATTORNEY ACT § 102(2)-(4), (6)–(14).

[39] *See* UNIF. POWER OF ATTORNEY ACT § 102(7).

[40] *Id.* § 102(11).

3. *Section 103: Applicability*

The UPOAA does not apply to "powers coupled with an interest" in the subject of the power, medical powers of attorney, proxy or voting rights for an entity, or powers created on a government form for a government purpose.[41]

4. *Section 104: Power of Attorney is Durable*

Under the UPOAA, a power of attorney is durable unless it expressly states otherwise.[42] This is a major change from the common law, where a power of attorney had to contain the following provision or words of similar intent to be durable: "This power of attorney (or his authority) shall not terminate on disability of the principal."[43]

Even though under the UPOAA a power of attorney is durable unless the document states otherwise, to avoid any confusion a power of attorney should expressly state that it survives the principal's incapacity.

5. *Section 105: Execution of Power of Attorney*

A power of attorney must be signed by the principal or in the principal's conscious presence by another individual at the principal's direction.[44] The presumption is that a signature is genuine if acknowledged before a notary public.[45] Although acknowledgment of the principal's signature is not man-

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[41] *See id.* § 103. A power coupled with an interest is "'a present or future interest in the thing or subject . . . on which the power is to be exercised . . . .'" Cox v. Freeman, 227 P.2d 670, 679 (Okla. 1951) (quoting 2 AM. JUR. 2D *Agency* § 77 (1948)); *see* BLACK'S LAW DICTIONARY 1288 (9th ed. 2009) ("[a] power to do some act, conveyed along with an interest in the subject matter of the power."); *see also* M.T. Brunner, Annotation, *What Constitutes Power Coupled with Interest within Rule as to Termination of Agency*, 28 A.L.R. 2d 1243 (1953) (discussing the definition of powers coupled with an interest).

[42] *See* UNIF. POWER OF ATTORNEY ACT § 104.

[43] *E.g.*, VA. CODE ANN. § 11-9.1(A) (2006) (repealed 2010).

[44] *See* UNIF. POWER OF ATTORNEY ACT § 105. Maine's UPOAA requires the inclusion of certain notices, which substantially follows the language enumerated in the UPOAA's statutory form power of attorney, for a power of attorney to be valid. *See* ME. REV. STAT. ANN. tit. 18-A, § 5-905 (Supp. 2009) (effective July 1, 2010); UNIF. POWER OF ATTORNEY ACT § 301. The Nevada UPOAA imposes the additional requirement if the principal resides in a hospital, assisted living facility, or skilled nursing facility at the time the power of attorney is executed, then a certification of the principal's competency from a physician, psychologist, or psychiatrist must be attached to the power of attorney. *See* NEV. REV. STAT. § 162A.220.2 (LexisNexis Supp. 2009).

[45] *See* UNIF. POWER OF ATTORNEY ACT § 105.

datory under the UPOAA, only an acknowledged signature carries the statutory presumption of validity.[46]

To help insure that a state that has not enacted the UPOAA will consider a durable power of attorney to be valid, two unrelated, disinterested witnesses should witness the principal's signature. Some states require that the witnessing or executing of powers of attorney be in the same manner as a will or a deed.[47] Witnesses can also testify to the capacity of the principal at the time the principal executed the power of attorney if the power of attorney is ever challenged on the basis of the principal's lack of capacity. Additionally, any power of attorney that may require recording in the office of a clerk of court (1) should be acknowledged before a notary public; (2) each individual's surname only, where it first appears, should be underscored or capitalized; (3) each page should be numbered; (4) names of all grantors and grantees should be listed; and (5) the first page should show the name of the draftsperson.[48] The power of attorney should also comply with the requirements of the State Library Board for the creation, storage, and filing of public records.[49]

6. *Section 106: Validity of Power of Attorney*

This section recognizes the validity of powers of attorney created under other law and encourages their portability. The UPOAA does not affect the validity of preexisting powers of attorney executed under prior law, powers of attorney validly created under the law of another jurisdiction, or military powers of attorney.[50] Except as otherwise provided by statute other than the

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[46] *See* Linda S. Whitton, *Navigating the Uniform Power of Attorney Act*, 3 NAT'L ACAD. ELDER L. ATT'YS J. 1, 6 (2007).

[47] *See* ARIZ. REV. STAT. ANN. § 14-5501(D)(4) (2005); FLA. STAT. ANN. § 709.08 (West 2000 & Supp. 2009); OKLA. STAT. ANN. tit. 58, § 1072.2(A)(1) (West Supp. 2009); S.C. CODE ANN. § 62-5-501(C) (2009).

[48] See, for example, Virginia Code section 17.1-227 for the rules relating to the recordation of documents and section 55-107, which provides that a power of attorney may be admitted to record in any county or city. VA. CODE ANN. § 17.1-227 (2010); *id.* § 55-107 (2007). The authors are not aware of any problems recording DPAs; however, the authors recommend compliance with recordation rules to avoid potential problems that may arise.

[49] *See, e.g.*, VA. CODE ANN. § 17.1-239 (2010). These requirements provide that the power of attorney must be on white paper, no less than eight and one-half by eleven inches nor larger than eight and one-half by fourteen inches in size, with a paper weight of at least twenty pounds. *See* 17 VA. ADMIN. CODE § 15-70-20 (1996). The writing must be black, and signatures must be in black or dark blue ink. *See id.* § 15-70-30. The printing must be at least nine points in size and the margins one inch on the left, top, and bottom margins, and one-half inch on the right margin. *See id.* §§ 15-70-40, 15-70-50.

[50] *See* UNIF. POWER OF ATTORNEY ACT § 106.

UPOAA,[51] photocopies and electronically transmitted copies have the same force and effect as the original.[52] Some have expressed concern about making all photocopies of powers of attorney valid. It could become problematic in that, when combined with the good faith and actual notice standard for revocation, this rule may make it very difficult for a principal to ever completely revoke a power of attorney. The authors recommend that states looking to enact the UPOAA consider including opt-out language in the UPOAA that allows a principal, within the power of attorney, to provide that a photocopy of the power will not have the same effect as the original.

The UPOAA is silent on the issue of whether a power of attorney requires delivery to the agent in order for it to be valid. The omission of a delivery requirement from the UPOAA suggests that delivery by the principal to the agent is not necessary for the validity of a power of attorney. However, where the UPOAA is silent, the common law still applies.[53] Cases from common law jurisdictions vary as to whether delivery of the power of attorney to the agent is required for validity.[54] For example, prior to the enactment of the UPOAA, Virginia common law was silent on this issue, but Virginia statutory law addressed this concern by expressly eliminating the delivery requirement.[55]

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[51] "An example of another law that might require presentation of the original power of attorney is the jurisdiction's recording act." *Id.* § 106 cmt.

[52] *See id.* § 106. While retaining the statutory provision providing that a copy of the power of attorney has the same effect as the original, the Nevada UPOAA also requires that, upon demand by a third party, the agent provide an affidavit stating that the copy is a true and accurate copy of the original. *See* NEV. REV. STAT. § 162A.230.4 (LexisNexis Supp. 2009). The requested affidavit must also assert that, to the best of the agent's knowledge, the principal is still alive and that the agent's relevant powers have not been altered or terminated. *See id.*

[53] *See* UNIF. POWER OF ATTORNEY ACT § 121 cmt.

[54] See, for example, *Kountouris v. Varvaris*, 476 So. 2d 599, 604 (Miss. 1985), where the Mississippi Supreme Court stated:

> As between the parties, the principal and the purported attorney-in-fact, all that is requisite to the enforceability of the power of attorney is execution and delivery in the same sense that, as between grantor and grantee, all that is necessary for a deed to be valid and enforceable is that the grantor execute it and deliver it.

Id. (citing Davis v. Holified, 193 So. 2d 723, 726 (Miss. 1957); Walker v. Walker, 59 So. 2d 277, 284 (Miss. 1952)).

[55] The Virginia Code provided as follows:

> An attorney-in-fact or other agent in possession of a general, special or limited power of attorney or other writing vesting any power or authority in him shall, where the instrument is otherwise valid, be deemed to possess the powers and authority granted by such instrument

7. *Section 107: Meaning and Effect of Power of Attorney*

The UPOAA clarifies that the law of the jurisdiction indicated in the power of attorney or, if not indicated, the law of the jurisdiction where the power of attorney was created governs the power.[56]

8. *Section 108: Nomination of Conservator or Guardian—Relation of Agent to Court-Appointed Fiduciary*

The UPOAA allows a principal to nominate a conservator or guardian for the court to consider if protective proceedings begin after the principal executes a power of attorney.[57] The UPOAA gives deference to the principal's choice of an agent by providing that the agent's authority continues despite the appointment of a guardian or conservator, unless the court decides to limit or terminate the agent's authority.[58]

9. *Section 109: When Power of Attorney is Effective*

The UPOAA establishes a default rule that a power of attorney is immediately effective unless the principal creates a "springing" power of attorney.[59] Under the UPOAA, if the principal creates a springing power of attorney and does not designate an individual to make the determination that the principal is incapacitated, then a physician, licensed psychologist, attorney, judge, or appropriate governmental official is authorized to make the determination.[60] Additionally, under the UPOAA, a person authorized to

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> notwithstanding any failure of the principal to deliver the instrument to him, and persons dealing with such attorney-in-fact or agent shall have no obligation to inquire into the manner or circumstances by which such possession was acquired; provided, however, that nothing herein shall preclude the court from considering such manner or circumstances as relevant factors in any proceeding brought to terminate, suspend or limit the authority of the attorney-in-fact . . . .

VA. CODE ANN. § 11-9.7 (2006) (repealed 2010).

[56] *See* UNIF. POWER OF ATTORNEY ACT § 107.

[57] *See id.* § 108(a). New Mexico added language to its UPOAA which requires that, following the court appointment of a conservator, notice and the opportunity to be heard be afforded to the agent and the principal prior to the limitation, suspension, or termination of the power of attorney. *See* N.M. STAT. ANN. § 46B-1-108 (LexisNexis 2009).

[58] *See* UNIF. POWER OF ATTORNEY ACT § 108(b). Nevada added language to its UPOAA that terminates a power of attorney when the court appoints a guardian for the principal's estate. *See* NEV. REV. STAT. § 162A.250.2 (LexisNexis Supp. 2009).

[59] *See* UNIF. POWER OF ATTORNEY ACT § 109(a).

[60] *Id.* § 109(c). An attorney, judge, or appropriate governmental official operates as a default arbiter of incapacity only as that term is defined in UPOAA section 102(5)(B). *See*

verify the incapacity of the principal is the principal's representative for purposes of the Health Insurance Portability and Accountability Act (HIPAA), which includes obtaining access to the principal's health care information and communicating with the principal's health care provider.[61]

10. Section 110: Termination of Power of Attorney or Agent's Authority

The UPOAA expressly provides a list of events that will terminate the power of attorney[62] or the agent's authority.[63] A power of attorney will not become ineffective due to a lapse of time since its execution.[64] To effectively revoke a power of attorney, a subsequently executed power of attorney must expressly provide for the revocation of the previously created power of attorney or state that all other powers of attorney are revoked.[65] A terminating event is not effective as to an agent or other individual who does not have actual knowledge that the power of attorney or the agent's authority is terminated and who "acts in good faith under the power of attorney."[66] Filing an action for divorce, annulment, or legal separation from the principal

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id. § 109(c)(2). Nevada, however, eliminated this provision from its UPOAA. *See* NEV. REV. STAT. § 162A.260.3 (LexisNexis Supp. 2009).

[61] *See* UNIF. POWER OF ATTORNEY ACT § 109(d). Since the person authorized to verify the principal's incapacity will likely need access to the principal's health records, the UPOAA qualifies that person to act as the principal's representative for the purposes of HIPAA. HIPAA does not authorize the agent to make health care decisions for the principal, nor does it prevent the principal's authorized health care agent from also qualifying as a representative under HIPAA. *See* 45 C.F.R. § 164.502(g)(1)–(2) (2008).

[62] *See* UNIF. POWER OF ATTORNEY ACT § 110(a). Events that terminate the power of attorney include: (1) death of principal; (2) principal's incapacity, if the power of attorney is not durable; (3) principal revokes the power of attorney; (4) the power of attorney provides that it terminates; (5) the purpose of the power of attorney is accomplished; and (6) the principal revokes the agent's authority, or the agent dies, resigns, or becomes incapacitated, and the power of attorney does not name a successor agent. *Id.*

[63] *See id.* § 110(b). Events that terminate the agent's authority include: (1) the principal revokes the authority; (2) the agent dies, resigns, or becomes incapacitated; (3) an action is filed for divorce or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney provides otherwise; or (4) the power of attorney terminates. *Id.*

[64] *See id.* § 110(c).

[65] *See id.* § 110(f). *But see* Whitley v. Lewis, 55 Va. Cir. 485, 493 (Cir. Ct. 2000) (decided before Virginia enacted the UPOAA and holding original power of attorney revoked when party later created a second power of attorney, even though party did not expressly revoke the original).

[66] UNIF. POWER OF ATTORNEY ACT § 110(d).

terminates a spouse agent's authority.[67] This is a default rule that the principal may override in the power of attorney.[68]

11. Section 111: Coagents and Successor Agents

The UPOAA permits coagents to exercise their authority independently.[69] This is a default position intended to discourage the execution of multiple coextensive powers of attorney naming different agents.[70] However, the UPOAA does not encourage naming coagents due to the potential for disagreements between agents and the possibility of agents taking inconsistent actions.[71]

Regarding successor agents, unless the power of attorney expressly provides otherwise, they have the same power and authority as the original agent had.[72] However, circumstances in which the principal does not want the successor agent to have the same authority as the original agent may arise.[73] For example, a principal may wish to give a spouse the power to change beneficiary designations on insurance policies.[74] However, if the principal designates one of his four children as successor agent, he may not wish to grant his successor agent child that same authority, especially if the children do not get along.[75] In these types of circumstances, "additional language [may be warranted] in the power of attorney to alter the default rule."[76]

An agent is not liable for the actions of another agent unless the former participates in or conceals the latter's breach of fiduciary duty.[77] If an agent with actual knowledge of another agent's breach of fiduciary duty fails to notify the principal or take reasonable action to safeguard the principal's interests, he will be liable for foreseeable damages that might have been avoidable had he acted.[78]

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[67] *See id.* § 110(b)(3).
[68] *See id.*
[69] *See id.* § 111(a).
[70] *See id.* § 111(a) & cmt.
[71] *See id.* § 111 cmt.
[72] *See id.* § 111(b)(1).
[73] *See* Whitton, *supra* note 46, at 20.
[74] *See id.*
[75] *See id.* at 12.
[76] *Id.*
[77] *See* UNIF. POWER OF ATTORNEY ACT § 111(c).
[78] *See id.* § 111(d) & cmt.

12. Section 112: Reimbursement and Compensation of Agent

The UPOAA establishes a default rule that an agent is entitled to reasonable compensation and to "reimbursement of expenses reasonably incurred on behalf of the principal."[79]

While the principal is not likely to alter the default rule concerning expenses, limiting or defining the terms of the agent's compensation is frequently desirable and appropriate.[80] For example, "My agent is authorized to pay compensation for his services to himself from my funds at the rate of $____ per month"; or "My agent shall not be entitled to compensation for his services as my agent."

13. Section 113: Agent's Acceptance

This section creates a default rule that a person accepts his appointment as an agent under a power of attorney when he begins exercising authority, performing duties, or evidencing any other conduct or assertion that indicates he has accepted.[81] The UPOAA does not make delivery of the power of attorney a requirement for the agent to act on the principal's behalf.[82] However, statutory and case law suggest that, under the common law, delivery is required. For example, prior to the enactment of the UPOAA, Virginia power of attorney statutes specifically stated that the principal's failure to deliver the power of attorney to the agent would not affect its validity.[83] Under the UPOAA, acceptance is the "point for commencement of the agency relationship and the imposition of fiduciary duties."[84]

14. Section 114: Agent's Duties

"Although [it was] well-settled [law] that an agent under a power of attorney [was] a fiduciary,"[85] power of attorney statutes were previously un-

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[79] *Id.* § 112. Under the Nevada UPOAA, an agent is only entitled to the reimbursement of expenses, not compensation, unless the power of attorney provides otherwise. *See* NEV. REV. STAT. § 162A.290 (LexisNexis Supp. 2009).

[80] *See* UNIF. POWER OF ATTORNEY ACT § 112 cmt.

[81] *See id.* § 113; *see also id.* § 118 (creating a default method for agent resignation).

[82] *See id.* § 113–14.

[83] *See* VA. CODE ANN. § 11-9.7 (2006) (repealed 2010).

[84] *See* UNIF. POWER OF ATTORNEY ACT § 113 cmt. This is similar to the provisions of the Uniform Trust Code, which provides that the trustee's acceptance of the trust is the point at which fiduciary duties are imposed on the trustee. *See* UNIF. TRUST CODE § 801, 7C U.L.A. 428 (2006).

[85] UNIF. POWER OF ATTORNEY ACT § 114 cmt.; *see* RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

clear on the extent of the fiduciary duties imposed upon the agent.[86] The UPOAA lists mandatory duties of the agent that the power of attorney cannot alter.[87] The mandatory duties provide that all agents must "act in good faith," "within the scope of authority granted," and "in accordance with the principal's reasonable expectations," if known, or "in the principal's best interest" if the principal's expectations are unknown.[88] The remaining duties are default rules that the principal can modify.[89] These duties include: (1) acting loyally; (2) avoiding conflicts of interests; (3) acting with care, competence, and diligence; (4) keeping records; (5) cooperating with the health care agent; and (6) attempting "to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interests based on all relevant factors."[90]

"An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan."[91] Similarly, an agent who acts with care "for the best interest of the principal is not liable solely because the agent also benefits from the act" or has a conflicting interest.[92] "If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation" of those skills or expertise, the special skills or expertise shall be considered in determining whether the agent has acted with care under the circumstances.[93] Absent a breach of duty, "an agent is not liable if the value of the principal's property declines."[94] An agent who exercises authority to delegate to some-

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[86] *See* UNIF. POWER OF ATTORNEY ACT § 114 cmt.

[87] *See id.* § 114(a).

[88] *Id.* § 114(a). The mandatory duties of an agent under the UPOAA are similar to those imposed on a trustee in the UTC, namely, "to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries." UNIF. TRUST CODE § 105(b)(2).

[89] *See* UNIF. POWER OF ATTORNEY ACT § 114(b).

[90] *Id.* The default duties to cooperate with the principal's health care agent and to preserve the principal's estate plan were included to protect the principal's previously-expressed choices. *See id.* § 114 cmt. The UPOAA does not create a default affirmative duty of periodic accounting. *See id.* § 114(h). The agent is not required to disclose records "unless ordered by a court or requested by the principal, . . . another fiduciary acting for the principal, [or] a governmental agency [with] authority to protect the welfare of the principal." *Id.*

[91] *Id.* § 114(c).

[92] *Id.* § 114(d).

[93] *Id.* § 114(e).

[94] *Id.* § 114(f).

one else the authority granted by the power of attorney is not liable for any error of that person, provided the agent exercises care in the delegation.[95]

When the agent has accepted appointment under section 113, UPOAA section 114 imposes fiduciary duties.[96] Is the agent liable if he subsequently fails to act? The answer is potentially yes because, unless the power of attorney provides otherwise, an agent must act with "diligence ordinarily exercised by agents in similar circumstances."[97] If this potential liability is a concern, consider including the following provision: "My agent shall not be liable to me or my estate for the failure to exercise any of the authority granted by this power of attorney."

15. Section 115: Exoneration of Agent

Under the UPOAA, the inclusion of an exoneration provision, relieving the agent of liability for breach of fiduciary duties, is binding on the principal and the principal's successors in interest unless the agent's breach is "committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the

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[95] *See id.* § 114(g). Virginia amended the UPOAA to expressly provide that the power to delegate does not abrogate the agent's duties under the Virginia Uniform Prudent Investor Act. *See* VA. CODE ANN. § 26-85(G) (Supp. 2010). Virginia Code section 26-45.13 expressly includes agents under powers of attorney within the definition of *trustee*. VA. CODE ANN. § 26-45.13 (2009). Section 26-45.10 provides:

> A. A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:
>
> 1. Selecting an agent;
> 2. Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
> 3. Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.
>
> B. In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.
>
> C. A trustee who complies with the requirements of subsection A is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.
>
> D. By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this Commonwealth, an agent submits to the jurisdiction of the courts of this Commonwealth.

VA. CODE ANN. § 26-45.10 (2009).

[96] *See* UNIF. POWER OF ATTORNEY ACT § 114(a)–(b).

[97] *Id.* § 114(b)(3).

principal."[98] As an additional protection for the principal, an exoneration provision also will not be binding if it was inserted in the power of attorney "as the result of an abuse of a confidential . . . relationship with the principal."[99]

16. Section 116: Judicial Relief

The purpose of this section is to protect vulnerable or incapacitated individuals against financial abuse and to protect the self-determination rights of principals.[100] In addition to the remedies in UPOAA section 123, section 116 states the following:

> (a) The following persons [are authorized to] petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief:
> (1) the principal or the agent;
> (2) a guardian, conservator, or other fiduciary acting for the principal;
> (3) [the principal's health-care agent];
> (4) the principal's spouse, parent, or descendant;
> (5) an individual who would qualify as a presumptive heir of the principal;
> (6) . . . [a beneficiary under the principal's estate plan];
> (7) a governmental agency having regulatory authority to protect the welfare of the principal;
> (8) the principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and
> (9) a person asked to accept the power of attorney.
> (b) Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.[101]

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[98] *Id.* § 115(1).
[99] *Id.* § 115(2).
[100] *See id.* § 116 cmt.
[101] *Id.* § 116. Idaho added a provision in its UPOAA that allows the court, in its discretion, to award reasonable attorney's fees and costs to the prevailing party in a proceeding to construe the power of attorney or review the agent's conduct. *See* IDAHO CODE ANN. § 15-12-116(3) (2009).

17. Section 117: Agent's Liability

If an agent violates the UPOAA, he is liable to the principal for the restoration value of the principal's property and for reimbursement of attorneys' fees and costs paid from the principal's property on the agent's behalf.[102] An agent who violates the UPOAA will be subject to liability as provided in the Act and may also be subject to civil or criminal liability under separate state statutes dealing with financial abuse.[103]

18. Section 118: Agent's Resignation; Notice

This section provides a default procedure for an agent's resignation. An agent must give notice to the principal and, "if the principal is incapacitated," the following hierarchy of individuals:

(1) "conservator or guardian, if one has been appointed for the principal, and a coagent or successor agent; or," if none, then

(2) any adult spouse, child or other descendant, parent, or sibling of the principal; or, if none, then

(3) "another person reasonably believed by the agent to have sufficient interest in the principal's welfare; or," if none, then

(4) "a governmental agency having authority to protect the welfare of the principal."[104]

19. Section 119: Acceptance and Reliance Upon Acknowledged Power of Attorney

This section provides broad protections for persons who, in good faith (defined as "honesty in fact"),[105] accept "an acknowledged power of attorney without actual knowledge that it is forged, void, invalid, or terminated; that the purported agent's authority is void, invalid, or terminated; or that the agent is exceeding or improperly exercising [her] authority."[106] Under the UPOAA, "'acknowledged' means *purportedly* verified before a notary public or other individual authorized to take acknowledgments."[107] Therefore, this section protects third parties who, in good faith, accept a purpor-

[102] *See* UNIF. POWER OF ATTORNEY ACT § 117.
[103] *See id.* § 117 cmt.
[104] *Id.* § 118.
[105] The definition of *good faith* is found in section 102 of the UPOAA. UNIF. POWER OF ATTORNEY ACT § 102.
[106] *Id.* § 119(c).
[107] *Id.* § 119(a) (emphasis added).

tedly acknowledged power of attorney.[108] To promote the acceptance of powers of attorney, the UPOAA places the risk of invalidity on the principal rather than the third party.[109] This represents a change in common law. For example, in the past, the Supreme Court of Virginia has held that "[o]ne who deals with an agent does so at his own peril and has the duty of ascertaining the agent's authority. If the agent exceeds his authority, the principal is not bound by the agent's act."[110] The UPOAA's protection of third parties against liability for good faith acceptance of acknowledged powers of attorney reflects a new trend in the law aimed at facilitating greater acceptance of powers of attorney.[111] Of the twelve states that currently consider it unlawful to unreasonably refuse a power of attorney, five use the term *purports* or *purporting* to clarify that good faith reliance on a power of attorney will be protected absent actual knowledge that the power of attorney was not validly executed.[112]

This section of the UPOAA protects good faith acceptances of purportedly acknowledged powers of attorney, which could include forged powers of attorney.[113] According to the UPOAA Reporter, this section was "arguably one of the most difficult intersections of public policy that had to be

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[108] *See id.* § 119 cmt..

[109] *See id.*

[110] Kern v. J.L. Barksdale Furniture Corp., 299 S.E.2d 365, 367 (Va. 1983) (citing Kern v. Freed Co., 299 S.E.2d 363, 364 (Va. 1983); Seergy v. Morris Realty Corp., 121 S.E. 900, 902 (Va. 1924)).

[111] *See* Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7, 44–45 (2007); *see also* CAL. PROB. CODE § 4303(a)(2) (West 2009); 755 ILL. COMP. STAT. ANN. 45/2-8 (West 2007 & Supp. 2009); IND. CODE ANN. § 30-5-8-2 (West 2000); N.C. GEN. STAT. § 32A-40 (2009). The 2009 revision of New York's Power of Attorney Statute requires that a power of attorney "be signed and dated by a principal with capacity, with the signature of the principal duly acknowledged." N.Y. GEN. OBLIG. LAW 5-1501B(1)(c) (McKinney 2009).

[112] *See* Whitton, *supra* note 111, at 41–42. Professor Whitton discusses a notable case in which a third-party bank relied on a forged power of attorney that one of their customers ostensibly executed. *See* Estate of Davis v. Citicorp Savings, 632 N.E.2d 64, 65 (Ill. App. Ct. 1994). The court placed the risk of accepting an invalid power of attorney on the third party presented with the power, rather than the principal. *Id.* at 66. Illinois has since revised its power of attorney statutes to provide that "[a]ny person who acts in good faith reliance on a copy of a document purporting to establish an agency will be fully protected . . . ." 755 ILL. COMP. STAT. ANN. 45/2-8 (West 2007 & Supp. 2009).

[113] E-mail from Linda S. Whitton, Professor of Law, Valparaiso University School of Law and Reporter for the Uniform Power of Attorney Act, to Andrew H. Hook, Attorney at Law, Oast & Hook, P.C. (Mar. 29, 2009, 21:11 CST) [hereinafter E-mail from Linda S. Whitton] (on file with author).

addressed in the Act."[114] Based on the Drafting Committee's research and considerable anecdotal evidence, the problem of power of attorney abuse appears to be slight compared to the volume of powers of attorney that are used legitimately.[115] Where abuse occurs, the problem is typically abuse of a valid power of attorney or a power of attorney obtained through duress—not a forged durable power of attorney.[116] The threshold question that must be addressed is, "Who should bear the risk that the power of attorney is not valid?"[117] Placing risk upon the principal rather than a third party "enhances the likelihood of an acceptance [by a third party] and also strengthens the justification for sanctioning an unreasonable refusal."[118] Placing the risk on the principal may also, however, reduce due diligence by third parties and increase the number of cases involving forged powers of attorney.

The issue of forged powers of attorney is a concern in many states that are considering the UPOAA for adoption or have already enacted the UPOAA. For example, Virginia was the first state to enact the UPOAA with an amendment to section 119(b) that expressly places the risk that a power of attorney is a forgery upon the third party accepting the power of attorney.[119] Virginia's position on this issue is consistent with the current state of the common law, which places the risk of forgeries on third parties.

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[114] *Id.*

[115] *See id.* After extensive research, the Ohio State Bar Association was only able to identify four cases dealing with a forged POA. *See* e-mail from Richard E. Davis, Attorney at Law, Krugliak, Wilkins, Griffiths & Dougherty Co., LPA, to Andrew H. Hook, Attorney at Law, Oast & Hook, P.C. (May 11, 2009, 15:49 CST) (on file with author). In a 1997 opinion, the United States Court of Appeals for the Third Circuit held that a law firm that disbursed funds out of its trust account based upon instructions given to it by an agent under a forged POA was not liable. *See* Villanueva v. Brown, 103 F.3d 1128, 1137 (3d Cir. 1997). In an earlier case, the Appellate Court of Illinois held a bank liable for amounts paid out pursuant to a forged POA. *See In re* Estate of Davis, 632 N.E.2d 64, 64–66 (Ill. App. Ct. 1994). In response to this decision, the Illinois legislature amended its POA statute to protect any person who acts in good faith in reliance on a document purporting to establish an agency. *See* 755 ILL. COMP. STAT. ANN. 45/2-8 (West 2007 & Supp. 2009). In the third case, the United States Bankruptcy Court for the District of Columbia held that a deed of trust executed pursuant to a forged POA was ineffective. *See* Baxter v. Baxter, 320 B.R. 30, 39 (Bankr. D.D.C. 2004). In the fourth case, the California Court of Appeals held that a bank was not protected from liability when a purported agent used a forged power of attorney because the conduct did not constitute impersonation within the meaning of the California Commercial Code. *See* Title Ins. Co. of Minn. v. Comerica Bank-California, 32 Cal. Rptr. 2d 735, 738 (Ct. App. 1994).

[116] *See* E-mail from Linda S. Whitton, *supra* note 113.

[117] Whitton, *supra* note 111, at 41.

[118] *Id.*

[119] *See* VA. CODE ANN. § 26-90(B) (Supp. 2010).

Maryland adopted the UPOAA shortly after Virginia and took a different approach to the issue of forged powers of attorney. Maryland deleted section 119 from its UPOAA due to concerns that the protections afforded under this section would reduce the standard of care for financial institutions.[120] Other states, such as Ohio, that have UPOAA bills pending before their state legislatures are also recommending that section 119 be eliminated to address this concern.

While the UPOAA does not require investigation into the validity of a power of attorney or an agent's authority, the Act allows a third party to request the agent's certification under oath on any factual matter, an English translation of the power of attorney, and an opinion of counsel as to any matter of law concerning the power of attorney—provided the person making the request provides the reason in writing.[121] Under the UPOAA, an English translation or the opinion of the agent's or principal's counsel must be provided at the principal's expense.[122]

UPOAA section 119 also rejects an imputed knowledge standard for those individuals who conduct activities through employees. Specifically, the UPOAA holds these individuals to be without actual knowledge of a fact "if the employee conducting the transaction involving the power of attorney is without actual knowledge of the fact."[123] If an employee who accepted a forged, invalid, or revoked power of attorney did so honestly and without actual knowledge that it was forged, invalid, or revoked, then the employer is insulated from liability. For example, if a customer mailed a letter to his or her bank instructing the bank not to accept any power of attorney, the bank would not be liable if an employee accepted a forged power of attorney without knowledge of the customer's instructions. However, many states have expressed concerns with this provision. As the Virginia UPOAA bill was making its way through the General Assembly, lawmakers became worried that third parties may remain willfully uninformed to hide behind the protections afforded in this section of the Act. Virginia amended section 119(f) of the UPOAA to state the following:

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[120] *See* Act effective Oct. 1, 2010, ch. 689, 2010 Md. Laws.

[121] *See* UNIF. POWER OF ATTORNEY OF ACT § 119 cmt., 8B U.L.A. 61 (Supp. 2010). Virginia did not amend this section of the UPOAA. Thus, it appears that under the Virginia UPOAA, a third party that accepts a power of attorney with an agent's certification would be protected from liability under 119(c) despite Virginia's amendment of 119(b). Virginia is currently reviewing the interplay between amended 119(b) and 119(c).

[122] *See id.* § 119(e).

[123] *Id.* § 119(f).

> For purposes of this section and § 26-91, a person that conducts activities through employees and exercises commercially reasonable procedures to communicate information concerning powers of attorney among its employees is without actual knowledge of a fact relating to a power of attorney, a principal, or an agent, if the employee conducting the transaction involving the power of attorney has followed such procedures and is nonetheless without actual knowledge of the fact.[124]

Thus, third parties will be held to a reasonable negligence standard meaning they must use reasonable systems to disseminate information among employees to receive protection under the UPOAA.

The authors recommend that states looking to enact the UPOAA amend the Act so that third parties retain the risk of loss for forgeries and adhere to commercially reasonable standards when disseminating information related to a power of attorney among employees.

20. Section 120: Liability for Refusal to Accept Acknowledged Power of Attorney

The UPOAA provides enacting jurisdictions with a choice between alternative liability provisions.[125] Alternative A applies to all acknowledged powers of attorney.[126] Alternative B addresses only statutory form powers of attorney.[127] The authors recommend using Alternative A to facilitate the acceptance of all acknowledged powers of attorney rather than only statutory form powers of attorney.

Generally, under Alternative A, a third party must either accept an acknowledged power of attorney or request a certification, translation, or an opinion of counsel within seven business days of presentment.[128] If the third party requests a certification, translation, or opinion of counsel, the third party must accept the power of attorney within five business days of receiv-

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[124] VA. CODE ANN. § 26-90(F) (Supp. 2010).

[125] *See* UNIF. POWER OF ATTORNEY ACT § 120.

[126] *See id.* § 120 Alternative A cmt.

[127] *See id.* § 120 Alternative B. Of the states that have adopted the UPOAA, New Mexico and Maryland are the only states to have chosen Alternative B. *See* N.M. STAT. ANN. § 46B-1-120 (LexisNexis Supp. 2009); Act effective Oct. 1, 2010, ch. 689, sec. 1, § 17-104, 2010 Md. Laws.

[128] *See* UNIF. POWER OF ATTORNEY ACT § 120(a)(1) Alternative A.

ing the requested document.[129] Additionally, a third party cannot require an additional or different form of power of attorney.[130]

This section also provides third parties with significant protection against liability for rejecting a power of attorney by providing clear safe harbors for legitimate refusals.[131] First among these safe harbors, a third party is not required to accept powers of attorney if she is permitted to refuse transacting business with the principal in the same circumstances.[132] Second, a third party can reject powers of attorney if engaging in the transaction with the agent or the principal in the same circumstances would be inconsistent with federal law.[133] Similarly, when a third party has actual knowledge of the termination of either the agent's authority or the power of attorney, she is free to reject the power of attorney.[134] If a request for a certification, a translation, or opinion of counsel has been refused, the third party may also reject the power of attorney.[135] A fourth safe harbor provides shel-

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[129] *See id.* § 120(a)(2) Alternative A.

[130] *See id.* § 120(a)(1)–(3) Alternative A.

[131] *See id.* § 120(b) Alternative A. Colorado amended this section in its UPOAA to include a safe harbor for individuals who refuse to accept a power of attorney based on their good faith belief that the agent was acting "either unlawfully or not in good faith." COLO. REV. STAT. ANN. §15-14-720 (LexisNexis 2009). However, under the Colorado UPOAA, in order to escape liability for refusing to accept a power of attorney, the person must perform a good faith investigation of the situation before so refusing. *See id.* Although Maryland stripped section 119 from its UPOAA, it did retain a modified version of section 120, Alternative B, applicable to the statutory short form power of attorney. Under section 120 of the Maryland UPOAA, a third party may not require an additional or different form of power of attorney for any authority granted in their statutory form power of attorney. Act effective Oct. 1, 2010, sec. 1, § 17-104, 2010 Md. Laws. Maryland's statute does not include any safeharbors for third parties who legitimately refuse a power of attorney. *See id.* However, Maryland does retain the section 120 sanctions for third parties who refuse to accept the statutory form power of attorney. Wisconsin added a provision to its UPOAA that lists the bases on which a third party may not refuse to accept an acknowledged power of attorney. Act of May 12, 2010, ch. 319, sec. 16, § 244.20(1), 2009 Wis. Sess. Laws. In Wisconsin, if a third party has no good faith basis for refusal or if the reason for the refusal is based exclusively on the fact that a power of attorney is too old or on a mandate that a different or additional power of attorney be used, then a third party may not refuse to accept an acknowledged power of attorney. *See id.* at § 244.20(2).

[132] *See* UNIF. POWER OF ATTORNEY ACT § 120(b)(1) Alternative A. Virginia expanded this third party protection to allow financial institutions and third parties to insert a provision in their agreements with principals providing that the financial institution or other party is not required to accept a power of attorney. *See* VA. CODE ANN. § 26-91(B)(1) (Supp. 2010).

[133] *See id.* § 120(b)(2) Alternative A.

[134] *See id.* § 120(b)(3) Alternative A.

[135] *See id.* § 120(b)(4) Alternative A.

ter if the third party believes in good faith that the power of attorney is not valid or that the agent does not have the authority to perform the act requested.[136] Finally, if the third party makes, or has actual knowledge that another person has made, a report to the local adult protective services department or adult protective services hotline stating 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, she can reject a power of attorney.[137] Only when a refusal does not meet one of these safe harbors will an individual be subject to a court order mandating acceptance of the power of attorney and liability for the costs and attorneys' fees incurred to obtain that mandate.[138]

> While the UPOAA does not require third persons [including financial institutions] to serve as watchdogs for [financial] abuse, the Act *permits* a third person to do so when there is good faith belief that the principal may be subject to some type of abuse by the agent or someone acting in concert with the agent. If the third person has such a belief and is willing to make a report to the local adult protective services office [or adult protective services hotline], or knows that someone else has made such a report, then an otherwise valid power of attorney may be refused.[139]

When counseling clients about powers of attorney, practitioners should recommend that the client ask financial institutions with whom they do business whether or not her account agreements opted out of accepting powers of attorney in accordance with UPOAA section 120(b), Alternative A.

21. Section 121: Principles of Law and Equity

Although the UPOAA is a lengthy statute, the common law of agency remains relevant. As stated previously, where the UPOAA is silent, the

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[136] *See id.* § 120(b)(5) Alternative A.

[137] *See id.* § 120(b)(6) Alternative A.

[138] *See id.*

[139] Linda S. Whitton, *Hot Buttons on the New Uniforms: The Controversial Provisions of the UTC, UPOAA, and UPMIFA, Balancing the "Buttons" on the Uniform Power of Attorney Act*, American College of Trust & Estate Counsel 2007 Annual Meeting, Symposium 1 (2007), http:www.actec.org/Documents/CLEMaterials/SymILWhitton UPAA.pdf (emphasis added).

common law of agency applies.[140] For example, matters not covered by the UPOAA include: (1) the authority a principal cannot delegate to an agent;[141] (2) the agent's liability and duties to third parties;[142] (3) the principal's duty to deal fairly and in good faith with the agent;[143] (4) actual and apparent authority;[144] and (5) the capacity of the agent.[145]

22. Section 122: Laws Applicable to Financial Institutions and Entities

Section 122 addresses the concerns of the banking and insurance industries that laws governing those entities may conflict with certain provisions of the UPOAA.[146] UPOAA section 122 provides that in the event that laws applicable to financial institutions, insurance companies, or other entities conflict with the UPOAA, the other law will supersede the UPOAA to the extent of the inconsistency.[147]

23. Section 123: Remedies Under Other Law

Remedies under the UPOAA are not exclusive and should not prevent aggrieved parties from seeking additional remedies under other laws.[148]

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[140] *See* UNIF. POWER OF ATTORNEY ACT § 121.

[141] Generally, a principal can delegate to an agent any acts that the principal could do for himself unless public policy or contractual obligations require personal performance. *See* RESTATEMENT (THIRD) OF AGENCY § 6.08 cmt. c (2006); *see also* First Union Nat'l Bank v. Thomas, 37 Va. Cir. 35, 40 (Cir. Ct. 1995) ("In the few reported cases dealing specifically with durable [p]owers of [a]ttorney, the [c]ourts have defined nondelegability rather narrowly."). However, some judicial decisions have held certain acts to be nondelegable, including marriage; divorce; voting; executing, amending, or revoking a will; representing the principal in court; and initiating bankruptcy proceedings. *See* Hook, *supra* note 4, at A-7 to -8. Additionally, it is doubtful that an agent in Virginia may make an augmented estate election against the estate of a deceased spouse of the principal. The Virginia conservatorship statute requires a conservator to obtain court approval for the election, and no similar authority for agents exists. *But see* VA. CODE ANN. § 37.2-1023(A)(6)(ii) (2005 & Supp. 2010).

[142] *See* RESTATEMENT (THIRD) OF AGENCY §§ 7.01, 7.02 (2006).

[143] *See id.* § 8.15.

[144] *See id.* §§ 2.01, 2.03.

[145] *See id.* § 3.05.

[146] However, the comments to section 122 suggest that, despite these concerns, "no specific conflicts were identified during the drafting process." UNIF. POWER OF ATTORNEY ACT § 122 cmt, 8B U.L.A. 66 (Supp. 2010).

[147] *See* UNIF. POWER OF ATTORNEY ACT § 122.

[148] *See id.* § 123.

B. Article 2: Authority

1. *Section 201: Authority That Requires Specific Grant; Grant of General Authority*

> This section requires that an agent receive an express, specific grant of authority for certain acts due to "the risk those acts pose to the principal's property and estate plan."[149] The acts requiring a specific grant of authority (frequently referred to as the "hot powers") include the ability to:
>
> (1) create, amend, revoke, or terminate an inter vivos trust;[150]
>
> (2) make a gift;
>
> (3) create or change rights of survivorship;
>
> (4) create or change a beneficiary designation;
>
> (5) delegate authority granted under the power of attorney;
>
> (6) waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; [or]
>
> (7) exercise fiduciary powers that the principal has authority to delegate [; or
>
> (8) disclaim property, including a power of appointment].[151]

Powers of attorney were previously strictly construed in many states.[152] Therefore, clearly stating in the instrument what authority an agent had was extremely important.

> The authority granted [in a power of attorney] is never considered to be greater than that warranted by its

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[149] *Id.* § 201 cmt. The draftsperson should pay particular attention to drafting provisions granting this authority.

[150] Virginia amended sections of the Virginia Uniform Trust Code to permit an agent under a power of attorney to create a trust when the terms of the power of attorney specifically authorize it. *See* VA. CODE ANN. § 55-544.01(1) (Supp. 2010). Virginia also amended another section of the Virginia Uniform Trust Code to provide that an agent acting under a power of attorney that expressly authorizes such action may exercise the settlor's powers of revocation, amendment, or distribution of trust property. *See id.* at 1, § 55-546.02(E).

[151] See UNIF. POWER OF ATTORNEY ACT § 201(a)(1)–(8) (brackets in original).

[152] *See, e.g.*, Jones v. Brandt, 645 S.E.2d 312, 315 (Va. 2007).

> language, or indispensable to the effective operation of the authority granted. The authority given is not extended beyond the terms in which it is expressed.
>
> This general rule of construction [regarding powers of attorney] essentially provides that expansive language . . . should be interpreted as intending only to confer those incidental powers necessary to accomplish object[ives] as to which express authority has been [granted]. . . .[153]

In contrast, the UPOAA simplifies defining the agent's authority. The Act spells out authority that requires a specific, express grant and allows the incorporation of authority into the power of attorney by reference. A grant of general authority under the UPOAA permits an agent to do all acts enumerated in UPOAA sections 204 through 216.[154]

You can prepare a one sentence power of attorney. For example, "I hereby grant my agent the authority to do or perform all acts that I could do." By including this language in a general durable power of attorney under the UPOAA, the agent automatically receives a broad grant of authority without the need to expressly list each power given.[155]

2. Section 202: Incorporation of Authority

The statutory definitions for authority over various subject areas may be incorporated by reference using "[t]he optional statutory form provided in section 301" or by referring to the descriptive term or specific statutory section in which the authority is described.[156]

As an example of granting general authority with respect to the principal's real property, the power of attorney could state: "I grant my agent general authority to act for me with respect to real property as defined in the UPOAA," or "I grant my agent general authority to act for me as provided in [State Code Section]."

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[153] *Id.* (citing Hotchkiss v. Middlekauf, 32 S.E. 36, 38 (Va. 1899)). However, in *Jones*, the court held that an agent acting pursuant to a power of attorney had the authority to change the beneficiary designation on a certificate of deposit even though the power of attorney did not expressly grant the agent the power to do so. *See id.* at 315–16.

[154] *See infra* Part III.B.4.

[155] *See* UNIF. POWER OF ATTORNEY ACT § 201(c).

[156] *Id.* § 202 cmt. Colorado added a provision to its UPOAA that allows a power of attorney to incorporate by reference a writing or any other record in existence at the time the power of attorney is executed. *See* COLO. REV. STAT. ANN. §15-14-725 (2009). The language of the power of attorney must manifest the intent to incorporate the writing or record, and it must describe the writing or other record "sufficiently to permit its identification." *Id.*

"If a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has authority with respect to all of the enumerated subject areas in Article 2 that do not require an express grant of authority."[157] "A principal may modify any authority incorporated by reference."[158]

3. *Section 203: Construction of Authority Generally*

> This section . . . describes incidental types of authority that accompany all authority granted to an agent under each of [UPOAA] [s]ections 204 through 217, unless this incidental authority is modified in the power of attorney. The actions authorized in [s]ection 203 are of the type often necessary to carry out the authority over the subjects described in [s]ections 204 through 217.[159]
>
> Incidental authority includes the power to do the following:
>
> (1) [recover] money or another thing of value to which the principal is, may become, or claims to be entitled and conserve, invest, disburse, or use anything so received or obtained for the purposes intended;
>
> (2) contract . . . on terms agreeable to the agent . . . and perform, rescind, cancel, terminate, reform, restate, release, or modify the contract or another contract made by . . . the principal;
>
> (3) execute, acknowledge, seal, deliver, file, or record any instrument . . .;
>
> (4) initiate, participate in, . . . settle, or accept a compromise with respect to a claim existing in favor of or against the principal . . .;
>
> (5) seek on the principal's behalf the assistance of a court or other governmental agency . . .;
>
> (6) engage, compensate, and discharge an attorney, accountant, discretionary investment manager, expert witness, or other advisor;
>
> (7) prepare, execute and file a record, report, or other document . . .;

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[157] Whitton, *supra* note 46, at 10.

[158] UNIF. POWER OF ATTORNEY ACT § 202 cmt.

[159] *Id.* § 203 cmt.

> (8) communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality on behalf of the principal;
> (9) access communications intended for, and communicate on behalf of the principal . . .; and
> (10) do any lawful act with respect to the subject and all property related to the subject.[160]

4. Sections 204 through 216

A power of attorney may grant an agent authority with respect to a particular subject by using the descriptive term for the subject or by citing to the section in the UPOAA where the authority is described. For example, if a power of attorney grants an agent authority over the principal's real property, the agent will have the authority described in UPOAA section 204.[161]

If the principal creates a general power of attorney and the principal's will makes a specific gift of property, the power of attorney or will should expressly address whether the gift is extinguished if the agent sells the property while the principal is incapacitated. For example, the Virginia

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[160] *Id.* § 203.

[161] The UPOAA defines the authority granted by the following descriptive terms: Real Property; Tangible Personal Property; Stocks and Bonds; Commodities and Options; Banks and Other Financial Institutions; Operation of Entity or Business; Insurance and Annuities; Estates, Trusts, and Other Beneficial Interests; Claims and Litigation; Personal and Family Maintenance; Benefits From Governmental Programs of Civil or Military Service; Retirement Plans; and Taxes. *See id.* §§ 204–16. Nevada added an additional provision to its UPOAA requiring that when the power of attorney grants specific or general authority for the agent to convey the principal's real property, or any other real property which the principal has the power to convey, the power of attorney must be recorded in the office or place where such conveyances are recorded. *See* NEV. REV. STAT. § 162A.480.2 (Supp. 2009). Furthermore, Nevada's UPOAA makes clear that when the power of attorney has been properly recorded, the power of attorney is not terminated by any act of the principal until an instrument containing a revocation is "deposited for record in the same office in which the instrument containing the power is recorded." *Id.* § 162A.480(3). Nevada also added a provision under the descriptive term "Banks and Other Financial Institutions," stating that "[a]n agent who is not the spouse of the principal must not be listed on any account as a cosigner with right of survivorship, but must be listed on the account solely as [agent under the] power of attorney." *Id.* § 162A.520.2. Regarding the descriptive term, "Personal and Family Maintenance", Maine's UPOAA omits the provision providing the general authority for an agent to perform the acts necessary to maintain the customary standard of living for the principal's children. *See* ME. REV. STAT. ANN. tit. 18-A, § 5-943 (Supp. 2009) (effective July 1, 2010).

Code provides for a default nonademption rule.[162] If a principal in Virginia wishes to provide for ademption, the following (or a similar) provision should be added to both the will and power of attorney: "I direct that any gift of specific property made in my will shall be extinguished by ademption if my agent under my general power of attorney shall sell the property. I expressly release my agent from any liability to my estate or to any beneficiary of my estate as a consequence of such sale."

The incorporation of descriptive terms into a power of attorney will permit the draftsperson to shorten the length of the document and significantly improve its readability. When this drafting option is used, the authors recommend that the draftsperson give the principal a separate document with the full description of the authority granted by each of the descriptive terms.

5. Section 217: Gifts

A specific grant of authority to make a gift under UPOAA section 201(a) is subject to the default limitations of UPOAA section 217 unless the principal expressly modifies the default limitations in the power of attorney.[163] "Because a gift of the principal's property reduces the principal's estate, the [UPOAA] . . . sets default per-donee limits on gift amounts."[164]

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[162] *See* VA. CODE ANN. § 64.1-62.3(B) (2007).

> Unless a contrary intention appears in a testator's will or durable power of attorney, a bequest or devise of specific property shall, in addition to such property as is part of the estate of the testator, be deemed to be a legacy of a pecuniary amount if such specific property shall, during the life of the testator and while he is incapacitated, be sold by an agent acting within the authority of a durable power of attorney for the testator, or if proceeds of fire or casualty insurance as to such property are paid to the agent. For purposes of this subdivision, (i) the pecuniary amount shall be the net sale price or insurance proceeds, reduced by the sums received under subdivision 2, (ii) no adjudication of testator's incapacity before death is necessary, (iii) the acts of an agent within the authority of a durable power of attorney are rebuttably presumed to be for an incapacitated testator, and (iv) an "incapacitated" person is one who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions. This subdivision shall not apply (i) if the agent's sale of the specific property or receipt of the insurance proceeds is thereafter ratified by the testator or (ii) to a power of attorney limited to one or more specific purposes.

Id.

[163] *See* UNIF. POWER OF ATTORNEY ACT § 217(b).

[164] *Id.* § 201 cmt.

However, the principal may expressly grant the agent greater authority to make gifts of his property.[165] For example, the principal may wish to grant greater authority to the agent to make a gift of his or her assets to qualify for Medicaid Long Term Care assistance.[166]

No single gift authority provision is appropriate for every client. An attorney should carefully discuss this authority with the client and draft the provision to meet the client's needs and desires.

C. Article 3: Statutory Forms

1. Section 301: Statutory Form Power of Attorney

Article 3 includes a concise, optional statutory form.[167] The availability of legal forms is widespread;[168] eighteen states have statutory power of attorney forms.[169] The UPOAA statutory form is designed to be understandable to lay persons and still provide attorneys with a "foundation upon which any drafting option under the Act [UPOAA] can be implemented."[170] The purpose of including a statutory form is to achieve familiarity and a common understanding of powers of attorney through the use of one form with a goal of facilitating acceptance by third parties.[171] Critics of the UPOAA

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[165] *See id.*

[166] *See id.* VA. DEP'T OF SOC. SERVS., VOL. 13, MEDICAID ELIGIBILITY MANUAL ch. M1450.400 (C), (D) (2008) (setting forth the rules relating to transfers that are exempt from the Medicaid transfer of asset rules).

[167] Of those states that have adopted the UPOAA, Maine and Virginia are the only states that chose not to include a statutory form. *See* ME. REV. STAT. ANN. tit. 18-A, § 5-951 (Supp. 2009) (effective July 1, 2010); VA. CODE ANN. § 26-112 (Supp. 2010). However, both states did include the Agent's Certification for the statutory form, which the agent uses to certify facts concerning a power of attorney. *See* ME. REV. STAT. ANN. tit. 18-A, § 5-951; VA. CODE ANN. § 26-113 (Supp. 2010).

[168] A Google search for "power of attorney form" resulted in about 6.2 million hits with some power of attorney forms free to download and others costing as little as $9.99. *See* Google, http://www.google.com (last visited Mar. 3, 2010). The same search on Amazon resulted in eighty-nine hits. *See* Amazon.com, http://amazon.com (last visited Mar. 3, 2010). LegalZoom.com sells a customized power of attorney for $35 with a "LegalZoom Peace of Mind Review" and rush, two-business-day delivery. Legalzoom.com, http://www.legalzoom.com/power-of-attorney-pricing.html (last visited Mar. 3, 2010). Thus, even without the assistance of an attorney, a consumer can obtain a power of attorney form without difficulty.

[169] *See, e.g.*, ARK. CODE. ANN. § 28-68-401 (2004 & Supp. 2009); COLO. REV. STAT. ANN. § 15-1-1302 (LexisNexis 2009); KAN. STAT. ANN. § 58-632 (2005); MINN. STAT. ANN. § 523.23 (West 2006); N.C. GEN. STAT. § 32A-1 (2009); OKLA. STAT. ANN. tit. 15, § 1003 (West Supp. 2009).

[170] Whitton, *supra* note 46, at 6.

[171] *See* UNIF. POWER OF ATTORNEY ACT art. 3 gen. cmt.

have expressed concern that the inclusion of a statutory form would take business away from attorneys who routinely draft comprehensive powers of attorney. The authors have spoken with attorneys in North Carolina, New York, and sixteen other states with statutory forms who report that they still frequently draft custom powers of attorney for their clients and that the statutory form has not diminished their practice in this area.

The inclusion of the hot powers in the statutory form is an option granted in the UPOAA.[172] However, fiduciaries generally do not have these powers, and agents under a POA are fiduciaries with the least supervision.[173] Some members of the Virginia bar have expressed concern that the inclusion of these optional hot powers in the statutory form would increase the likelihood of financial elder abuse using POAs. These members believe that, despite the cautionary caption, many elderly persons using the statutory form without the assistance of an attorney will simply check all of the boxes on the form without fully considering the extraordinary authority they are granting their agent.[174] Therefore, the authors recommend deleting these powers from the statutory form.

Will attorneys draft comprehensive powers of attorneys or statutory short form powers of attorney for their clients? The authors have learned from corresponding with attorneys in other jurisdictions that two practices have developed. The first practice is for the attorney to draft (1) a statutory short form power of attorney for routine transactions with financial institutions and (2) a comprehensive power of attorney to define the full scope of the authority granted and the terms of the relationship. The second practice is for the attorney to draft only a comprehensive power of attorney. However, even in those states that use the statutory short form, the majority of attorneys still utilize addenda (or, in the case of the UPOAA, the Special Instructions section) to tailor the form as needed for individual client's circumstances. The authors will likely adopt the first practice of drafting both a short form and a comprehensive power of attorney.

The statutory short form power of attorney has an excellent, easy-to-understand set of instructions for agents. Attorneys should consider adopting the instructions for the powers of attorney they draft.

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[172] *See id.* § 201.

[173] *See* Jones v. Brandt, 645 S.E.2d 312, 315 (Va. 2007).

[174] This information is based on conversations with elder law attorneys by e-mail and at the Annual Meeting of the Virginia Chapter of the National Association of Elder Law Attorneys. Virginia did not include the statutory form power of attorney in its UPOAA. *See supra* note 167. The authors recommend that the Virginia UPOAA be amended to include the statutory form power of attorney without the hot powers.

2. *Section 302: Agent's Certification*

This section is optional for an "agent certification of facts pertaining to a power of attorney."[175] The statements of fact in the form are those for "which third persons commonly request certification," but the agent may add any "other factual statements . . . to the form for the purpose of providing an agent certification request pursuant to [UPOAA] [s]ection 119."[176]

D. Article 4: Miscellaneous Provisions

1. *Section 401: Uniformity of Application and Construction*

UPOAA section 401 provides: "In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it."[177] The Uniform Trust Code, Uniform Principal and Income Act, and Uniform Simultaneous Death Act contain this same provision.[178]

2. *Section 402: Relation to Electronic Signatures in Global and National Commerce Act*

The UPOAA modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (ESGNCA).[179] However, the UPOAA does not modify, limit, or supersede section 101(c) or section 103(b) of that Act.[180] Section 101(c) of the ESGNCA provides that "if a statute, regulation, or law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing," that writing may be in electronic form only if the requirements in section 101(c) are met.[181] Furthermore, section 103(b) prohibits electronic delivery of certain notices.[182]

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[175] UNIF. POWER OF ATTORNEY ACT art. 3 gen. cmt.

[176] *Id.* § 302 cmt.

[177] *Id.* § 401.

[178] *See* UNIF. TRUST CODE § 1101, 7C U.L.A. 670 (2006); UNIF. PRINCIPAL AND INCOME ACT § 601, 7A U.L.A. 544 (2006); UNIF. SIMULTANEOUS DEATH ACT (amended 1993) § 8, 8B U.L.A. 157 (2001).

[179] *See* UNIF. POWER OF ATTORNEY ACT § 402 (citing Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified as amended at 15 U.S.C.A. §§ 7001–06, 7021, 7031 (West 2006)).

[180] *See id.*

[181] Therefore, an agent acting for a principal under the UPOAA is subject to the requirements in section 101(c) of the ESGNC only when each of the following elements is met: (1) the agent is selling or leasing real or personal property, products, goods, or services for the principal; (2) the recipient of the property, products, goods, or services will use them primarily for personal, family, or household purposes; (3) the transaction is in or affects

This section, which is being inserted in all Uniform Acts approved in 2000 or later, preempts the ESGNCA. Section 102(a)(2)(B) of the ESGNCA provides that a later state statute that specifically refers to the federal law can preempt the ESGNCA.[183] For all other purposes, the effect of this section is to leave to state law the procedures for obtaining and validating an electronic signature.[184]

3. Section 403: Effect on Existing Powers of Attorney

The UPOAA applies to both a power of attorney created before, on, or after the effective date and a judicial proceeding concerning a power of attorney commenced on or after the effective date.[185] The UPOAA "applies to a judicial proceeding concerning a power of attorney commenced before the effective date . . . unless the court finds that the application of a provision of . . . [the UPOAA] would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party."[186] The UPOAA does not affect any action taken by an agent or third party before the effective date.[187]

IV. CONCLUSION

Eight states and the U.S. Virgin Islands have already enacted the UPOAA, and many other states are considering its enactment.[188] The au-

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interstate or foreign commerce; and (4) there is a statute, regulation, or law requiring information relating to the transaction to be in writing. *See* 15 U.S.C. §§ 7001(c)(1), 7006(a)(1), (a)(13) (2006).

[182] This provision prohibits the electronic delivery of the following notices:

> (A) the cancellation or termination of utility services (including water, heat, and power);
>
> (B) default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual;
>
> (C) the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities); or
>
> (D) recall of a product, or material failure of a product, that risks endangering health or safety . . . .

15 U.S.C. § 7003(b)(2)(A)–(D) (2006).

[183] *See id.* § 7002(a)(2)(B).

[184] *See id.* § 7002(a).

[185] *See* UNIF. POWER OF ATTORNEY ACT § 403.

[186] *Id.*

[187] *See id.*

[188] *See* Unif. Law Comm'rs, *supra* note 29.

thors suggest that states looking to enact the UPOAA consider the following revisions to the Act:

(1) Amend section 106 to incorporate language that eliminates any requirement that the power of attorney must be delivered to the agent in order for it to be valid;[189]

(2) Amend section 301 to delete the hot powers from the statutory form;[190]

(3) Amend section 119 to provide that the risk of loss for acceptance of a forged power of attorney by a third party will rest with a third party who accepted it rather than with the purported principal.[191]

(4) Amend section 119 to mandate that third parties adhere to commercially reasonable standards when disseminating information related to a power of attorney, a principal, or an agent to employees to receive protection under the UPOAA

(5) Amend section 106 to include optout language that allows a principal, within the power of attorney, to provide that a photocopy of a power of attorney will not have the same effect as the original.[192] In addition to these amendments to the UPOAA, the authors recommend that adopting states review their Trust Code to specifically permit a power of attorney to expressly authorize the creation of a trust and the exercise of the settlor's powers of revocation, amendment, or distribution of trust property.

The UPOAA, with the amendments noted above, should be enacted in all states for several reasons. First, the UPOAA seeks to preserve powers of attorney as a low-cost, flexible, and private form of surrogate decision making. Second, the UPOAA encourages third-party acceptance of powers of attorney by providing broad protection for good faith acceptance or refusal of an acknowledged power of attorney by third parties. Third, the UPOAA provides sanctions for unreasonable refusals of an acknowledged power of attorney.[193] Fourth, the UPOAA provides protection for principals with mandatory and default fiduciary duties for the agent, liability for agent misconduct, broad standing for judicial review, and the requirement for express language to grant certain authority that could dissipate the principal's prop-

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[189] *See supra* Part III.A.6.
[190] *See supra* Part III.C.1.
[191] *See supra* Part III.A.19.
[192] *See supra* Part III.A.6.
[193] *See* UNIF. POWER OF ATTORNEY ACT § 120(c) Alternative A.

erty or alter the principal's estate plan.[194] Fifth, the UPOAA recognizes that an agent who acts with care, competence, and diligence for the benefit of a principal should not be liable solely because the agent also benefits from the act or has conflicting interest.[195] Finally, the UPOAA facilitates the drafting of powers of attorney by providing modern definitions of authority that can be granted to an agent by incorporation by reference of descriptive terms and default provisions that can be customized to suit the principal.[196]

Powers of attorney have become an essential disability and incapacity planning tool. As the popularity of powers of attorney has increased over the years, so has the resulting litigation surrounding their use. Most states currently only have a few brief statutes that address powers of attorney.[197] The common law of agency supplements most of the law in this area.[198] The problem is that the common law of agency was developed for supervised agencies where a principal was still competent to supervise his agent's actions. The common law does not take into account that most powers of attorney are now durable and last beyond a principal's incapacity. A comprehensive statute pertaining to the use of powers of attorney is warranted in every state. Such a statute would ensure that default rules are in place when a principal is incapacitated and can't supervise his agent and to protect third parties. The authors feel that the UPOAA is that statute.

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[194] *See, e.g.*, UNIF. POWER OF ATTORNEY ACT § 114.

[195] *See, e.g.*, *id.* § 114 cmt.

[196] *See* Unif. Law Comm'rs, The Nat'l Conference of Comm'rs on Unif. State Laws, Summary: Uniform Power of Attorney Act (2006), http://www.nccusl.org/update/uniform act_ summaries/uniformacts-s-upoaa.asp.

[197] *See* Whitton, *supra* note 18, at 4–5.

[198] *See id.*