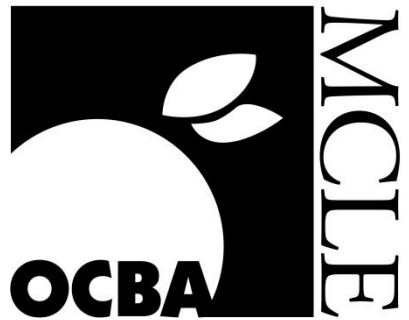

ORANGE COUNTY BAR ASSOCIATION

**TRUSTS & ESTATES
SECTION WEBINAR**

Powers of Attorney – Myths, Management and Litigation



Tuesday, April 20, 2021

Bank XYZ

Dear Bank

I prepared a Durable Power of Attorney for your depositor, ** appointing ** as her agent and attorney-in-fact. ** executed the power of attorney and it was notarized on **.

** informs me that she is having difficulty utilizing the power of attorney at your branch. She has apparently been told that only the bank's own power of attorney form is valid at your bank. Whomever is rendering that legal opinion is incorrect.

If it is your bank's policy to require attorneys-in-fact to execute an affidavit under Probate Code §4305, to the effect that the Power of Attorney is still in full force and effect, ** will sign such an affidavit for you. However, the bank cannot impose requirements to the execution of the power of attorney itself that are not otherwise required by law.

In any event, the bank is obligated to honor the Power of Attorney. Anyone refusing to honor a valid Power of Attorney is liable for any attorney fees and costs incurred by the other party in prosecuting a court action to confirm that party's authority under the power of attorney.

Before ** takes any formal court action to have the power of attorney recognized, I would like to give your bank an opportunity to reconsider its position. Attached is a copy of the relevant Probate Code sections 4305 and 4306, specifically referencing the liability of anyone refusing to honor the power of attorney. You may call me or have your attorney call me if you have any questions or concerns about the power of attorney. Otherwise, please accommodate ** request to access her mother's accounts. Thank you for your prompt attention to this request.

Sincerely,

Powers of Attorney – Myths, Management and Litigation

OUTLINE OF CALIFORNIA FINANCIAL POWER OF ATTORNEY STATUTES

**Vivian L. Thoreen
Stacie Nelson
Holland & Knight LLP**

**Orange County Bar Association
April 20, 2021**

I. Scope of Statutes Related to Financial POAs

1. Scope of California Power of Attorney Laws

California has a law that applies broadly to almost all powers of attorney, the California Power of Attorney Law (“California POA Law”), as well as additional laws that apply to powers of attorney (“POA” and “POAs”) that utilize a statutory form, known as the California Uniform Statutory Form Power of Attorney Act (“California Uniform POA Forms Act”). The California POA Law applies to all powers of attorney except:

- a power to make healthcare decisions;¹
- a power to the extent it is coupled with an interest in the subject of the power of attorney;²
- “reciprocal or interinsurance exchanges and their contracts, subscribers, attorneys-in-fact, agents, and representatives;”³ and
- a proxy or other delegation to exercise voting rights.⁴

Under the California POA Law, a durable power of attorney executed in another state or jurisdiction that was executed in compliance with the laws of that state or jurisdiction, or California, is valid in California.⁵ And although it is not explicitly stated in the California POA law, a POA is also valid if executed in compliance with the federal requirements for a military power of attorney.⁶

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¹ Cal. Prob. Code §4050(a)(1).

² Cal. Prob. Code §4050(b)(1).

³ Cal. Prob. Code §4050(b)(2).

⁴ Cal. Prob. Code §4050(b)(3).

⁵ Cal. Prob. Code §4053.

⁶ See 10 U.S.C. §1044b(a)(1)-(2) (“A military power of attorney (1) is exempt from any requirement . . . provided for powers of attorney under the laws of a State; and (2) shall be given

The California POA Law can apply based on a broad range of criteria, and once applicability is established, the California POA Law remains applicable. More specifically, if the POA states that the California POA Law will govern, or if it otherwise indicates that this was the principal's intent, then the California POA law applies to acts and transactions of the attorney-in-fact in or outside of California if any of the following conditions exist:

- (1) the principal or attorney-in-fact was domiciled in California when the principal executed the POA;
- (2) the authority conferred on the attorney-in-fact relates to property, acts, or transactions in California;
- (3) the acts or transactions of the attorney-in-fact occurred or were intended to occur in California;
- (4) the principal executed the POA in California; or
- (5) there is otherwise a reasonable relationship between California and the subject matter of the POA.⁷

Even absent such conditions, the California POA Law still applies to the acts and transactions of an attorney-in-fact in California when either the principal was domiciled in California when the POA was executed, or if the principal executed the POA in California.⁸ The applicability of the California POA Law does not change if the domicile of the attorney-in-fact or principal or the location of the property which caused the California POA Law to apply changes.⁹

Under the California POA Law, POAs are only durable if appropriate language is included to show that the principal intended the attorney-in-fact to be able to exercise the authority conferred regardless of the principal's subsequent incapacity.¹⁰

If a court appoints a conservator of the principal's estate or other fiduciary charged with management of some or all of the principal's property, the attorney-in-fact becomes accountable to the fiduciary as well as to the principal.¹¹ The fiduciary has the same power to revoke or amend the durable power of attorney that the principal would have had if not incapacitated, subject to any required court approval.¹² A conservator of the estate can revoke or amend the POA only if the court has first ordered the conservator to modify or revoke the POA and the modification or

the same legal effect as a power of attorney prepared and executed in accordance with the laws of the State concerned.”)

⁷ Cal. Prob. Code §4052(a)(1)-(5).

⁸ Cal. Prob. Code §4052(b)(1)-(2).

⁹ Cal. Prob. Code §4052(c).

¹⁰ Cal. Prob. Code §§4018 (defining “durable power of attorney”), 4124 (stating the required language).

¹¹ Cal. Prob. Code §4206(a).

¹² Cal. Prob. Code § 4206(a).

revocation is consistent with the order.¹³ In addition, the court can suspend or terminate the POA as part of the conservatorship proceedings.¹⁴

In the absence of a specific rule within the California POA Law, however, the general law of agency applies.¹⁵

2. *Observations of the California POA Law*

“Agent” vs. “Attorney-in-Fact”: The person given authority to act for the principal under a POA is an agent called the “attorney-in-fact.”¹⁶

Applicability to all POAs: The California POA Law has been in effect since January 1, 1995, and applies to all POAs regardless of whether they were executed before, on, or after that date.¹⁷

Liability of attorneys-in-fact: An attorney-in-fact is not liable for a predecessor attorney-in-fact’s breach of fiduciary duty.¹⁸ Additionally, the California POA Law provides relatively broad relief from liability when an attorney-in-fact has taken reasonable actions in good faith, but it is at the court’s discretion whether to excuse the attorney-in-fact from liability.¹⁹

General and Specific Grants of Authority: The California POA Law’s provision on the powers bestowed upon an attorney-in-fact by a general grant of authority is much less specific than the California POA Forms Act. The California POA Forms Act has numerous provisions detailing the default powers an attorney-in-fact is given if a POA states that he has general authority as to a specific subject or category of actions,²⁰ while the California POA Law does not have similar sections.

Of note, the California POA Forms Act is California’s enactment of the Uniform Statutory Form Power of Attorney Act, a predecessor to the Uniform Power of Attorney Act (UPOAA). (The UPOAA incorporates much of the material previously in the Uniform Statutory Form Power of Attorney Act, which explains why the California POA Forms Act shares more similarities with the UPOAA than the California POA Law.) The California POA Law also allows a non-statutory POA to incorporate provisions applicable to a statutory POA by reference.

¹³ Cal. Prob. Code §§4206(b), 4153(a)(3).

¹⁴ See Cal. Prob. Code §4206(b).

¹⁵ Cal. Prob. Code §4051.

¹⁶ Cal. Prob. Code §4014(a).

¹⁷ Cal. Prob. Code §4054.

¹⁸ Cal. Prob. Code §4203(c).

¹⁹ Cal. Prob. Code §4231.5(b).

²⁰ Cal. Prob. Code §§4451-4463.

II. Summary of Statutes

1. Statutes related to rights, responsibilities, duties and obligations of the attorney-in-fact, principal and third parties dealing with POAs

a. Attorney-in-Fact

Attorney-in-Fact's Duties

The California POA Law gives principals broad power to limit or eliminate the default duties imposed on an attorney-in-fact, although the principal is precluded from limiting certain specific duties.²¹

Unless the power of attorney states otherwise, an attorney-in-fact also has the following duties under the California POA Law:

- (1) act loyally in the principal's best interest²²;
- (2) avoid conflicts of interest²³;
- (3) keep the principal's property separate and distinct from other property in a manner adequate to clearly identify the property as belonging to the principal²⁴;
- (4) act with the care, competence, and diligence ordinarily exercised by attorney-in-facts in similar circumstances²⁵; and
- (5) keep a record of all receipts, disbursements, and transactions made on behalf of the principal²⁶.

The California POA Law provides a mechanism by which an attorney-in-fact may provide an affidavit as to acts undertaken in good faith reliance of the validity of the POA, but does not explicitly impose an obligation on an attorney-in-fact to provide one.²⁷ If an attorney-in-fact provides an affidavit stating that "at the time of the exercise of the power, the attorney-in-fact did not have actual knowledge of the termination of the power of attorney or the attorney-in-fact's authority by revocation or of the principal's death or incapacity," such affidavit is "conclusive proof of the nonrevocation or nontermination of the power at that time."²⁸ If the attorney-in-fact provides the affidavit, whether voluntarily or on demand, and the POA is refused, the attorney-in-

²¹ Cal. Prob. Code §4101.

²² Cal. Prob. Code §4232(a).

²³ Cal. Prob. Code §4232(a).

²⁴ Cal. Prob. Code §4233(a).

²⁵ Cal. Prob. Code §§4231, 4237.

²⁶ Cal. Prob. Code §4236(a).

²⁷ Cal. Prob. Code §§4305-4306.

²⁸ Cal. Prob. Code §4305(a).

fact may seek a court order mandating acceptance of the POA.²⁹ If such a request is granted, the attorney-in-fact is entitled to recover reasonable attorney's fees and costs from the third party, unless the court determines that the third person believed in good faith that the attorney-in-fact was not qualified or was attempting to exceed or improperly exercise the attorney-in-fact's authority.³⁰

The California POA Law also imposes a duty on an attorney-in-fact to maintain regular contact and communications with the principal, and to follow the principal's instructions unless a court authorizes him to do otherwise.³¹

Attorney-in-Fact's Liability

If an attorney-in-fact breaches a fiduciary duty, he is liable for the full amount of damages caused by his breach under the California POA Law.³² An attorney-in-fact can only be held liable for a decline in the value of a principal's property if the attorney-in-fact breached a duty he owed to the principal.³³ If an attorney-in-fact violates any provision of the California POA Law, damages owed by the attorney-in-fact can include loss or depreciation in value of the principal's property resulting from the breach of duty, with interest; profits made by the attorney-in-fact due to his breach, with interest; and/or profit that would have accrued to the principal if the loss of profit is the result of the breach of duty.³⁴ Additionally, the California POA Law allows an attorney-in-fact to avoid liability for reasonable actions taken in good faith,³⁵ but it also imposes twice the value of the property recovered against an attorney-in-fact if the attorney-in-fact acts in bad faith, and allows for an award of attorney's fees against such an attorney-in-fact, as well.³⁶

As mentioned above, the California POA Law does not impose liability on an attorney-in-fact for the actions of a predecessor attorney-in-fact.³⁷

The California POA Law does not explicitly address provisions relieving an attorney-in-fact from liability, but a principal generally has the power to limit the application of any provision of the California POA Law, and the provisions imposing liability on attorney-in-facts are not excluded from that power.³⁸ The California POA Law has a broad liability exemption for attorney-in-fact whose actions were reasonably taken in good faith, but courts have discretion as to whether to excuse the attorney-in-fact from liability.³⁹

²⁹ Cal. Prob. Code §4306.

³⁰ Cal. Prob. Code §4306.

³¹ Cal. Prob. Code §4234.

³² Cal. Prob. Code §4231.5(a).

³³ Cal. Prob. Code §4231.5.

³⁴ Cal. Prob. Code §4231.5(a).

³⁵ Cal. Prob. Code §4231.5(b).

³⁶ Cal. Prob. Code §4231.5(c).

³⁷ Cal. Prob. Code §4203(c).

³⁸ Cal. Prob. Code §4101.

³⁹ Cal. Prob. Code §4231.5(b).

Reimbursement and Compensation of Attorney-in-Fact

Attorneys-in-fact are entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to reasonable compensation unless the power of attorney states otherwise.⁴⁰

Attorney-in-Fact's Powers

Under the California Uniform POA Forms Act, an attorney-in-fact's power over the principal's property automatically extends to all property the principal has when the power of attorney is executed or acquires later, even if the property is outside of the state, the attorney-in-fact exercises his authority outside of the state, and/or the power of attorney is executed outside of the state.⁴¹

The California POA Law gives an attorney-in-fact the power to do the following: "consult with and obtain information needed to carry out the attorney-in-fact's duties from the principal's spouse, physician, attorney, accountant, a member of the principal's family, or other person, business entity, or government agency with respect to matters to be undertaken on the principal's behalf and affecting the principal's personal affairs, welfare, family, property, and business interests" if the principal becomes incapacitated or there is a question about the principal's capacity, unless the POA otherwise limits or eliminates this power.⁴²

There are certain types of powers an attorney-in-fact only has if the power of attorney specifically grants them. The California POA Law requires specific grants of authority in order for an attorney-in-fact to be able to do any of the following:

- (1) Create, amend, revoke, modify, or terminate a trust;
- (2) Make or revoke a gift;
- (3) Create or change rights of survivorship; or
- (4) Create or change a beneficiary designation.⁴³

Of note, the California POA Law requires a specific grant of authority to take action as to any trust, and further requires specific grant of authority for certain uses of the principal's property to fund trusts.⁴⁴ The California POA Law also requires a grant of specific authority in order for an attorney-in-fact to make loans to himself from the principal's property.⁴⁵

⁴⁰ Cal. Prob. Code §4204.

⁴¹ Cal. Prob. Code §4464.

⁴² Cal. Prob. Code §4235.

⁴³ Cal. Prob. Code §4264(a), (c)-(f).

⁴⁴ Cal. Prob. Code §4264(a)-(b).

⁴⁵ Cal. Prob. Code §4264(g).

Under the California POA Law, attorneys-in-fact have the authority to delegate by default.⁴⁶ If the POA in question is the form POA provided under the California Uniform POA Forms Act, then it grants the attorney-in-fact general authority to do all of the following:

- (1) Demand, receive, and obtain by litigation or otherwise, money or other thing of value to which the principal is, may become, or claims to be entitled, and conserve, invest, disburse, or use anything so received for the purposes intended.
- (2) Contract in any manner with any person, on terms agreeable to the attorney-in-fact, to accomplish a purpose of a transaction, and perform, rescind, reform, release, or modify the contract or another contract made by or on behalf of the principal.
- (3) Execute, acknowledge, seal, and deliver a deed, revocation, mortgage, lease, notice, check, release, or other instrument the attorney-in-fact considers desirable to accomplish a purpose of a transaction.
- (4) Prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to, a claim existing in favor of or against the principal or intervene in litigation relating to the claim.
- (5) Seek on the principal's behalf the assistance of a court to carry out an act authorized by the power of attorney.
- (6) Engage, compensate, and discharge an attorney, accountant, expert witness, or other assistant.
- (7) Keep appropriate records of each transaction, including an accounting of receipts and disbursements.
- (8) Prepare, execute, and file a record, report, or other document the attorney-in-fact considers desirable to safeguard or promote the principal's interest under a statute or governmental regulation.
- (9) Reimburse the attorney-in-fact for expenditures properly made by the attorney-in-fact in exercising the powers granted by the power of attorney.
- (10) In general, do any other lawful act with respect to the subject.⁴⁷

California law does not generally authorize the attorney-in-fact to access electronic communications, but California has enacted its Uniform Fiduciary Access to Digital Assets Act (UFADAA).

⁴⁶ Cal. Prob. Code §4205.

⁴⁷ Cal. Prob. Code §4450.

An attorney-in-fact under California law does have the authority to reimburse himself for expenditures he properly makes by exercising the powers granted to him under the POA.⁴⁸

The California POA Law also provides an attorney-in-fact who has been given general authority a much broader range of power: the attorney-in-fact “has all the authority to act that a person having the capacity to contract may carry out through an attorney-in-fact specifically authorized to take the action.”⁴⁹

A power of attorney may also give an attorney-in-fact authority as to certain categories of assets or dealings. Under the California Uniform POA Forms Act, unless the POA specifies otherwise, the scope of a grant of general authority as to the following matters is defined by statute:

- real estate;⁵⁰
- tangible personal property;⁵¹
- stocks and bonds;⁵²
- commodities and options;⁵³
- dealings with banks and other financial institutions;⁵⁴
- operation of an entity or business;⁵⁵
- insurance and annuities;⁵⁶
- estates, trusts, and other beneficial interests;⁵⁷
- claims and litigation;⁵⁸
- personal and family maintenance;⁵⁹
- benefits from governmental programs or military service;⁶⁰
- retirement plans;⁶¹ and
- taxes.⁶²

If a POA falls under the California POA Law rather than the California POA Forms Act, there are no statutory gap-fillers to elaborate on what a grant of general authority as to any of these categories specifically authorizes an attorney-in-fact to do. When a POA grants attorney-in-fact a limited authority, the California POA Law simply states that the attorney-in-fact has that authority

⁴⁸ Cal. Prob. Code §4450(i).

⁴⁹ Cal. Prob. Code §4261.

⁵⁰ Cal. Prob. Code §4451.

⁵¹ Cal. Prob. Code §4452.

⁵² Cal. Prob. Code §4453.

⁵³ Cal. Prob. Code §4454.

⁵⁴ Cal. Prob. Code §4455.

⁵⁵ Cal. Prob. Code §4456.

⁵⁶ Cal. Prob. Code §4457.

⁵⁷ Cal. Prob. Code §4458.

⁵⁸ Cal. Prob. Code §4459.

⁵⁹ Cal. Prob. Code §4460.

⁶⁰ Cal. Prob. Code §4461.

⁶¹ Cal. Prob. Code §4462.

⁶² Cal. Prob. Code §4463.

as described, along with “the authority incidental, necessary, or proper to carry out the granted authority.”⁶³ Additionally, the California POA Law allows a POA to incorporate by reference any powers of attorney-in-fact under the California POA Forms Act, as well as any powers of guardians, conservators, and trustees under applicable California laws, or to grant powers by incorporating any other statute.⁶⁴

Termination of POA or Attorney-in-Fact’s Authority

Under the California POA Law, an attorney-in-fact’s authority terminates when (1) revoked by the principal; (2) upon the principal's death; (3) upon the attorney-in-fact’s death, incapacity, removal, or resignation; (4) filing of dissolution or annulment of the attorney-in-fact’s marriage to the principal or their legal separation (unless the POA states otherwise); or (5) the power of attorney otherwise has its purpose fulfilled or terminates.⁶⁵

Further, the execution of a new POA does not automatically revoke a previous POA. The execution of a new POA does not revoke a previous POA or terminate an attorney-in-fact’s authority.⁶⁶ The California POA Law also contemplates the designation of multiple attorneys-in-fact through more than one POA.⁶⁷ However, if a principal grants inconsistent authority to one or more attorneys-in-fact under the California POA Law, the later-granted authority controls.⁶⁸

If an attorney-in-fact wishes to resign under the California POA Law, the attorney-in-fact may do so by giving notice to the principal, or if the principal is incapacitated, to the person(s) authorized under the applicable statute to accept notice on the principal’s behalf.⁶⁹ The California POA Law also provides that an attorney-in-fact may resign pursuant to a court order.⁷⁰ The California POA Law does not allow a POA to alter the statutorily prescribed resignation methods for resigning, such as by unique terms set forth in a POA.⁷¹

b. Principal

Under the California POA Law, a principal may limit the application of any part of that law through either an express statement in the POA or by providing an inconsistent rule in the POA;⁷² however, the following provisions of the California POA Law may not be limited or altered:

- Warnings or notices required to be included in a power of attorney;
- Operative dates of statutory enactments or amendments;

⁶³ Cal. Prob. Code §4262.

⁶⁴ Cal. Prob. Code §4263(a).

⁶⁵ Cal. Prob. Code §4152(a).

⁶⁶ Cal. Prob. Code §§4152, 4153.

⁶⁷ Cal. Prob. Code §§ 4130; 4202(a).

⁶⁸ Cal. Prob. Code §4130(a).

⁶⁹ Cal. Prob. Code §4207(a)(1)-(3).

⁷⁰ Cal. Prob. Code §4207(a)(4).

⁷¹ Cal. Prob. Code §4207(b).

⁷² Cal. Prob. Code §4101(a).

- Execution formalities;
- Qualifications of witnesses;
- Qualifications of attorneys-in-fact; and
- Protection of third persons from liability.⁷³

Under the California POA Law, a principal has the right to decide whether his POA is durable and when it takes effect.⁷⁴ If the principal provides that the POA only becomes effective upon the occurrence of a future event or contingency, he may likewise authorize a specific person or persons to determine whether that event or contingency has occurred.⁷⁵

The California POA law allows a principal to designate multiple co-attorneys-in-fact and/or successor attorneys-in-fact.⁷⁶ Under the California POA Law, attorneys-in-fact must act unanimously unless the POA gives them explicit authority to act independently.⁷⁷

A principal has the right to nominate a conservator of the principal's estate or person through a durable power of attorney as long as the POA is executed before protective proceedings begin.⁷⁸ If conservatorship proceedings are initiated in California, the California POA Law directs that the Court shall give effect to the nomination in the principal's most recent writing, whether that is the durable POA or a subsequent document.⁷⁹

Unless the principal lacks capacity, he has the power to modify or revoke a power of attorney or a grant of authority to an attorney-in-fact.⁸⁰ However, if an attorney-in-fact or another person acts in good faith under power of attorney without knowledge that the attorney-in-fact's authority has been terminated, the power of attorney pursuant to which the attorney-in-fact was acting has been terminated, or if the principal of a nondurable power of attorney has become incapacitated, these good-faith actions still bind the principal's successors in interest unless otherwise invalid or unenforceable.⁸¹ While the California POA Law does not explicitly say such acts still bind the principal when the attorney-in-fact's authority has been terminated for other reasons, some protections are still provided for attorneys-in-fact and third parties who do not have notice of modifications to or revocations of a POA.⁸²

⁷³ Cal. Prob. Code §4101(b).

⁷⁴ Cal. Prob. Code §§4124, 4129.

⁷⁵ Cal. Prob. Code §4129(a).

⁷⁶ Cal. Prob. Code. §§4202(a), 4203(a).

⁷⁷ Cal. Prob. Code §4202(b).

⁷⁸ Cal. Prob. Code §4126(a).

⁷⁹ Cal. Prob. Code §4126(b).

⁸⁰ Cal. Prob. Code §§4120, 4150(a), 4151(a).

⁸¹ Cal. Prob. Code §4304.

⁸² Cal. Prob. Code §§4150(b), 4151(b), 4300-4310.

c. *Third Parties*

Under the California POA Law, a third party who is presented with a power of attorney may ask that the attorney-in-fact certify a factual matter concerning the principal, attorney-in-fact, or power of attorney. If an attorney-in-fact furnishes an affidavit that he has executed stating that, “at the time of the exercise of the power, the attorney-in-fact did not have actual knowledge of the termination of the power of attorney or the attorney-in-fact’s authority by revocation or of the principal’s death or incapacity,” and a third party refuses to accept the attorney-in-fact’s exercise of his or her powers under the POA, the attorney-in-fact may initiate proceedings as necessary to confirm his or her qualifications or authority.⁸³ Unless the court determines the third party believed in good faith that the attorney-in-fact was not qualified or was attempting to exceed or improperly exercise his or her authority, the third party is liable for the attorney-in-fact’s attorney’s fees.⁸⁴

Additionally, under the California POA Law, a third party may require the attorney-in-fact to provide any of the following information: identification, examples of the principal’s and/or attorney-in-fact’s signatures, the current and permanent residence addresses of the principal, and any other information reasonably necessary or appropriate to identify the principal and attorney-in-fact and to facilitate the actions of the third party in transacting business with the attorney-in-fact.⁸⁵

In the absence of a specific rule within the California POA Law, the general law of agency applies.⁸⁶

2. *Statutes addressing remedies for abuses and accounting requirements*

Although an attorney-in-fact must keep a record of all receipts, disbursements, and transactions made on behalf of the principal,⁸⁷ under the California POA Law, absent contrary requirements in the power of attorney, an attorney-in-fact only has to disclose this information upon court order, request by the principal, request by another fiduciary acting for the principal (i.e., a guardian or conservator), or upon the principal’s death, request by personal representative or successor-in-interest of the principal’s estate.⁸⁸ Under the California POA Law, a POA’s requirement for an attorney-in-fact to account must also specify to whom the account must be made to be effective.⁸⁹

The California POA Law gives an attorney-in-fact sixty (60) days upon written request to provide an account or report of the attorney-in-fact’s acts as attorney-in-fact to the principal, the spouse of

⁸³ Cal. Prob. Code §§4305(a), 4306(a), 4541(f).

⁸⁴ Cal. Prob. Code §4306(a).

⁸⁵ Cal. Prob. Code §4302.

⁸⁶ Cal. Prob. Code §4051.

⁸⁷ Cal. Prob. Code §4236(a).

⁸⁸ Cal. Prob. Code §4236(b)(1), (3)-(5).

⁸⁹ Cal. Prob. Code §4236(b)(2).

the principal, the conservator of the person or the estate of the principal, or to any other person required by the court in its discretion.⁹⁰

The California POA Law explicitly authorizes the filing of a petition with broad but detailed list of circumstances:

- Determining whether the power of attorney is in effect or has terminated;
- Passing on the acts or proposed acts of the attorney-in-fact, including approval of authority to disobey the principal's instructions as provided elsewhere in the California POA Law;
- Compelling the attorney-in-fact to submit the attorney-in-fact's accounts or report the attorney-in-fact's acts as attorney-in-fact to the principal, the spouse of the principal, the conservator of the person or the estate of the principal, or to any other person required by the court in its discretion, if the attorney-in-fact has failed to submit an accounting or report within 60 days after written request from the person filing the petition;
- Declaring that the authority of the attorney-in-fact is revoked on a determination by the court of all of the following:
 - The attorney-in-fact has violated or is unfit to perform the fiduciary duties under the power of attorney;
 - At the time of the determination by the court, the principal lacks the capacity to give or to revoke a power of attorney; and
 - The revocation of the attorney-in-fact's authority is in the best interest of the principal or the principal's estate;
- Approving the resignation of the attorney-in-fact:
 - If an attorney-in-fact is subject to a duty to act under Section 4230, the court may approve the resignation, subject to any orders the court determines are necessary to protect the principal's interests; or
 - If the attorney-in-fact is not subject to a duty to act under Section 4230, the court shall approve the resignation, subject to the court's discretion to require the attorney-in-fact to give notice to other interested persons; and
- Compelling a third person to honor the authority of an attorney-in-fact.⁹¹

Under the California POA Law, a principal or attorney-in-fact may petition a court.⁹² Certain third parties are authorized to petition the court:

- the spouse of the principal;
- a relative of the principal;
- the conservator of the person or estate of the principal;

⁹⁰ Cal. Prob. Code §4541(c).

⁹¹ Cal. Prob. Code §4541.

⁹² Cal. Prob. Code §4540(a)-(b).

- the court investigator of the county where the power of attorney was executed or where the principal resides;
- the public guardian of the county where the power of attorney was executed or where the principal resides;
- the personal representative or trustee of the principal’s estate;
- the principal’s successor-in-interest; and
- a person who is requested in writing by an attorney-in-fact to take action.⁹³

Under the California POA Law, a principal may expressly limit or eliminate the ability of certain third parties to initiate proceedings if the principal has the advice of an attorney licensed in the state where the POA is executed, and that attorney signs a certificate with the statutorily required language.⁹⁴ There is a sufficient catch-all provision for persons not otherwise listed, with the California POA Law allowing actions to be maintained by “any other interested person or friend of the principal.”⁹⁵ Of note, under the California POA Law, when a proceeding is commenced by someone other than the attorney-in-fact, the court has discretion to award reasonable attorney’s to either the party commencing the proceeding if appropriate circumstances exist or the attorney-in-fact if the proceeding was commenced without reasonable cause.⁹⁶

The remedies under the California POA Law are not exclusive of other remedies provided by law.⁹⁷

⁹³ Cal. Prob. Code §4540(c)-(j).

⁹⁴ Cal. Prob. Code §4503.

⁹⁵ Cal. Prob. Code §4540(k).

⁹⁶ Cal. Prob. Code §4545.

⁹⁷ Cal. Prob. Code §4501.

Orange County Bar Association

Powers of Attorney – Myths, Management and Litigation

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Overview

- Scope of authority granted under financial powers of attorney (“POA”)
- Statutory governance and schemes
- Rights, duties, authority and obligations created under a POA and rights of third parties in reliance thereon
- Strategies for drafting provisions to meet your clients’ specific needs and to avoid litigation and the dangers of these sweeping powers
- Litigation and remedies to address breaches

Types of Powers of Attorney

- Health care power of attorney
 - Medical power of attorney
 - Health care proxy
 - Advance directive
 - Personal care power of attorney (basic necessities of living)
- Financial power of attorney
 - Durable
 - Springing

Myths

- The attorney-in-fact's powers continue post-death of the principal.
- The appointment of a conservator supersedes a POA .
- The POA is not operative if someone becomes incapacitated.
- The POA is only operative if someone becomes incapacitated.

California's POA Law

- California POA statutes are contained at Probate Code § 4000 *et seq.*
- Applies to all POAs including California's statutory form power of attorney except health care power, voting rights proxy, or forms prescribed by a governmental agency
- California recognizes POAs executed in other jurisdictions if valid in that jurisdiction.

Attorney-in-Fact's Duties

- Act loyally in the principal's best interest
- Avoid conflicts of interest
- Keep the principal's property separate and distinct from other property in a manner adequate to clearly identify the property as belonging to the principal
- Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances
- Maintain regular contact and communications with the principal
- Follow the principal's instructions unless a court authorizes the attorney-in-fact to do otherwise

Attorney-in-Fact's Duties (cont.)

- Keep a record of all receipts, disbursements, and transactions made on behalf of the principal
- An attorney-in-fact must disclose his records of receipts, disbursements and transactions made on behalf of the principal upon court order, request by the principal, request by another fiduciary acting for the principal (e.g., a conservator), or after the principal's death, upon request by personal representative or successor-in-interest of the principal's estate

Attorney-in-Fact's Powers – Generally

- Powers extend to all property even if later acquired
- Attorney-in-fact has all of the authority to act that a person having the capacity to contract may carry out through an agent specifically authorized to take the action.

Attorney-in-Fact's Powers Set Forth in the Probate Code

- Asset categories over which the Probate Code sets forth general powers:
 - Real estate
 - Tangible personal property
 - Stocks and bonds
 - Commodities and options
 - Dealings with banks and other financial institutions;
 - Operation of an entity or business;
 - Insurance and annuities;
 - Estates, trusts, and other beneficial interests;
 - Claims and litigation;
 - Personal and family maintenance;
 - Benefits from governmental programs or military service;
 - Retirement plans; and
 - Taxes
- The Probate Code provides scope of authority for each of the above unless restricted or expanded by the terms of the POA.

Attorney-in-Fact's Powers that Must Be Specifically Granted

- These powers are only exercisable if specifically granted:
 - Create, amend, revoke, modify, or terminate a trust;
 - Make or revoke a gift;
 - Create or change rights of survivorship;
 - Create or change a beneficiary designation; or
 - Loans to himself or another agent.
- California law does not generally authorize the attorney-in-fact to access electronic communications, but California has enacted the California Uniform Fiduciary Access to Digital Assets Act.

Conservatorships

- If a court appoints a conservator of the principal's estate, the attorney-in-fact becomes accountable to the conservator as well as to the principal.
- The conservator as legal representative of the principal may revoke an attorney-in-fact's authority under a POA with court authority to do so.
- The court can suspend or terminate the POA as part of conservatorship proceedings.

Attorney-in-Fact's Compensation & Reimbursement

- Attorney-in-fact's compensation
 - An attorney-in-fact is entitled to reasonable compensation unless the document provides otherwise.
- Attorney-in-fact's reimbursement
 - An attorney-in-fact is entitled to reimbursement for expenses reasonably incurred on behalf of the principal.

Principal's Rights

- May limit, expand or alter the scope of virtually any power
- May identify the date or future contingency when the POA becomes operative or date or contingency for its termination
- May identify a specific person or persons to determine whether the future contingency has occurred for when POA becomes operative or terminates

Principal's Rights – Limitations

- Principal may not limit or alter the following:
 - Warnings or notices required to be included in a power of attorney
 - Operative dates of statutory enactments or amendments
 - Execution formalities
 - Qualifications of witnesses
 - Qualifications of attorneys-in-fact
 - Protection of third persons from liability

Termination

- Revocation by principal
 - Execution of a new POA does not automatically revoke a prior one.
 - If principal grants inconsistent authority to multiple attorneys-in-fact, the most recent grant controls.
- Upon principal's death
- Upon attorney-in-fact's death, incapacity, removal or resignation
- Dissolution or annulment of attorney-in-fact's marriage to principal or legal separation
- The purposes of the POA have been fulfilled or a stated contingency has occurred

Third Parties

- Third party may ask for an affidavit regarding authority and scope of powers
 - If presented, third party must honor POA
 - If refused, third party may accept or reject authority under POA
 - If third party was required to honor POA and refuses, may be liable for fees and costs of attorney-in-fact incurred in connection with that matter
- Third party may require the attorney-in-fact to provide any of the following information:
 - Identification, examples of the principal's and/or attorney-in-fact's signatures, the current and permanent residence addresses of the principal, and any other information reasonably necessary or appropriate to identify the principal and attorney-in-fact and to facilitate the actions of the third party in transacting business with the attorney-in-fact

Attorney-in-Fact's Liability

- Not liable for a predecessor attorney-in-fact's breach of fiduciary duty
- Attorney-in-fact is liable for the full amount of damages caused by his breach.
- Damages include loss or depreciation in value of the principal's property, with interest; profits made by the attorney-in-fact, with interest; and/or profit that would have accrued to the principal but for the breach.
- Probate Code allows relief from liability when an attorney-in-fact has taken reasonable actions in good faith, but it is at the court's discretion whether to excuse the attorney-in-fact from liability.
- Double damages can be imposed if the attorney-in-fact acted in bad faith. Attorney's fees can be awarded against the attorney-in-fact as well.

Court Intervention

- A petition may be filed for any of the following purposes:
 - Determining whether the power of attorney is in effect or has terminated
 - Passing on the acts or proposed acts of the attorney-in-fact, including approval of authority to disobey the principal's instructions as provided elsewhere in the California POA Law
 - Compelling the attorney-in-fact to account or report the attorney-in-fact's acts to the principal, the spouse of the principal, the conservator of the person or the estate of the principal, or to any other person required by the court in its discretion, if the attorney-in-fact has failed to submit an accounting or report within 60 days after written request from the person filing the petition

Court Intervention (cont.)

- A petition may be filed for any of the following purposes:
 - Declaring that the authority of the attorney-in-fact is revoked on a determination by the court of all of the following:
 - The attorney-in-fact has violated or is unfit to perform the fiduciary duties under the power of attorney;
 - At the time of the determination by the court, the principal lacks the capacity to give or to revoke a power of attorney; and
 - The revocation of the attorney-in-fact's authority is in the best interest of the principal or the principal's estate;
 - Approving the resignation of the attorney-in-fact
 - Compelling a third person to honor the authority of an attorney-in-fact

Dangers of POA'S

- Sweeping powers
 - Conflict between the benefits of broad authority if principal becomes incapacitated or incapable of handling his/her affairs and concerns about the powers being too broad
- Case examples of attorneys-in-fact gone astray
 - *Estate of Huston* (1997) 51 Cal.App.4th 1721
 - Attorney-in-fact received an oral instruction to purchase an annuity and to have the attorney-in-fact be the designated beneficiary on the principal's death.
 - Attorney-in-fact purchased the annuity but failed to make himself the beneficiary and the estate became the ultimate beneficiary.
 - Attorney-in-fact sought to recover the annuity distribution. The court ruled that because the power of attorney stated "you shall not make gifts to yourself", the attorney-in-fact could not have been a proper designee even though the he presented substantial evidence of the decedent's knowledge, consent, and approval of the gift.

Dangers of POA'S (cont.)

- *Hutcheson v. Eskaton Fountainwood Lodge* (2017) 17 Cal.App.5th 937
 - The court concluded that the admission of the principal to the residential care facility was a health care decision, and was not authorized by the financial POA or California law for financial POA's.
 - Case example of nursing home failing to read the POA and the attorney-in-fact acting beyond the rights provided
- Case example of siblings suing because son/attorney-in-fact bought himself groceries with mother's credit card when he bought her groceries or paid for both of their dinners with mother's credit card when they dined together at a restaurant
- *Schubert v. Reynolds* (2002) 95 Cal.App.4th 100
 - Attorney-in-fact/sister created a trust for her father and transferred the home (the father's sole asset). The trust provided attorney-in-fact/sister a life estate in the home.
 - On father's death, siblings contested the validity of the trust.
 - Court held that the designation of attorney-in-fact/sister as a beneficiary of the life estate was invalid as the document did not specifically allow for that power as is required to exercise such a power.
 - Thus, attorney-in-fact/sister could make a trust, as that was specifically authorized, but the power to change otherwise designated beneficiaries is limited.

More Dangers of POA'S

- *Cartwright v. Batner* (2014) 15 N.E.3d 401 (Ohio)
 - Beneficiary of decedent's trust (the successor in interest to the decedent) successfully prosecuted a claim against the attorney-in-fact under a power of attorney for improper charges.
 - Some of the charges were significant, such as paying the attorney-in-fact's mortgage, and others were smaller items, such as an expense at Sam's Club.
 - The Court reviewed the expenses in the aggregate and the trends and pattern of the attorney-in-fact's spending for his personal benefit to find that the attorney-in-fact significantly breached his fiduciary duties to the decedent.
- *Estate of Moore through Ellis v. Jones*, No. 2231, 2018 WL 3000294 at *10 (Md. App. Jan. 5, 2018)
 - Maryland appellate court held that the burden of an accounting is on the attorney-in-fact to establish that the use of the funds was fair and reasonable and that her actions did not constitute a breach of duty.

Drafting Tips

- Drafting tips
 - Evaluate your client's estate planning to determine if any additional powers are desired or needed – such as exercising a power of appointment, amending a trust
 - Talk about disputes among children or others and ways to draft to curb them
 - Challenges about skimming v. theft
 - Equal gifting
 - Special assets with special authority

Thank you!!

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