Source: Estate Planning/California Powers of Attorney and Health Care Directives/Contents

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Preface

Powers of attorney for financial management and personal care, along with advance health care directives, are essential parts of any person's estate plan. These documents allow persons to plan for their incapacity by naming agents to make necessary financial, personal, and health care decisions. These documents also allow persons to specify desires about future care when they are unable to do so because of their own incapacity. For example, a person can indicate a preference for use of artificial nutrition while in a coma or authorize an agent to make a gift for estate tax reasons.

This book is designed to guide the practitioner through the numerous issues that arise in drafting and using advance health care directives and powers of attorney for financial management and personal care. Alternatives to using powers of attorney and advance health care directives are explained and compared. The book describes and provides a host of ancillary documents such as powers of attorney for minors, confidential medical information release forms, and organ-donation forms. The book delves into some timely topics such as flexibility in estate planning; organ donation; end-of-life care decisions; medical marijuana; and California's latest position on assisted suicide. The book also provides practical and legal advice on third party acceptance of powers of attorney and advance health care directives, including when judicial intervention might be necessary.

This book replaces CEB's California Durable Powers of Attorney, published in 1996 and updated annually through 2007. CEB wishes to acknowledge the work of Fay Blix, Priscilla Camp, and Don Edward Green, the original authors of that book. Their work served as a valuable resource for this book.

CEB Attorney Editor Kevin Urbatsch and Legal Editors Kate Sheppard, Frederike Schilter, and Daphne Somkin contributed to this title. Administrative support was provided by Debby Harrison and Akanke Peyton. Elizabeth J. Asborno and Paul McBrearty handled copyediting and production. Robert W. Burke prepared the index. Composition was performed by CEB's Electronic Publishing staff.

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Selected Developments

November 2009 Update

In §2.20, Proposition 8 is discussed in overturning same sex marriage in California. Further, the Supreme Court of California ruled that marriages entered into prior to the passage of Proposition 8 remained valid.

Section 4.77 was updated to include the revised definition of financial abuse as set forth in Welf & I C §15610.30.

The annual gift exemption was updated in Rev Proc 2008-66, 2008-45 to $13,000, see §6.27.

A new form has been added at §7.9A in which a physician can make an incapacity determination.

The discussion concerning the Physician Order for Life Sustaining Treatment (POLST) has been revised in §7.66.

New material in §§8.7A-8.7B discusses the use of a psychiatric AHCD and provides a sample psychiatric AHCD with direction on how to download a full form.

In §8.33A a complete attorney drafted advance health care directive form has been added.

In §9.35 and §§9.37A-9.37B, there is a discussion and review of Washington and Montana's newly enacted laws on physician assisted suicide. There is also a 2008 update on the use of Oregon's law in §9.37. This brings the total to three states that authorize physician assisted suicide. Plus, there is a short discussion of Vermont's submission of its bill on physician assisted suicide.

Luxembourg has become the third country in the world to authorize euthanasia. See §9.39.

In §9.63, the trial against a physician who was accused of hastening a death in order to harvest organs resulted in a not guilty verdict is reviewed and discussed. The case was believed to be the first of its kind brought anywhere.

In §9.74, an update to the nation's medical marijuana laws is discussed including the use of the Compassionate Use Act of 1996 as a defense in a criminal matter.

A review of the latest federal response to California's medical marijuana laws is discussed in §9.75.

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Cutoff Dates and CEB Citation

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Powers of Attorney and Health Care Directives: Overview and International Considerations

Alexandra Gadzo
Max K. Riederer von Paar

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I. PRELIMINARY CONSIDERATIONS

§1.1 A. Introduction

Planning for the client's incapacity is an integral part of estate planning. Although there are numerous devices for handling incapacity—*e.g.,* a conservatorship, revocable living trust, joint tenancy, or community property management by a spouse—anyone who may, at some future time, need another person to make his or her health care decisions or personal care decisions or manage his or her financial affairs needs a durable power of attorney for financial management (DPOA) or an advance health care directive (AHCD) either as the primary tool for handling incapacity or as a backup device for other methods. Essentially, every estate planning client should have a DPOA and an AHCD. The main purpose of the DPOA and the AHCD is to ensure that a trusted nominee is ready to act if needed, thereby avoiding the expense and potential conflict of a conservatorship proceeding in the event of incapacity and the unavailability of suitable alternatives.

Some of the most important decisions a client will make, or that will be made for the client, will be made at the end of his or her life. A knowledgeable attorney can help clients carefully consider in advance how, and by whom, those decisions are made. It is not enough for a lawyer to know the legal mechanisms for making an AHCD. The attorney should encourage reflection by the client, in consultation with family and friends, and help in formulating and memorializing wishes and desires. Good communication underlies all planning for health care decisions, and eliciting the client's values, which are the distillation of religious, familial, cultural, social, and medical influences, is an essential skill in estate planning.

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§1.2 B. Scope of Book

This book is a guide to California DPOAs and AHCDs. The chapters describe different aspects of planning for incapacity:

- Chapter 1 presents a brief introduction to the Power of Attorney Law (Prob C §§4000-4545), which governs DPOAs, and to the Health Care Decisions Law (Prob C §§4600-4806), which covers AHCDs, including powers of attorney for health care (PAHC) and individual health care instructions. In the final sections, the authors discuss safekeeping and transfer of documents and how such documents are treated internationally.
- Chapter 2 discusses other devices for handling incapacity, comparing them with DPOAs and AHCDs.
- Chapter 3 discusses the ethical considerations that can arise when planning to use a DPOA or AHCD.
- Chapter 4 discusses fundamentals of a DPOA.
- Chapter 5 provides the different types of forms used as DPOAs, including fill-in-the-blank forms and attorney-drafted forms.
- Chapter 6 describes how DPOAs may be used to create flexibility in planning for a person's estate and tax matters in the event of incapacity. To maximize the possibilities of estate planning in the future, an attorney-drafted DPOA may be used even when the client wants just a "simple form." For example, providing an agent with the power to create, modify, or revoke a trust requires not only an express provision in the power of attorney but also an express provision in any existing trust.
- Chapter 7 discusses fundamentals of an AHCD.
- Chapter 8 provides the different types of forms used as AHCDs, including fill-in-the-blank documents and attorney-drafted forms.
- Chapter 9 discusses legal and medical health care issues related to PAHCs and other AHCDs.
- Chapter 10 provides practical solutions to gain third party acceptance of DPOAs and AHCDs.
- Chapter 11 addresses judicial proceedings that may arise when enforcing or administering a DPOA or an AHCD.

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C. Definitions

§1.3 1. Common Terms Used in Durable Powers of Attorney for Financial Management

The following terms are used throughout this book when discussing durable powers of attorney for financial management (DPOAs):

- **Agent** means the same as attorney-in-fact for financial matters, *i.e.,* the person authorized to act for another. For clarity and uniformity, this book generally refers to the attorney-in-fact as the agent. Although the term "attorney-in-fact" is used in the Power of Attorney Law, the term "agent" is used in the statutory form DPOA. Prob C §4401. See also Prob C §4014.
- **Attorney-in-fact** means a person granted authority to act for the principal in a power of attorney, regardless of whether the person is known as an attorney-in-fact or as an agent. Prob C §4014(a). This includes a successor or alternate attorney-in-fact and a person delegated authority by an attorney-in-fact. Prob C §4014(b).
- **Durable power of attorney** means a power of attorney that can be exercised notwithstanding the principal's subsequent incapacity. Prob C §4018. It must contain a statement that the power of attorney shall not be affected by subsequent incapacity of the principal, or shall become effective upon the incapacity of the principal, or similar words. Prob C §4124. If it does not contain this language, the agent lacks authority during the principal's incapacity.
- **Durable power of attorney for financial management (DPOA)** will be used in this book, sometimes shortened to "financial power." Although the term is not found in the Power of Attorney Law (Prob C §§4000-4545), it is a convention some practitioners use to distinguish a power of attorney used to manage the principal's assets or to make financial or business decisions from the power of attorney for health care (PAHC) or advance health care directive (AHCD) used to make health care decisions for the principal.
- **Power of attorney** means a written instrument that is executed by a natural person having the capacity to contract and that grants authority to an attorney-in-fact. A power of attorney may be durable or nondurable. Prob C §4022.
- **Principal** means a natural person who executes a power of attorney. Prob C §4026.
- **Springing power of attorney** means a power of attorney that by its terms becomes effective at a specified future time or on the occurrence of a specified future event or contingency, usually the subsequent incapacity of the principal. The springing power of attorney may be durable or nondurable. See Prob C §4030.

NOTE: The most common type of power-of-attorney document used for estate planning purposes is one that is both durable and springing. One way to provide for determining when a specific event has occurred is for the principal to designate in advance one or more persons who, by a written declaration under penalty of perjury, have the power to determine conclusively that the specific event or contingency has occurred. The agent or another person may be designated to make the determination, either alone or jointly with others. Prob C §4129.

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§1.4 2. Common Terms Used in Advance Health Care Directives and Powers of Attorney for Health Care

The following terms are used throughout the book when discussing advance health care directives (AHCDs) and powers of attorney for health care (PAHCs):

- **Advance health care directive (AHCD)** means either an individual health care instruction or a power of attorney for health care (PAHC). Prob C §4605.
- **Agent** means an individual designated in a PAHC to make a health care decision for the principal, regardless of whether the person is known as an agent or attorney-in-fact, and includes any successor or alternate agent. Prob C §4607.
- **Health care** means any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a patient's physical or mental condition. Prob C §4615.
- **Health care decision** means a decision made by a patient or the patient's agent, conservator, or surrogate regarding the patient's health care, including selection and discharge of health care providers and institutions; approval or disapproval of diagnostic tests, surgical procedures, and programs or medications; and directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation. Prob C §4617.
- **Individual health care instruction** means a patient's written or oral direction concerning a health care decision for the patient. Prob C §4623.
- **Patient** means an adult whose health care is under consideration and includes a principal under a PAHC and an adult who has given an individual health care instruction or designated a surrogate. Prob C §4625.
- **Power of attorney for health care (PAHC)** means a written instrument designating an agent to make health care decisions for the principal. Prob C 4629.
- **Principal** means an adult who executes a PAHC. Prob C §4633.
- **Surrogate** means an adult, other than the patient's agent or conservator, authorized by the Health Care Decisions Law (Prob C §§4600-4806) to make a health care decision for the patient. Prob C §§4643, 4711-4717.

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D. Legal Authority

§1.5 1. History and Background

California has had durable power of attorney statutes since 1979 (former CC §2307.1; Stats 1979, ch 234) and was an early leader in this area. It was not until 1994, however, that the scattered statutes were consolidated and many new sections added in legislation enacted as the Power of Attorney Law, Division 4.5 of the Probate Code (former Prob C §§4000-4947). The Law provided a comprehensive treatment of powers of attorney. Its placement in the Probate Code reinforces its estate planning nature. 24 Cal L Rev'n Comm'n Reports 323, 333 (1994). See chaps 4-6 for discussion of powers of attorney for financial management and personal care decisions.

Operative July 1, 2000, powers of attorney for health care were no longer governed by the Power of Attorney Law (Prob C §§4000-4545) but by the Health Care Decisions Law, Division 4.7 of the Probate Code (Prob C §§4600-4806). That Law, based in large part on the Uniform Health-Care Decisions Act (1993), introduced the term "advance health care directives." The Health Care Decisions Law attempted to unify and simplify prior law in order to encourage individuals to make advance health care directives and to make it easier for individuals to express their health care concerns. For discussion of the Law, see chaps 7-9.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/1 Powers of Attorney and Health Care Directives: Overview and International Considerations/§1.6 2. Statutory Source of Power of Attorney Law and Health Care Decisions Law

§1.6 2. Statutory Source of Power of Attorney Law and Health Care Decisions Law

There are two separate laws that govern powers of attorney for financial management and health care decisions:

- The Power of Attorney Law (Prob C §§4000-4545) applies to powers of attorney other than powers of attorney for health care decisions, to statutory form powers of attorney, and to any other power of attorney that incorporates or refers to the Power of Attorney Law. Prob C §4050. See §§1.10-1.21.
- The Health Care Decisions Law (Prob C §§4600-4806) governs powers of attorney for health care and individual health care instructions. See §§1.22-1.33.

NOTE: Personal care provisions can be placed in either a power of attorney for financial management or an advance health care directive. See Prob C §§4123 and 4671. See also §1.34.

Unless there is a specific rule in the Power of Attorney Law, the general law of agency applies to powers of attorney. See §1.7.

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§1.7 3. Relation to General Law of Agency

Durable powers of attorney are a type of agency. Except to the extent that the Power of Attorney Law provides its own rules, powers of attorney governed by the Law are subject to the general law of agency. Prob C §4051. The Power of Attorney Law incorporates agency rules relevant to agents under durable powers of attorney, including the requirement that the principal have the capacity to contract (Prob C §4120; CC §2296), and, in general, rules on termination (Prob C §§4152-4153; CC §§2355-2356) and delegation (Prob C §4205; CC §2349). 24 Cal L Rev'n Comm'n Reports 323, 333 (1994). It is intended, however, that the Law be largely self-sufficient; the general agency rules are to be referred to when unanticipated questions arise.

Similarly, for advance health care directives that include a power of attorney for health care under the Health Care Decisions Law, if the Law does not provide a rule governing agents in a particular set of circumstances, the law of agency applies. Prob C §4688. Reference may be made to relevant agency principles set forth in case law and in statutes, including the Power of Attorney Law. 29 Cal L Rev'n Comm'n Reports 96 (1999).

The most important difference between a durable power of attorney and other agency relationships is the effect of the principal's incapacity on the agent's authority. Under the Power of Attorney Law, common law, and general agency law as set forth in the Civil Code, an agent's authority terminates on the principal's incapacity to contract. Prob C §4155; CC §2356(a)(3). Thus, under a nondurable power of attorney, the principal's incapacity to contract terminates the agent's power just when those powers may be needed most. In contrast, a durable power of attorney is not terminated by the principal's incapacity. Further, a power of attorney for health care is effective only when the principal lacks capacity, unless the instrument provides otherwise. Prob C §4682. For discussion of incapacity, see §§3.28-3.40.

The terms of Prob C §4121 provide that a durable power of attorney must be witnessed or notarized. If a durable power of attorney, other than a power of attorney for health care, is not properly witnessed or notarized, it might still be valid under the law of agency, but the agent's power to bind the principal would cease if the principal were to become incapacitated. See Prob C §4050(c). For a detailed discussion of agency law, see 3 Witkin, Summary of California Law, *Agency and Employment* (10th ed 2005). For discussion of witnesses' signature requirements, see §1.10.

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§1.8 E. Capacity

Questions concerning the capacity of a client may arise in several contexts. Initially, a client must have capacity in order to execute a power of attorney or advance health care directive. Later, a springing power of attorney may not come into effect unless the principal is incapacitated. In either event, the capacity of the client will be measured under the Due Process in Competence Determinations Act (DPCDA) (Prob C §§810-813, 1801, 1881, 3201, 3204).

Under DPCDA, a person lacks the capacity to make a decision unless the person has the ability to communicate the decision verbally, or by any other means, and to understand and appreciate the following matters (Prob C §812):

- The rights, duties, and responsibilities created by or affected by the decision;
- The probable consequences for the decision-maker and, when appropriate, for the persons affected by the decision; and
- The significant risks, benefits, and reasonable alternatives involved in the decision.

The attorney is neither a psychiatrist nor a psychologist and can make only gross estimates of the capacity of the client. The attorney who has questions about the client's capacity will have to rely on opinions of the client's physician or another health care professional.

For a further discussion of incapacity issues, see §§3.28-3.40. See also Capacity and Undue Influence: Assessing, Challenging, and Defending (Cal CEB Action Guide February 2008).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/1 Powers of Attorney and Health Care Directives: Overview and International Considerations/§1.9 F. Coordination of Durable Powers of Attorney and Advance Health Care Directives

§1.9 F. Coordination of Durable Powers of Attorney and Advance Health Care Directives

Even though a DPOA and an AHCD should be drafted as separate documents, the two should nonetheless be coordinated in order to avoid contradictory provisions and to provide complementary powers. Consider the following questions: If the agent under an AHCD has broad powers to authorize expensive elective medical treatment, does the agent under the DPOA have the authority to pay for that treatment? Conversely, if the principal does not want an agent under an AHCD to authorize certain expensive or questionable medical procedures, can the principal restrict in the DPOA the agent's authority to pay for such treatments? If the power of attorney provisions for decisions regarding personal care are in a separate document, cooperation between the agent under that power of attorney and the agents under the AHCD and DPOA is crucial.

If a principal grants inconsistent authority to one or more agents in two or more powers of attorney, the authority granted last controls to the extent of the inconsistency. Prob C §4130(a). An AHCD that conflicts with an earlier advance AHCD revokes the earlier AHCD to the extent of the conflict. Prob C §4698.

PRACTICE TIP: The attorney should discuss interaction between the DPOA and the AHCD with the client, particularly if different persons are named as agents in the two documents. Attorney and client should consider the possibility of disputes between a DPOA agent and an AHCD agent, as well as disputes between agents and another fiduciary (such as an agent under a personal care power of attorney, if designated in a separate document, or a trustee). The DPOA, trust instrument, or other document should specify whose decision is final and how disputes should be resolved.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/1 Powers of Attorney and Health Care Directives: Overview and International Considerations/ II. OVERVIEW OF DURABLE POWERS OF ATTORNEY FOR FINANCIAL MANAGEMENT/§1.10 A. Power of Attorney Requirements

II. OVERVIEW OF DURABLE POWERS OF ATTORNEY FOR FINANCIAL MANAGEMENT

§1.10 A. Power of Attorney Requirements

Who can be principal. A power of attorney may be created by any natural person having the capacity to contract. Prob C §§4026, 4120.

Who can be agent. Although the principal must be a "natural person" (Prob C §4026), the agent need only be a "person" (Prob C §§4014, 4200) "having the capacity to contract" (Prob C §4200). Thus, an agent may be an organization, corporation, or other legal person.

Execution. For a power of attorney to be legally sufficient, it must (Prob C §4121)

- contain the date of its execution;
- be in writing and be signed by the principal or in the principal's presence and at the principal's direction; and
- be either acknowledged before a notary public or signed by at least two witnesses who satisfy the requirements of Prob C §4122.

An exception to the general rule is the requirement that a Uniform Statutory Form Power of Attorney be acknowledged before a notary public; witnessing is not an option. Prob C §4402.

The witnesses' signatures are not required to be contemporaneous with the principal's. Even when the witnesses sign the durable power of attorney after the principal's death, the document may be valid. *Estate of Rabinowitz* (2003) 114 CA4th 635, 7 CR3d 722. See discussion of *Rabinowitz* in §4.24. However, the California Supreme Court subsequently ruled that witnesses must sign a will before the principal's death in order for the will to be valid. *Estate of Saueressig* (2006) 38 C4th 1045, 44 CR3d 672. The case did not raise the question of whether a power of attorney signed by witnesses after the principal's incapacity or after an action by the agent is valid. It also did not raise the validity of attempted actions by agents who are required to sign the power of attorney but do not until after the principal's incapacity. In light of *Saueressig,* the validity of *Rabinowitz* is subject to question, but it has not yet been overruled. Consequently, courts may be hesitant to uphold actions of agents when the witnesses (or the agent) have signed the power of attorney after the principal has become incapacitated.

NOTE: The court in *Saueressig* explicitly overruled *Estate of Eugene* (2002) 104 CA4th 907, 128 CR2d 622. 38 CA4th at 1057. In *Eugene,* the court admitted a will to probate despite a witness's inadvertent failure to sign the will until after the testator's death. The court in *Rabinowitz* relied on *Eugene* in part for its holding. To the extent that *Rabinowitz* relies on *Eugene,* it is no longer valid law.

PRACTICE TIP: In general, notarization of a power of attorney is recommended because the need to record the power may arise, *e.g.,* if real estate is being affected by the power of attorney.

Duration of validity. Unless the power of attorney states a time of termination, the agent's authority is exercisable no matter how much time has elapsed since execution of the power of attorney. Prob C §4127.

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§1.11 B. Validity of Prior Documents

The Power of Attorney Law applies to all powers of attorney—except advance health care directives, including powers of attorney for health care—regardless of whether they were executed before, on, or after January 1, 1995. Prob C §4054(a)-(c); see Prob C §4050. However, nothing in the Law affects the validity of a power of attorney executed before January 1, 1995, that was valid under prior law. Prob C §4054(d).

As a practical matter, therefore, older powers are effective documents, but the 1995 requirements may limit the authority actually conferred on the agent. Note, however, that a court may determine that prior law should apply under certain circumstances. Prob C §4054(c).

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C. The Agent

§1.12 1. Multiple and Successor Agents

A principal may designate more than one agent in one or more powers of attorney. Prob C §4202. When there are two or more agents, they must act unanimously if they all are available. Prob C §4202. A principal may also designate successor agents. Prob C §4203.

If a principal grants inconsistent authority to one or more agents in two or more powers of attorney, the general rule is that the last-granted authority controls to the extent of the inconsistency. Prob C §4130(a). This rule cannot be altered by provisions in the power of attorney.

NOTE: Counsel should not draft a power of attorney to grant authority to either agent or to permit one of several agents to act unilaterally. This risks inconsistent acts of the agents, which will confuse the custodian or other person who is asked to act on the agents' power and will mislead the agents into believing they do not need the consent of the other agent to act.

See §§4.49-4.55 for further discussion and forms.

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§1.13 2. Standard of Care

Except for uncompensated agents or agents who have special skills, an agent must observe the standard of care that would be observed by a prudent person dealing with the property of another. Prob C §4231(a). An agent who is not compensated will not be liable for the loss to the principal's property unless the loss results from the agent's bad faith, intentional wrongdoing, or gross negligence. Prob C §4231(b). An agent who has special skills, or who was designated agent on the basis of a representation of special skills, must observe the standard of care that would be observed by those with similar skills or expertise. Prob C §4231(c).

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§1.14 3. Rights and Duties

A general grant of authority gives the agent all authority to act that a person having capacity to contract may carry out through an agent. Prob C §4261. The Power of Attorney Law also permits incorporating powers set forth in other statutes. Prob C §4263. Thus, for example, a regular power of attorney, *i.e.,* one that is nondurable, could grant all powers authorized by the Uniform Statutory Form Power of Attorney Act (Prob C §§4400-4465) or the powers given to trustees under Prob C §§16200-16249. A limited grant of authority is defined in Prob C §4262.

Sections 1.15-1.17 provide a brief overview of the agent's authority under a DPOA, the powers that must be specifically granted to be applicable, and the agent's basic duties. For full discussion of the authority and duties of the agent, see §§4.62-4.78.

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§1.15 a. General Powers and Rights

Compensation. An agent is entitled to reasonable compensation for services rendered to the principal as agent and to reimbursement for reasonable expenses incurred as a result of acting as agent. Prob C §4204.

Access to confidential information. If the principal becomes wholly or partially incapacitated, or if the principal's capacity to give instructions to and supervise the agent is in any doubt, the agent may consult with someone previously designated by the principal for this purpose. The agent may also consult with, and obtain information needed to carry out the agent's duties from, the principal's spouse or registered domestic partner, physician, attorney, accountant, a member of the principal's family, or other person, business entity, or government agency on matters to be undertaken on the principal's behalf and affecting the principal's personal affairs, welfare, family, property, or business interests. A person from whom information is requested must disclose relevant information to the agent. Disclosure under this provision is not a waiver of any privilege that may apply to the information disclosed. Fam C §297.5; Prob C §4235.

NOTE: Probate Code §4235 requires the "person from whom information is requested" to disclose the information. This disclosure of information is thus exempted from the confidentiality provisions of California's Confidentiality of Medical Information Act (CMIA) (CC §§56-56.37), under the provisions of CC §56.10(b)(9) (exemption for disclosure "where otherwise specifically required by law").

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§1.16 b. Powers That Must Be Specifically Granted

An agent can perform any of the following acts only if they are expressly authorized in the power of attorney (Prob C §4264):

- Create, modify, or revoke a trust;
- Fund with the principal's property a trust not created by the principal or a person authorized to create a trust on behalf of the principal;
- Make or revoke a gift of the principal's property;
- Exercise the right to make a disclaimer on behalf of the principal (an agent may still disclaim a detrimental transfer to the principal with court approval even without specific authorization);
- Create or change survivorship interests in the principal's property or in property in which the principal may have an interest;
- Designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death; or
- Make a loan to the agent.

In addition, if the power to modify a trust is desired, the trust instrument itself must also refer to the power of attorney. Prob C §15401(c). See §§4.72, 6.18.

A power of attorney cannot be used to execute, amend, or revoke a will. Prob C §4265.

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§1.17 c. Duties

Duty to act. In the absence of an agreement, under the Power of Attorney Law an agent (Prob C §§4207, 4230; see also Prob C §4152)

- is free to act or not to act, regardless of whether the principal has become incapacitated, is missing, or is otherwise unable to act;
- may refuse to act in future transactions after having acted in some matters; and
- may resign (see §§4.64-4.65).

However, the agent has a duty to complete a transaction that the agent has commenced. Prob C §4230(b).

If an agent has expressly agreed in writing to act for the principal, the agent must act under the terms of the agreement. The agreement is enforceable against the agent as a fiduciary regardless of whether there is consideration to support a contractual obligation. Prob C §4230(c).

NOTE: The rules are intended to facilitate the use of powers of attorney by allowing a person who might be reluctant to be named as agent to accept the designation and then decide according to the situation whether to act. See 24 Cal L Rev'n Comm'n Reports 323, 341 (1994).

Duty to communicate. The agent must, to the extent reasonably practicable under the circumstances, maintain regular contact and communication with the principal and follow the principal's instructions. Prob C §4234(a). These instructions may be disobeyed only with court approval. Prob C §4234(b).

NOTE: This provision seems to provide that the instructions of a principal whose judgment is impaired may not be disobeyed without court permission, unless to obey them would not be reasonably practicable under the circumstances. There are no standards set out in the statute for determining what is reasonable or who is to make that determination. However, when the principal's capacity to give instructions is in question, the agent may consult members of the principal's family or other persons (*e.g.,* principal's physician, attorney, accountant). Prob C §4235.

Duty to avoid conflict of interest. An agent has a duty to act solely in the interest of the principal and to avoid conflicts of interest. Prob C §4232(a). An agent, however, is not in violation of the duty provided in subdivision (a) of Prob C §4232 solely because the agent also benefits from acting for the principal; has conflicting interests in relation to the property, care, or affairs of the principal; or acts in an inconsistent manner regarding the respective interests of the principal and the agent. Prob C §4232(b).

NOTE: Probate Code §4232(b) seems to say that there is no way the agent can be in a conflict of interest with his or her principal. An example of an agent performing an act that may benefit the agent as well as the principal would be signing transfer documents for property held by the agent and the principal together, by the agent in a personal capacity and also as agent for the principal. The transfer benefits both the agent and the principal but does not benefit the agent at the principal's expense.

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§1.18 D. Modification and Revocation

Methods of modification or revocation. The methods by which a principal may modify or revoke a power of attorney are set out in Prob C §§4150-4151. The principal may also terminate or revoke the agent's authority. Prob C §§4152-4153. Termination and revocation of a DPOA are fully discussed in §§4.86-4.100.

NOTE: A power of attorney may contain provisions other than those granting powers to an agent, such as a provision nominating a conservator. Therefore, revocation of the entire instrument may have more far-reaching consequences than a termination of the agent's authority under Prob C §4152. See Comment to §4151 (24 Cal L Rev'n Comm'n Reports 323, 390 (1994)).

Effect of dissolution or annulment. The authority of a spouse or registered domestic partner named as agent in a power of attorney is revoked if the principal's marriage or domestic partnership is later dissolved or annulled. Fam C §297.5; Prob C §4154(a). The authority of an agent whose authority is revoked solely by the operation of Prob C §4154(a) is revived by the principal's remarriage to (or, reregistration of the domestic partnership with) the agent. Fam C §297.5; Prob C §4154(b). This section is subject to limitation by the power of attorney. Prob C §4101; Comment to §4154 (24 Cal L Rev'n Comm'n Reports 323, 393 (1994)).

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§1.19 E. Relationship With Third Party

Third persons are required to honor powers of attorney. Probate Code §4300 provides:

> A third person shall accord an attorney-in-fact acting pursuant to the provisions of a power of attorney the same rights and privileges that would be accorded the principal if the principal were personally present and seeking to act….

Third parties have the right to require that the agent provide certain information, including proof of identity, specimen signatures of the principal and agent, and the agent's affidavit establishing that the power is still in effect. Prob C §§4302, 4305. Third parties are generally protected if they rely in good faith on a power that appears on its face to be valid and has been properly notarized or witnessed. Prob C §4303.

In *Kaneko v Yager* (2004) 120 CA4th 970, 16 CR3d 183, the court held that a third party dealing with an attorney-in-fact was not entitled to possible immunity under Prob C §4303, because the power of attorney was neither notarized nor witnessed. (In an unpublished portion of the opinion, the court determined that the third party was nevertheless protected from liability because the attorney-in-fact had ostensible authority under the law of agency.)

Failure to honor the power can lead to an award of attorney fees to the agent in a court proceeding. Prob C §§4306(a), 4406(b). See Prob C §4545. Pointing this out to banks or other third parties who are refusing to honor the power is often sufficient. For a full discussion of third party acceptance of powers of attorney, see chap 10.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/1 Powers of Attorney and Health Care Directives: Overview and International Considerations/§1.20 F. Judicial Proceedings; Permission to Disobey Principal

§1.20 F. Judicial Proceedings; Permission to Disobey Principal

The list of permissible judicial proceedings under the Power of Attorney Law (Prob C §§4000-4545) is quite broad. A proceeding can be brought for the following purposes (Prob C §4541):

- To determine whether the power of attorney is in effect or has terminated;
- To review the agent's acts or proposed acts, including approval of authority for the agent to disobey the principal's instructions;
- To compel the agent to account;
- To revoke the authority of the agent on the following grounds:
- The agent has violated or is unfit to perform the fiduciary duties under the power of attorney;
- The principal lacks capacity to give or revoke a power of attorney; and
- The revocation of the agent's authority is in the best interest of the principal or the principal's estate;
- To approve the resignation of the agent; and
- To compel a third person to honor the authority of the agent.

For a full discussion of judicial proceedings (Prob C §§4500-4545), see chap 11.

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§1.21 G. Use in Other States

If a power of attorney indicates the principal's intention that the Power of Attorney Law (Prob C §§4000-4545) govern the power of attorney, the Law governs and applies to the agent's acts and transactions in or outside California if any of the following applies (Prob C §4052(a)):

- The principal or agent was domiciled in California when the principal executed the power of attorney;
- The authority conferred on the agent relates to property, acts, or transactions in California;
- The agent's acts or transactions occurred or were intended to occur in California;
- The principal executed the power of attorney in California; or
- There is otherwise a reasonable relationship between California and the subject matter of the power of attorney.

A power of attorney under the Power of Attorney Law remains subject to the Law even if the principal or agent changes domicile or if property that was the subject of the power of attorney is removed from California. Prob C §4052(c).

As a practical matter, clients who are moving to another state, or who spend significant time in another state, should be advised to execute powers in that state.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/1 Powers of Attorney and Health Care Directives: Overview and International Considerations/§1.22 III. OVERVIEW OF ADVANCE HEALTH CARE DIRECTIVES

§1.22 III. OVERVIEW OF ADVANCE HEALTH CARE DIRECTIVES

An "advance health care directive" (AHCD) or "advance directive" includes both an "individual health care instruction" and a power of attorney for health care (PAHC). Prob C §4605. A PAHC is a written document designating an agent for health care decision making (formerly known as a "durable power of attorney for health care"). Prob C §4629.

Unless otherwise specified in the document, the authority of an agent becomes effective only on a determination that the principal lacks capacity, and ceases to be effective on a determination that the principal has regained capacity. Prob C §4682.

An "individual health care instruction" or "health care instruction" describes a patient's ability to make written or oral directions for his or her own health care without necessarily naming an agent. See Prob C §4623. It addresses the planning needs of the client who does not have family or friends able or willing to serve as agent, as well as allowing directions to be provided to a designated health care agent. This is particularly useful for many seniors who outlive family or friends or who are geographically separated from family.

The individual instruction may be oral or written, and it may be limited to take effect only if a specified condition arises. Prob C §4670.

In practice, the two functions are often joined together—a single document, usually the PAHC, contains both health care instructions and nomination of an agent. Prob C §4671.

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§1.23 A. Requirements for Execution

Capacity. An adult having capacity may give an individual health care instruction and execute a PAHC. Prob C §§4670, 4671. Capacity is defined in Prob C §4609 as a

> person's ability to understand the nature and consequences of a decision and to make and communicate a decision, and includes in the case of proposed health care, the ability to understand its significant benefits, risks, and alternatives.

A patient is presumed to have the capacity to make a health care decision, give or revoke an AHCD, and designate or disqualify a surrogate. Prob C §4657. When capacity is questionable, the practitioner should refer to the legal standards for determining incapacity in the Due Process in Competence Determinations Act (DPCDA). See §1.8. Unless otherwise specified in a written AHCD, a determination that a patient lacks or has recovered capacity, or that another condition exists that affects an individual health care instruction or the authority of an agent or surrogate, must be made by the primary physician. Prob C §4658. The physician, in making the Prob C §4658 determination, must apply the Prob C §813 criteria.

NOTE: Even though the Health Care Decisions Law does not refer to "informed consent," a term used under former law, the doctrine of informed consent is still applicable. See Comment to Prob C §4617 and the definition of "capacity" under Prob C §4609. See also Prob C §813.

Execution of written AHCD. For a written AHCD to be legally sufficient, the document must meet the following requirements (Prob C §4673):

- Contain the date of its execution;
- Be signed either by the patient or in the patient's name by another adult in the patient's presence and at the patient's direction; and
- Be either witnessed or notarized as follows:
- Two adult witnesses are required. Prob C §4673(a)(3). One of the two witnesses cannot be related to the principal by blood, adoption, or marriage, or be entitled to part of the principal's estate. Prob C §4674(e). A declaration to that effect must be part of the document and signed by the appropriate witness. Prob C §4674(f). Both witnesses must execute a statement under penalty of perjury that they witnessed the principal signing the document, have knowledge of the identity of the principal or proof of identity, and believe the principal to have capacity. Prob C §4674(d).
- The PAHC may be notarized as an alternative to witnessing. Prob C §4673(a)(3). The witnessing requirements of Prob C §4674 do not apply to notarization. Prob C §4674(g). Notarization is required for an electronic advance health care directive that may be executed with a digital signature. Prob C §4673(b).

Execution in skilled nursing facility. The execution of a written AHCD in a skilled nursing facility (SNF) deserves the careful treatment the law provides because of the possible mischief that can occur surrounding the voluntariness of a decision made by patients of impaired capacity. If the principal is a patient in an SNF when the AHCD is executed, a patient advocate or ombudsman designated by the Department of Aging must sign the document as one of two witnesses if the witnessing procedure is followed or is done in addition to notarization. Prob C §4675(a). The patient advocate or ombudsman will usually want to speak with the principal in advance of the execution to be sure that the document is understood and undertaken voluntarily. Contact information for the local ombudsman's office should be available on a large sign posted in the SNF, through the local Area Agency on Aging, or in the telephone book. The attorney should call in advance to arrange the details for the execution.

Use of copies. A copy of a written AHCD, revocation of an AHCD, or designation or disqualification of a surrogate has the same effect as the original. Prob C §4660.

See chap 7 for a full discussion of the requirements for execution of the documents.

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§1.24 B. Duration of Validity

A power of attorney for health care executed on or after January 1, 1992, has no time limitation on validity unless the principal specifies a limit. Prob C §4686. The practitioner should caution clients that imposing a time limit creates a risk that the client might become incapacitated and need medical treatment without having a valid document. An expired document may nevertheless be useful to an attending physician as evidence of a patient's wishes.

NOTE: An attorney may occasionally see "durable powers of attorney for health care" (DPAHC) executed on or after January 1, 1984, and before January 1, 1992. These had a 7-year validity limitation. If the principal became incapacitated after execution but before the expiration of the limit, the DPAHC continued to be valid until the principal regained capacity. Former Prob C §4654. Appointments under such documents are no longer effective for clients with capacity. In reviewing a client's estate planning documents, the attorney should be alert for expired DPAHCs and urge the client to execute current documents.

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§1.25 C. Validity of Documents Drafted Before July 1, 2000

The Health Care Decisions Law applies to all AHCDs and PAHCs regardless of whether they were executed before, on, or after July 1, 2000. Prob C §4665(a). However, nothing in the Health Care Decisions Law affects the validity of a durable power of attorney for health care executed before July 1, 2000, that was valid under prior law. Prob C §4665(d). Additionally, nothing in the Law affects the validity of a PAHC executed on a printed form that was valid under prior law, regardless of whether execution occurred before, on, or after July 1, 2000. Prob C §4665(e). This protects individuals who use an outdated printed form. But see Note in §1.24.

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§1.26 D. The Agent

The most important decision the client will make is the selection of an agent. Any adult with capacity can serve as agent (Prob C §4671) except for the following individuals, who are prohibited from serving as agent in order to avoid what could be dangerous or even life-threatening conflicts of interest (Prob C §4659(a)):

- A supervising health care provider of the health care institution where the client or patient is receiving care;
- An employee of the health care institution where the patient is receiving care; and
- An operator or employee of a community care facility or residential care facility where the client or patient is receiving care.

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§1.27 1. Agent's Authority

The Health Care Decisions Law authorizes the agent to make the following decisions:

- **Health care decisions** (as defined in Prob C §4617) for the principal to the same extent the principal could make health care decisions if the principal had the capacity to do so; and
- **Postmortem decisions** such as disposition of remains, making an anatomical gift, requesting an autopsy, or releasing medical records. Prob C §4683(b).

During the principal's lifetime, the agent has the same access to the principal's medical records as the patient would have. Prob C §4678.

An agent under a PAHC can grant consent, refuse consent, or withdraw consent to health care for the principal. Probate Code §4617 specifically includes the right to provide, withhold, or withdraw artificial nutrition and hydration in the definition of health care decisions. In exercising the authority under the PAHC, the agent has a duty to act consistently with the principal's desires as expressed in the individual health care instructions or otherwise made known to the agent at any time or, if the principal's desires are not known, to act in the principal's best interests. Prob C §4684.

NOTE: The principal's personal values are to be taken into consideration when determining what would be in the principal's best interest. Prob C §4684. It may be helpful, therefore, to include statements in the PAHC about the principal's values for the purpose of providing guidance to the agent and the patient's health care providers in the event that they will need to make future health care decisions on behalf of the principal.

If the principal objects to any treatment or objects to withholding or withdrawing any treatment, and if the principal understands the consequences of making such objections, nothing can be given, withdrawn, or withheld over the principal's objections. Prob C §4689.

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§1.28 2. Limitations on Agent's Authority

The PAHC does not give the agent the power to commit the principal to a mental health treatment facility or to authorize convulsive treatment, psychosurgery, sterilization, or abortion. Prob C §4652. These limitations are more restrictive than the limitations for conservators in Prob C §2356.

Under Prob C §4681(b), the power of attorney may not limit the application of any statute regarding specified matters, including qualifications of witnesses or agents and protection of third persons from liability.

Under Prob C §4753(b), the advance health care directive may not limit the right of the conservator or the agent to petition the court for specified matters.

Further, there are explicit statutory prohibitions against mercy killing, assisted suicide, and euthanasia contained in the Health Care Decisions Law. Prob C §4653.

Other than the statutory limitations of Prob C §§4652, 4681(b), and 4753(b), a power of attorney for health care may limit any power by an express statement or by providing a rule inconsistent with the default provisions of the Probate Code in the power of attorney. Prob C §4681(a).

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§1.29 3. Agent's Liability

An agent (or surrogate) is not subject to civil or criminal liability or to discipline for unprofessional conduct for health care decisions made in good faith. Prob C §4741.

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§1.30 E. Revocation

Methods of revocation. A patient with capacity may revoke the designation of an agent by a signed writing or by personally informing the supervising health care provider. Prob C §4695(a). Any portion or portions of a health care directive other than appointment of the agent can be revoked at any time and in any manner that communicates an intent to revoke. Prob C §4695(b).

The higher standard for revocation of an agency designation protects against miscommunication or misinterpretation by a third party or the false revocation of an agent, such as when unscrupulous friends or relatives try to replace the name of the former agent with an abuser's name.

A health care provider, agent, conservator, or surrogate who is informed of a revocation of an AHCD must promptly communicate the fact of the revocation to the supervising health care provider and to any health care institution where the patient is receiving care. Prob C §4696. The communication triggers the obligation of the health care provider to record the revocation in the patient's health care record in order to reduce the risk of reliance on an invalid directive. Prob C §4731(a).

In case of conflict of a directive with an earlier advance directive, the later one revokes the earlier advance directive. Prob C §4698.

PRACTICE TIP: A successor document that expressly revokes its predecessor and is copied and distributed to the principal's medical caretakers avoids the potential conflict of partial revocations.

Effect of dissolution or annulment. If, after executing a PAHC, the principal's marriage to or registered domestic partnership with the agent is dissolved or annulled, the designation is revoked. Fam C §297.5; Prob C §4697(a). On remarriage to the agent (or reregistration of the partnership), the designation is revived. Fam C §297.5; Prob C §4697(b). The revocation rule does not apply to legal separation.

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§1.31 F. Relationship With Third Parties

An agent under a PAHC has priority in making health care decisions over a conservator of the person, even if the conservator has been given medical consent powers. See Prob C §§2356(e), 4685. Probate Code §2356(e) makes it clear that a person's valid and effective directive under the Health Care Decisions Law (Prob C §§4600-4805) must be followed.

Health care providers and health care institutions must comply with individual health care instructions and with the agent's health care decisions as if the decision had been made by the patient while having capacity. Prob C §4733. Limited reasons allow a health care provider to decline to comply. Prob C §§4734 (reasons of conscience), 4735 (medically ineffective care).

The agent (or surrogate) can petition the court for an order to require third persons to honor the AHCD. Prob C §4766(e). The court may issue a temporary order prescribing the patient's care and award reasonable attorney fees. Prob C §§4770-4771.

Furthermore, a health care provider or health care institution that intentionally violates the Health Care Decisions Law is subject to liability for damages plus reasonable attorney fees. Prob C §4742. The damages provided in Prob C §4742 are cumulative and not exclusive of any other remedies provided by law. Prob C §4742(c).

Because the remedies of Prob C §4742 as well as those under Prob C §4766 petitions are cumulative and not exclusive (Prob C §4751), the agent (or surrogate) might also seek a permanent injunction requiring that conservators, hospitals, and others with a duty to serve the principal (patient) refrain from doing or continue doing anything as properly directed by the agent (or surrogate). Alternatively, the agent (or surrogate) might file a declaratory relief action. As to conservators, the agent's (or surrogate's) best remedy may be a petition for instructions in the conservatorship. Prob C §2359.

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§1.32 G. Judicial Proceedings

Judicial proceedings are generally disfavored in the law concerning health care decisions. See Prob C §4753. However, Probate Code §4766 identifies the following purposes for which a petition may be filed regarding an AHCD:

- Determining whether the patient has capacity to make health care decisions;
- Determining whether the AHCD is in effect or has terminated; determination that the AHCD is in effect may include (1) whether it was effectively executed or (2) whether the principal objects to its use (see Prob C §4689);
- Determining whether the prior or proposed acts of the agent (or surrogate) are consistent with the principal's expressed desires, if any, or otherwise made known to the court or, when the desires of the principal are unknown or unclear, whether the acts are in the principal's best interest;
- Declaring that the AHCD has terminated, on the court's finding that the health care decision of the agent (or surrogate) has authorized anything illegal, or on finding *both* of the following:
- The agent (or surrogate) has violated or failed to perform, or is unfit to perform, the duty under an AHCD to act in a manner consistent with the patient's desires or, when the patient's desires are unknown or unclear, is acting (by action or inaction) in a manner that is clearly contrary to the patient's best interest; and
- At the time of the determination by the court, the patient lacks capacity to execute or revoke an AHCD or to disqualify a surrogate;
- Compelling a third person to honor individual health care instructions or the authority of an agent (or surrogate).

For a full discussion of judicial intervention concerning AHCDs and PAHCs, see chap 11.

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§1.33 H. Out-of-State Documents

California recognizes and enforces a written AHCD or PAHC that meets the requirements of the law of California or of the state of origin. Prob C §4676(a). Not all states recognize California's PAHC, however.

Thus, if clients spend the winter or summer outside California or plan an extended stay in another state, it is advisable for them to execute an advance directive on the approved out-of-state form, observing the laws of execution of that state. This document should be distributed to all health care providers at the out-of-state site, and the original should be made accessible to the designated agent. For such drafting, it is advisable for the client to consult with a practitioner in the out-of-state locale.

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§1.34 IV. OVERVIEW OF POWERS OF ATTORNEY FOR PERSONAL CARE

A principal can give an agent authority to manage his or her personal care in either a DPOA (Prob C §4123(c)), a PAHC (Prob C §4671(b)), or in a separate durable power of attorney. Personal care decisions include the authority to decide where the principal will live, arrange for meals, hire household employees, provide transportation, handle mail, and arrange recreation and entertainment. Prob C §§4123(c), 4671(b). Because these matters are so personal, clients are hesitant to give someone else the authority to handle them. However, thorough planning concerning incapacity should include discussion of these powers, even with a reluctant client.

If a principal executes a Uniform Statutory Form Power of Attorney (Prob C §4401) and grants all the powers listed in the form, those powers include the authority to make not only personal but also family maintenance decisions. See letter J in Prob C §4401. This power, as detailed in Prob C §4460, includes the power to do the following:

- Take acts necessary to maintain the standard of living of the principal and of the principal's family (see Prob C §4460(a) for persons included), including providing living quarters, normal domestic help, usual vacation and travel expenses, funds for shelter, clothing, food, education, and other current living costs;
- Pay for necessary medical, dental, and surgical care, hospitalization, and custodial care for the principal and the principal's family;
- Continue provisions for transportation, including registering, licensing, insuring, and replacing automobiles for the principal and the principal's family; and
- Continue memberships in a church, club, society, order, or other organizations and continue contributions to those organizations for the principal.

Some of the agent's power to make personal care decisions for the principal, such as hiring household employees, involves incurring expenses on the principal's behalf. Therefore, many attorneys include authority to make personal care decisions in the durable power of attorney for financial management. However, a number of personal care decisions, such as handling mail and providing for the principal's religious needs, do not involve financial issues. The principal may prefer that these matters be handled by the same person who will make health care decisions and that the personal care provisions be included in the AHCD. A third alternative is to place personal care provisions in a separate durable power of attorney. Wherever the powers are placed, it is essential that the agents will be able to cooperate with each other to make sure that the principal's wishes are followed and that the agents can work in concert. For further discussion and sample provisions on personal care decisions to be included in a durable power of attorney, see §§5.61-5.67.

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§1.35 V. INTERNATIONAL CONSIDERATIONS

The need for documents that are useful outside a client's country is not limited to wills or trusts. More and more clients demand powers of attorney that work across borders, and they inquire about the use of health care directives and powers of attorney drafted by United States estate planners for use in other countries during periods of extended absence from the United States.

Clients must be counseled very carefully and must be advised that United States powers of attorney and health care directives will likely not be sufficient if the client decides to move to another country. The lack of an international convention and established legal doctrines for the use of powers of attorney in cross-border estate planning makes this part of the planning equally challenging and frustrating, but always interesting.

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§1.36 A. Recognition by United States of Powers of Attorney Drafted in Other Countries

A foreign power of attorney *may* be recognized by United States courts if it contains the seal of a foreign notary or was acknowledged by a United States consulate. For example, courts allowed a foreign power of attorney as evidence to establish a person's identity as heir when submitted together with additional documentary evidence. See *Estate of Rosen* (Pa 2003) 819 A2d 585, 594, citing *Estate of Demczuk* (Pa 1971) 282 A2d 700, 704. Another court entered a foreign power of attorney as evidence of the agent's power allowing the agent to appoint counsel in a United States lawsuit to act on behalf of the principal. See *In re Astibia's Estate* (Mont 1935) 46 P2d 712, 715 (authority of notary was certified by United States consulate). Yet another court held that the officially sealed certificate of a foreign notary on a power of attorney document, executed in the Republic of Ireland by an Irish resident in accordance with local law, combined with the sealed documents sent between defendant and his attorney, was valid and duly authenticated by the seal of the foreign (*i.e.,* Irish) notary. See *Whelton v Daly* (NH 1944) 37 A2d 1, 3.

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§1.37 B. Recognition by Foreign Jurisdictions of Powers of Attorney Drafted in United States

There is no law, treaty, or internationally recognized body of law that guarantees that a United States power of attorney will be recognized in another jurisdiction. Clients generally are displeased when the estate planner explains the necessity of a foreign court proceeding, because they came to avoid such a scenario.

However, there are some countries (or parts of countries) that specifically recognize powers of attorney drafted in other jurisdictions. For example, the Canadian provinces of Ontario and the Northwest Territories both recognize foreign powers of attorney, including powers of attorney for health care. For Ontario, see Substitute Decisions Act, SO 1992, c 30, §85; for Northwest Territories, see Powers of Attorney Act, SNWT 2001, c 15, as amended by SNWT 2002, c 20 (for durable power of attorney); Personal Directives Act, SNWT 2005, c 16 (for health care power of attorney). Other provinces, like Manitoba, require that a foreign health care power of attorney must comply with local law. Powers of Attorney Act, SM 1996, c P97; Health Care Directives Act, SM 1992, c H27.

Certain treaties may also provide a legal basis that might persuade a foreign court to recognize a United States power of attorney. These treaties include language that could be used to argue that the power of attorney drafted in accordance with the laws of the one country shall be enforceable in the other country, in particular if a United States power of attorney appoints a foreign agent. See, *e.g.,* Article VIII(1) of the Treaty of Friendship, Commerce and Navigation Between the United States of America and the Federal Republic of Germany, 7 UST 1839, 1954 UST Lexis 6, which states:

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, *attorneys, agents* and other specialists of their choice. [Emphasis added.]

Other countries may recognize foreign powers of attorneys because of the country's conflict-of-law statutes. For example, Spain routinely recognizes German powers of attorney if the powers are drafted and acknowledged in accordance with German law and include a choice-of-law clause electing German law, even if the power of attorney states that it shall survive the principal's death, which is allowed under Germany's Bürgerliches Gesetzbuch §196 but not under Spanish law (Código Civil Art. 10 (11)). The German power of attorney must be drafted in German and should be accompanied by a certified translation into Spanish.

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§1.38 C. Practical Considerations When Drafting Powers of Attorney for International Clients

The authors recommend that practitioners approached with the issue of drafting a cross-border power of attorney, health care directive, or power of attorney for health care for a client's estate plan do the following, in order:

- Find a local attorney and have that attorney draft a power of attorney or health care directive. The client should ensure that such power of attorney is limited to the country in which the client will be present for some time and includes a clause that ensures that the foreign power of attorney does not terminate the existing United States power of attorney (similar to language in multijurisdictional wills).

PRACTICE TIP: In looking for local counsel, contact the United States embassy and ask for a list of recommended counsel.

- Contact the consulate or embassy of the country the client will be visiting and see if its personnel will assist with the drafting of powers of attorney. Very few will do so, but the personnel may be able to assist with finding an attorney who is authorized to practice law in that country and works in the United States.
- If neither of the above works, ensure that the United States power of attorney is notarized and authenticated. In countries party to the Hague Legalization Convention, the foreign competent authority authenticates foreign documents. For a list of authorities in the United States, see http://www.hcch.net/index_en.php?act=authorities.details&aid=353. See Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (concluded Oct. 5, 1961), 33 UST 883, 1961 UST Lexis 657. In non-Hague countries, documents can be authenticated by a consular officer at the United States embassy or consulate. See 22 CFR §22.1, items 44-45. A translation of the power of attorney should be included. An attorney should also include language suggested in §1.39 for a health care directive.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/1 Powers of Attorney and Health Care Directives: Overview and International Considerations/§1.39 D. Form: Provision for International Health Care Instruction

§1.39 D. Form: Provision for International Health Care Instruction

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

1.39-1 Provision for international health care instruction

It is my intention that this declaration shall be honored by my family and physician as the final expression of my legal right to refuse medical or surgical treatment and accept the consequences of such refusal, and it is my intention that the terms of this instrument be honored in any jurisdiction, regardless of its conformity to that jurisdiction's technical requirements and legal formalities.

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VI. SAFEKEEPING AND TRANSFER OF DOCUMENTS

§1.40 A. Where Client Should Keep Originals and Copies

Clients often have questions about where to keep the originals and copies of various powers of attorney. If they are executing powers in connection with overall estate planning activities, they may have a trust, a will, a community property agreement, and powers of attorney for health care, personal care, and financial management. Separate decisions must be made about each of these.

Because the health care power may be needed in the middle of the night or on a weekend, this document should not be placed in a bank safe deposit box or left with the attorney. The agent should either have the original or know where it can be found quickly. Copies should be given to the principal's physician or health maintenance organization (HMO) for placement in the principal's medical file, but the original should never be left with a provider, because loss can occur. If a written individual health care instruction under the Health Care Decisions Law (Prob C §§4600-4806) is also executed, a copy should be given to the principal's primary care physician or HMO for placement in the medical file.

The personal care power should also be in the hands of, or easily accessible to, the agent.

Some practitioners draft only currently effective financial management powers, on the theory that springing powers are too cumbersome to effect. For a discussion of the dangers of immediately effective DPOAs, see Caveat in §4.8. Because the principal does not intend to give the agent authority immediately on execution but intends the power for use only in the event of incapacity, giving the document to the agent before it is to be used risks misuse. If the principal does not completely trust the agent, or if the agent does not want the responsibility of securing an original document, the attorney may be asked to do so.

Some attorneys do agree to keep the original financial management power for their clients. Clients may execute subsequent powers (and wills, for that matter) without the attorney's knowledge, but the later documents are presumably someone else's responsibility. If the agent appears and requests the original in the attorney's possession, the question arises whether the attorney has a duty to turn over the document. With a will, it is easy to ascertain whether the contingency, death, has occurred, but it may be more complicated to know when it is appropriate to give an original power of attorney to an agent. For these reasons, many practitioners refuse to keep original powers of any kind.

NOTE: For discussion of the state registry system and a sample form, see §§7.69-7.72.

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§1.41 B. Documents Deposited With Attorney

Probate Code §§710-716 set out the duties and liabilities of an attorney who holds estate planning documents. A signed original power of attorney, a signed original nomination of conservator, and any other signed original instrument that the attorney and the depositor agree in writing to deposit with the attorney are subject to these provisions. Prob C §704(b)-(c). Probate Code §713 provides that an attorney's acceptance of a document deposited for safekeeping imposes no duty on the attorney to inquire into the document's content, validity, correctness, or completeness or to provide continuing legal services to the depositor or to any beneficiary under the document. These rules, however, do not affect the duty, if any, of the drafter of the document to provide continuing legal services to any person. Prob C §713(b).

Provisions on terminating a deposit of documents by an attorney are in Prob C §§730-735. Documents may be transferred to the court clerk if the attorney who has held them dies, retires, or becomes incapacitated. Prob C §732(c). Probate Code §733 requires that an attorney transferring documents under Prob C §732 mail notice of the transfer to the State Bar of California. The provisions also describe the attorney's duties and liabilities if the documents are then transferred to another attorney and describe how a depositor or an attorney can terminate the deposit.

Because transfers must be reported to the State Bar of California, it has established a Transfer of Estate Planning Documents service and forms to use in registering the transfer information. Callers can learn whether estate planning documents have been transferred to another attorney or to the clerk of the superior court. To obtain forms to report transfers and to obtain information about transfers that have occurred and have been reported, and for other information, call 1-888-800-3400 or write to the State Bar of California, Membership Records, 180 Howard Street, San Francisco, CA 94105.

The statutes also provide for the court-ordered transfer of a conservatee's estate planning documents to a custodian designated by the court. See Prob C §2586(d).

The superior court clerk must accept for deposit certain documents, including durable powers of attorney, delivered by an attorney who held the document for safekeeping, and the clerk is authorized to copy and store the documents. Prob C §732; Govt C §26810. The superior court may charge fees for receiving and storing a document transferred to the superior court clerk under Prob C §732. Govt C §70660.

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2

Alternatives to Powers of Attorney and Advance Health Care Directives

Andrea Starrett
Amir Atashi Rang

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§2.1 I. INTRODUCTION

An integral part of any estate plan includes proper consideration for a person's potential incapacity. In California, two primary estate planning vehicles used to plan for an individual's incapacity are a durable power of attorney for financial management (DPOA) and an advance health care directive for health care decisions (AHCD). In general, most clients are receptive to their attorney's recommendation that both documents be executed, particularly if trustworthy and willing agents are available. The advantages and disadvantages of the DPOA and the AHCD are discussed in §§2.2-2.6.

Sometimes, however, either or both documents may be inappropriate or impractical. Section 2.7 lists specific situations in which either document should not or cannot be used. In these situations, alternatives must be considered. Sections 2.8-2.22 discuss alternatives to a DPOA, and §§2.23-2.42 discuss alternatives to an AHCD.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/ II. ADVANTAGES AND DISADVANTAGES OF DURABLE POWER OF ATTORNEY FOR FINANCIAL MANAGEMENT (DPOA) AND ADVANCE HEALTH CARE DIRECTIVE (AHCD)/ A. DPOA Advantages and Disadvantages/§2.2 1. DPOA Advantages

II. ADVANTAGES AND DISADVANTAGES OF DURABLE POWER OF ATTORNEY FOR FINANCIAL MANAGEMENT (DPOA) AND ADVANCE HEALTH CARE DIRECTIVE (AHCD)

A. DPOA Advantages and Disadvantages

§2.2 1. DPOA Advantages

A durable power of attorney for financial management (DPOA) has many advantages:

- **A DPOA is economical to create.** Attorney fees for drafting, counseling, and supervising the execution of a DPOA are generally less than the attorney fees associated with the alternatives, such as a conservatorship of the estate.
- **The power of attorney can specifically authorize the agent to create or fund a trust or fund a federal estate tax unified credit shelter trust on the death of the principal.** The DPOA can be used to dispose of assets at death or avoid probate. This is useful when discussion of complex trusts is beyond the understanding of the principal or the principal is unwilling to discuss the matter, as may be the case with less sophisticated clients. See chap 6.
- **A DPOA can be put into effect quickly.** A DPOA can be created in an emergency, even when death is imminent, by expressly authorizing the agent to fund gifts, make tax decisions, transfer assets to a revocable trust, disclaim property, and so forth. In order for the DPOA to be effective, the principal must have capacity when he or she executes the document. See §§3.28-3.40.
- **A DPOA can eliminate the need for a court-supervised conservatorship,** which is costly, time-consuming, cumbersome and open to the public.
- **A DPOA can have an unlimited duration and does not need to be periodically renewed.** Formal periodic review of a well-functioning principal-agent relationship can be unnecessarily expensive and time-consuming. However, informal periodic review is recommended to revisit the appropriateness of the DPOA and the designated agent. Additionally, many custodians and other third parties require a "fresh" DPOA (within the past 2 years) before honoring it. Presumably, these third parties believe that a DPOA executed within the past 2 years better reflects the principal's desires than one drafted years in the past. Counsel should therefore encourage clients to execute a "fresh" DPOA to facilitate acceptance by third parties. See chap 10.
- **A DPOA is flexible.** A DPOA can be designed to fit a vast array of situations, and the scope, duration, and selection of agents can vary according to the situation. As long as the principal retains capacity, he or she can revoke the DPOA and execute a new DPOA to reflect his or her needs, desires, and choice of agents at that particular time.

PRACTICE TIP: Rather than revising or amending the existing document, it is recommended that an old DPOA be revoked and a new DPOA be created to eliminate confusion by all parties.

- **A DPOA allows the principal to have someone else manage his or her affairs on a trial basis.** If a principal who still retains capacity wishes to test an agent's capabilities in managing his or her situation and is not pleased with the agent's performance, he or she can revoke the instrument, generally with little effort or expense.
- **A DPOA is private.** Neither the principal's assets nor his or her intentions are disclosed, except as needed to third parties dealing with the agent on specific matters.
- **A DPOA does not require formal transfer of title of the principal's assets into the agent's name.** Ownership of record remains in the principal's name. See, *e.g.,* Corp C §702(e).
- **Court review or approval of a DPOA is not required.** No formal court review is required for a DPOA to be effective. However, a relatively simple statutory procedure to obtain court review of the agent's actions (or court removal of the agent) is available if necessary (Prob C §§4540-4545). See chap 11.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/§2.3 2. DPOA Disadvantages

§2.3 2. DPOA Disadvantages

A durable power of attorney for financial management (DPOA) has several disadvantages:

- **In order for a DPOA to be effective, a third party must accept the DPOA as valid.** Third parties sometimes refuse to accept a DPOA, particularly if it is not a "fresh" DPOA (executed within the last 2 years), or they question the intention of the agent bringing the document to them. Many banks and brokerage firms will require that a DPOA be executed on the organization's own form and will not accept attorney-drafted forms. Title companies sometimes challenge real property transfers made under a DPOA or, years later, refuse to issue title insurance for the property. For further discussion of third party acceptance issues, see chap 10.
- **The principal or the agent of a DPOA may not fully understand the document being executed.** Because of the relative ease of its execution, a DPOA's serious legal ramifications may not be sufficiently understood by the principal or the agent. This can present future problems, *e.g.,* if a third person later challenges an agent's authority by claiming that the principal did not understand the nature of his or her acts.
- **An agent may not make authorized gifts to himself or herself without specific authority in the DPOA.** Gifts or other benefits from the principal's estate made to the agent will cause problems when the agent is considered a "disqualified person," pursuant to Prob C §§21350-21356, because such gifts are then invalid unless one of the few exceptions applies. See §§4.46-4.48. For example, the principal may expect that a family member or friend serving as agent will be allowed to receive gifts but was never made aware of the "disqualified person" issue.
- **A DPOA agent is generally not required to render an accounting.** An agent is required to account only in certain limited situations, *e.g.,* the document requires an accounting or the principal asks for one. See Prob C §4236(b). See also §4.71 for discussion of duty to account. An agent without a duty to account may become careless with his or her authorized powers or may make decisions without the principal's best interests in mind. In these situations, the only alternative is to compel an accounting in court. See §§11.50, 11.57-11.58 for discussion and sample forms of petition to compel accounting.
- **A DPOA is not supervised by a court.** Generally, the lack of court supervision of a DPOA is an advantage. However, if the DPOA is being misused or abused, not having court supervision can be a severe disadvantage. If the agent is not acting in the principal's best interests, the agent's improper acts may continue undetected until severe damage has been done. Because of this potential for abuse, many practitioners urge great caution when using a DPOA. See, *e.g.,* Barringer & Lawrence, *The Perils of Durable Powers of Attorney for Property Management,* 16 CEB Est Plan Rep 85 (Feb. 1995).
- **A DPOA principal still retains full legal capacity to act to his or her detriment.** For example, a principal may still legally gift his or her house away or spend extraordinary sums of money on sweepstakes contests and raffle tickets. Faced with the task of providing responsible financial management in such difficult circumstances, an agent may be forced to resign. In such a situation, a conservatorship may be preferable because a conservatee has no legal capacity to enter into contracts or convey property.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/§2.4 B. AHCD and Power of Attorney for Health Care (PAHC) Advantages and Disadvantages

§2.4 B. AHCD and Power of Attorney for Health Care (PAHC) Advantages and Disadvantages

In California, there are two primary types of health care documents executed by clients when planning for future health care decisions: an advance health care directive (AHCD) and a power of attorney for health care (PAHC).

NOTE: All PAHCs are AHCDs, but not all AHCDs are PAHCs.

A PAHC is defined as "a written instrument designating an agent to make health care decisions for the principal" (Prob C §4629), while an AHCD is "either an individual health care instruction or a power of attorney for health care" (Prob C §4605). Thus, an AHCD may be only a written health care instruction that indicates a preference for a type of health care but may not designate an agent. For most purposes, however, the two terms are used interchangeably because nearly all AHCDs appoint a health care agent and thus would also be defined as a PAHC.

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§2.5 1. AHCD and PAHC Advantages

An advance health care directive (AHCD) or power of attorney for health care (PAHC) has numerous advantages:

- **An AHCD or PAHC is private, dignified, and inexpensive.** The primary alternative to an AHCD is a conservatorship proceeding, which is public, often embarrassing for the proposed conservatee, and very expensive. Unless the proposed conservatee consents to the appointment, establishing a conservatorship requires proof that the proposed conservatee lacks capacity. Oftentimes this is shown in open court by spotlighting the numerous foolish or peculiar decisions the person has made.
- **An AHCD or PAHC is effective upon the incapacity of the principal.** In emergency medical situations, if the principal cannot make his or her own health care decisions, then the agent acting under the AHCD or PAHC can immediately act. In contrast, the appointment of a temporary conservator, which would be necessary if the principal had not prepared an AHCD or PAHC prior to his or her needing medical care, can take a matter of days, and may not be fast enough to ensure the principal receives the appropriate medical care.
- **An AHCD or PAHC is free of court supervision.** Unlike a conservatorship, an AHCD requires no judicial oversight or intervention. Prob C §§4500, 4750. This makes the use of an AHCD much less cumbersome and expensive than a conservatorship. (However, lack of court supervision can also be a disadvantage. See §2.6.)
- **An AHCD or PAHC principal has the option of selecting his or her agent,** as opposed to a judge's selecting a surrogate decision-maker (possibly even a stranger to the proposed conservatee). Health care decisions are generally better handled by someone who has a personal relationship with the principal.
- **An AHCD or PAHC may authorize an agent to make personal care decisions for the principal.** Personal care decisions include the authority to decide where the principal will live, arrange meals, hire household employees, provide transportation, handle mail, and arrange recreation and entertainment. Prob C §§4123(c), 4671(b). Alternatively, authority to make personal care decisions can be included in a DPOA or a separate power of attorney for personal care.
- **Drafting an AHCD or PAHC encourages the client's discussion with family and doctors on values, wishes, and end-of-life decisions.** An attorney should encourage discussion among the client's family and physician about values, wishes, and end-of-life decisions. The attorney can give information about scope, availability, and importance of the health care directive and guide the client through reflection about personal priorities and spiritual and other values pertinent to medical decisions. See chap 9. The attorney should analyze client circumstances and determine whether the statutory California Medical Association or attorney-drafted AHCD form is appropriate. See chap 8 for discussion of different forms. The attorney should make sure execution formalities are observed and advise on the retention of originals and distribution of copies. See chap 7. The attorney can also keep current on new legislation—cases and statutes that affect the substance and technicalities of health care decision making—and inform clients of changes.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/§2.6 2. AHCD and PAHC Disadvantages

§2.6 2. AHCD and PAHC Disadvantages

An advanced health care directive (AHCD) or power of attorney for health care (PAHC) has disadvantages, which include the following:

- **The principal must have capacity to execute an AHCD or PAHC.** Only adults with capacity have the right to establish an AHCD or to execute a PAHC authorizing an agent to make health care decisions. Prob C §§4670, 4671(a). Thus, if a client who would benefit from an AHCD or a PAHC does not have capacity, there is no way to establish one unless he or she regains capacity.
- **An agent may abuse his or her authority because the AHCD or PAHC does not require court supervision.** Because an AHCD or PAHC does not require court supervision, an interested person must file a petition if he or she wishes to challenge the action of the health care agent. Some practitioners are concerned that, with little or no oversight, an agent may abuse authority for his or her own benefit or, if the agent does not completely understand his or her duties and responsibilities, ignore obligations or exceed the authority granted by the AHCD or PAHC.
- **Hospitals or other health care providers may refuse to honor a valid AHCD or PAHC.** There is a tremendous fear of litigation in the medical community. Many health care professionals are ignorant of this area of the law and are fearful of lawsuits, criminal charges, and professional censure. For example, a physician may be presented with a comprehensive, multiple-page attorney-drafted AHCD or PAHC. The physician may have concerns about the legality of the document and may refuse to honor the document until his or her attorney has reviewed it. This may occur too late for his or her patient to receive the desired medical care.
- **Agents may develop "caregiver burnout" without third party supervision.** Agents can become worn out and develop "caregiver burnout." If this happens, the agent may start to make mistakes, act indifferently, or fail to act, all while no third party oversees the agent's activities. In contrast, a conservator must report to the court on a periodic basis and will be removed by the court if he or she begins to poorly serve the needs of the conservatee.
- **Medical information privacy laws may interfere with the agent's ability to remain informed.** The Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub L 104-191, 110 Stat 1936) and California's Confidentiality of Medical Information Act (CMIA) (CC §§56-56.37) may prevent health care providers from disclosing to an agent protected health care information about a principal's condition unless an appropriate release is prepared. Thus, an agent may not be able to adequately meet the needs of the principal. See discussion of HIPAA and CMIA in §§7.76-7.85 and HIPAA and CMIA disclosure forms in §§8.35-8.38.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/§2.7 III. WHEN DPOA OR AHCD IS NOT REASONABLE OR LEGAL OPTION

§2.7 III. WHEN DPOA OR AHCD IS NOT REASONABLE OR LEGAL OPTION

Under certain circumstances, using a DPOA or an AHCD for some or all of a person's affairs is not a reasonable or legal option. Neither document should be used in the following situations:

- The principal lacks the capacity to execute the document. When an individual lacks capacity, he or she is legally prohibited from executing either a DPOA or AHCD. See discussion in §§3.28-3.40 on capacity.
- No conscientious, capable, and willing person is available to be named as an agent. Some people do not have family members or close friends whom they trust to fulfill the duties of an agent and who have the time, live close enough, and are capable of doing a good job.

NOTE: In certain cases, a private professional fiduciary could serve as an agent. To locate available professional fiduciaries, the Professional Fiduciary Association of California (PFAC) maintains a website of licensed fiduciary members throughout California. See http://www.pfac-pro.org/pages/ref_referrals.htm.

- The DPOA does not authorize the named agent to take the required and intended action. In other words, the DPOA has already been executed by the principal, but it does not authorize the intended act, such as the power to disclaim an inheritance or make annual gifts. As discussed in §§4.72-4.75, certain acts may not be done by an agent under a DPOA unless it is specifically authorized. In some cases, the authorization is not granted after a thorough discussion with the drafting attorney. All too often, however, the authority either is not granted because of an oversight or because the action could not reasonably have been anticipated.
- The principal is partially incapacitated, and his or her ability to execute powers of attorney may be challenged by a third party. In this situation, an agent may refuse to take action on behalf of the principal because of litigation concerns.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/ IV. ALTERNATIVES TO DPOA AND AHCD/§2.8 A. Alternative Devices to DPOA

IV. ALTERNATIVES TO DPOA AND AHCD

§2.8 A. Alternative Devices to DPOA

Because a DPOA agent's authority to act is not terminated by the principal's incapacity, the DPOA has become a popular estate planning tool and a primary alternative to conservatorships, trusts, joint tenancy, and community property management under Prob C §§3000-3154. The discussion in §§2.9-2.22 compares the DPOA with other tools for handling the property and financial and business affairs of incapacitated persons.

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§2.9 1. Revocable Living Trusts

A trust is an arrangement in which one person, the settlor, settles on another, the trustee, responsibility for administering designated property, called the "trust estate" or "corpus." Although oral trusts are recognized under California law (see *Estate of Heggstad* (1993) 16 CA4th 943, 20 CR2d 433), most trusts are created by a written declaration of trust or trust agreement.

In the trust most commonly used for estate planning, the revocable living trust, the settlor and the initial trustee are usually the same person. Typically, these self-settled trusts are created when the settlor declares in writing that he or she holds title to property as trustee. Less commonly, a revocable trust is created by an agreement between the settlor and a third party trustee.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/§2.10 a. Compared With DPOA

§2.10 a. Compared With DPOA

A DPOA and a revocable living trust are not mutually exclusive: a complete estate plan often contains both. There are, however, several differences between a DPOA and a revocable living trust as financial management devices.

- The DPOA is effective only during the lifetime of the principal; the agent's authority terminates when the agent has actual knowledge of the principal's death. Prob C §§4152(a)(4), 4304(a). Thus, the DPOA cannot be used to dispose of assets at death or to avoid probate unless the power of attorney specifically authorizes the agent to create or fund a trust or fund a unified credit shelter trust on the death of the principal. The revocable living trust, in contrast, does not terminate on the settlor's death and can provide for the disposition of property after the settlor's death. The trustee may have considerable discretion to dispose of the settlor's assets in a manner consistent with the settlor's wishes. See *e.g., Young v McCoy* (2007) 147 CA4th 1078, 54 CR3d 847.
- Unless the settlor specifically reserves authority in the trust document, the settlor cannot act in his or her individual capacity with regard to any trust assets. The settlor's assets must be transferred to the trustee's name under the settlor's living trust. On the trust's proper funding, the settlor no longer holds title to property in his or her individual name. Instead, the settlor holds title as trustee.
- A trustee (who is not the settlor) has no authority to sign and file the settlor's individual personal income tax returns or to represent the settlor at tax audits, other than audits of trust returns. A DPOA agent may be given this authority. Further, a trustee may not execute disclaimers, consent to split gifts with a settlor's spouse, or make any other decisions involving assets that are not held by the trust, *e.g.,* retirement plans and government benefits.
- A DPOA is easier to terminate than a trust. If the principal is incapacitated and unable to remove an agent, an agent can be removed by court order. See Prob C §§4540-4545. See also chap 11. Although a trustee may be similarly removed by court order (see Prob C §17200(b)(10)), the trust will not automatically terminate simply because a trustee has been removed.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/§2.11 b. Coordinating DPOA With Revocable Living Trust

§2.11 b. Coordinating DPOA With Revocable Living Trust

A DPOA and revocable living trust should complement each other; therefore, a drafting attorney should create the two documents together in order to avoid conflicts. A DPOA may complement a revocable living trust in several ways.

- A DPOA may authorize the agent to transfer additional assets to a revocable living trust. See §§6.35-6.36. This becomes an extremely important power at certain critical times: (1) the settlor's death is imminent, (2) the settlor becomes incapacitated before completing intended funding of his or her living trust, or (3) the incapacitated settlor receives assets through gift or inheritance.
- A DPOA and a revocable living trust can be drafted to allow the agent to amend, create, or even revoke the revocable living trust. See §§6.13, 6.18, 6.21. These become critical powers if and when life situations, tax laws, or other circumstances change after the settlor loses capacity. Counsel should note that both the DPOA and the trust instrument must specifically authorize an agent to exercise these powers. Prob C §4264(a). A revocable living trust may not be revoked or modified by an agent under a power of attorney unless expressly permitted by the trust instrument. Prob C §15401(c).
- A DPOA agent can be given the authority to deal with assets not normally held as part of the trust, such as motor vehicles, personal effects, life insurance policies, public benefits, and employee benefits. A DPOA can also authorize the agent to collect assets belonging to the principal and deliver them to the trustee of the principal's trust. See §§6.35-6.36.
- A DPOA can authorize an agent to make decisions that a trustee is not authorized to make, such as (1) applying for government and insurance benefits (see §§5.21-5.23, 5.36-5.39); (2) transacting business regarding safe deposit boxes and credit cards (see §§5.7-5.11); and (3) preparing and signing the principal's personal income tax returns and representing the principal at audits (see §§6.63-6.72).
- A DPOA can be drafted to authorize the agent to make personal care decisions for the principal that a trustee lacks the authority to make, *e.g.,* to provide for the principal's personal care, maintenance, and medical needs and to enter into contracts for care (see §§5.62-5.68).

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§2.12 2. Conservatorship of the Estate

In a conservatorship of the estate, a court-appointed conservator manages the financial affairs of a person who is substantially unable to manage his or her own financial resources or to resist fraud or undue influence. See Prob C §1801(b). The conservator's primary responsibilities are to conserve, manage, and use the conservatee's property in California for the benefit of both the conservatee and those whom he or she is obligated to support. The conservator must use ordinary care and diligence. Prob C §2401. For a full discussion of conservatorships, see California Conservatorship Practice (Cal CEB 2005).

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§2.13 a. Compared With DPOA

A conservatorship of the estate is expensive, time-consuming, and public. If there is a trustworthy agent available and willing to serve, then in nearly all circumstances a DPOA is preferable to a conservatorship of the estate. However, when any one of the circumstances set forth in §2.7 exists, a conservatorship should be established instead of a DPOA.

EXAMPLE: If the proposed agent finds the principal's affairs in shambles or suspects that decisions or actions may later be challenged by family members or others, a conservatorship, along with prior court approval of these actions, would provide valuable protection for both the agent and the principal.

In many instances, the DPOA will not authorize the specific act contemplated. For example, an agent may wish to modify the principal's existing estate plan to better take advantage of gifting opportunities. However, an agent may not create, modify, or revoke a trust unless the DPOA specifically grants those powers and the trust allows modification by the agent of a DPOA. Prob C §§4264(a), 15402. A conservator, however, may petition for substituted judgment to amend a conservatee's estate plan. See Prob C §2580(a)(1). If the court finds that independent judgment should be substituted for the conservatee's judgment, then the court will make such judgment as the court believes the conservatee would make if he or she had legal capacity. Substituted judgment is not possible under a DPOA.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/ b. Interaction of Conservator and Agent/§2.14 (1) Agent Accountable to Conservator

b. Interaction of Conservator and Agent

§2.14 (1) Agent Accountable to Conservator

Unless a termination clause is included, a DPOA will not automatically terminate on the appointment of a conservator. Prob C §4206. Many DPOAs, however, specify such termination, so practitioners should carefully review the document.

If the DPOA is not terminated by its own terms or under a court order, the agent under the DPOA will be accountable to both the conservator of the estate and the principal. Prob C §4206(a). A conservator cannot revoke or amend the power of attorney without court permission. Prob C §4206(b). Therefore, a conservator who wishes to act without the participation of the previously appointed agent must petition the court in order to take action. If both parties take action, the agent must report to the conservator.

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§2.15 (2) Avoiding Potential Conflicts Between Agent and Conservator

If the agent and the conservator appointed by the court are not the same person, conflicts may arise about who has the authority to make certain decisions and to manage various affairs. See §2.14. Many DPOA instruments nominate a conservator. See Prob C §4126(a), which authorizes this procedure. The court will appoint the nominee unless the court finds such appointment is not in the best interests of the proposed conservatee. Prob C §1810. However, a subsequent writing signed by a principal with capacity nominating a different conservator will override the nomination in the DPOA. Prob C §4126(b). Therefore, many attorneys counsel the principal to nominate the agent of a DPOA as the conservator of the estate. This avoids a potential conflict between different and competing fiduciaries. See form in §5.45 for language on nominating a conservator of the estate.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/§2.16 (3) Personal Care Decisions

§2.16 (3) Personal Care Decisions

The Power of Attorney Law (Prob C §§4000-4545) does not specifically address the issue of the relationship between an agent who has authority for personal care of the principal and a conservator of the principal's person or estate. Under Prob C §4206, an agent under a DPOA is accountable to the conservator, and the conservator can revoke or amend the power with court authority. This provision presumably applies to personal care decisions as well, if authorized in a DPOA. Probate Code §4206, however, does not apply to personal care powers if contained in a power of attorney for health care, because personal care powers included in a power of attorney for health care are governed by Division 4.7 of the Probate Code (Prob C §§4600-4805), and there is no provision similar to Prob C §4206 in Division 4.7. Thus, it is unclear at this point who would have ultimate authority over the personal care of a person who has both an agent for personal care decisions and a conservator.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/§2.17 3. Joint Tenancy

§2.17 3. Joint Tenancy

Joint tenancy is a form of co-ownership of property in which the joint tenants own equal, undivided interests in the subject property and grant to each other a right of survivorship in that property. CC §683.

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§2.18 a. Compared With DPOA

A joint tenant and an agent under a durable power of attorney for financial management (DPOA) both hold broad authority over assets without supervision. However, a joint tenancy and a DPOA differ in several important ways.

- A joint tenancy creates an actual ownership interest in the underlying property, and any joint tenant has the authority to use the joint tenancy assets for his or her personal benefit. Additionally, after the death of one of the joint tenants, ownership of the property is vested in the surviving joint tenant(s). A DPOA neither creates an ownership interest for the agent nor allows the agent to use the principal's assets for the agent's benefit.
- Transfers to joint tenancy can create a myriad of income, gift, and estate tax consequences. A properly drafted DPOA, unless it confers on the agent a general power of appointment over the principal's assets (*e.g.,* by permitting the agent to make gifts of the principal's property to himself or herself), does not have such consequences. For example, joint tenants are presumed to own equal interests in the property. However, for federal estate tax purposes, the full value of the joint tenancy property is presumed to be owned by the deceased joint tenant. IRC §2040.
- A joint tenant is generally not considered a fiduciary, but a DPOA agent is. See discussion of agent's duties in §§1.13, 4.62-4.78.

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§2.19 b. Problems With Joint Tenancy

A joint tenancy (*e.g.,* a parent who adds his or her child to the title of his or her house or bank account) can result in problems during lifetime and unintended consequences at death. First, any joint tenant can legally use the joint tenancy assets for his or her own purposes. This can lead to an undesired result if a joint tenant acts unscrupulously regarding the asset. Second, the deceased joint tenant's estate plan (generally the decedent's will or trust) has no effect on the joint tenancy property, even if the joint tenant changes his or her mind about who should receive the property when he or she dies. By operation of law, the joint tenancy assets pass directly to the surviving joint tenant. Third, joint tenancy assets are reachable by creditors of any joint tenant during their joint lifetime. For example, if a child is uninsured or underinsured and is involved in an automobile accident, a judgment lien may be placed on the child's joint tenancy interest, even if the child was added to the title by the mother for estate planning purposes only. For further discussion, see 1 California Decedent Estate Practice §§4.15-4.37 (Cal CEB 1986).

Additional problems during lifetime can occur if one person serves as agent for a principal under a DPOA and another person holds property in joint tenancy with the principal. The other joint tenant may interfere with the agent's authority to withdraw assets held in joint tenancy, and the agent may have problems reaching the principal's joint tenancy assets.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/ 4. Community Property Management/§2.20 a. Spouse or Domestic Partner and Agent Compared

4. Community Property Management

§2.20 a. Spouse or Domestic Partner and Agent Compared

In California, spouses and registered domestic partners have equal management and control of community property. A spouse, same-sex spouse, or registered domestic partner with capacity may generally manage, control, and dispose of the community property of an incapacitated spouse or partner. Fam C §§1100, 1102; Prob C §3051. This is true even if a third party has been appointed conservator of the estate for the incapacitated spouse or partner. Prob C §3051(b)(1). The community property will not be part of the conservatorship estate unless the spouse or partner with capacity consents. Prob C §3051(b)(2)-(c).

NOTE: Spouses of some same-sex marriages are included in these instances. See *In re Marriage Cases* (2008) 43 C4th 757, 76 CR3d 683, which held that the right to marry, as embodied in California's Constitution, guarantees same-sex couples the same substantive constitutional rights as opposite-sex couples to choose one's life partner and enter with that person into a committed, officially recognized and protected family relationship that enjoys all of the constitutionally based incidents of marriage. The ruling in *In re Marriage Cases* has since been overturned by Proposition 8, which amended the California Constitution to state that only marriages between a man and a woman are recognized as valid in California. However, marriages performed after the ruling in *In re Marriage Cases,* but before the passage of Proposition 8, remain valid. The California Supreme Court ruled that Proposition 8 cannot be applied retroactively. *Strauss v Horton* (2009) 46 C4th 364.

The spouse, same-sex spouse, or registered domestic partner with capacity has broad management authority over community property but may not enter into certain transactions on behalf of the community without obtaining prior court approval. Prob C §3071. These transactions (listed in Fam C §§1100, 1102) include sales, encumbrances, long-term leases, and gifts of spousal community property. If one spouse or partner lacks legal capacity for a proposed transaction that would otherwise require the consent or joinder of both spouses or partners, a petition for a court order authorizing the transaction may be filed, whether or not the incapacitated spouse or partner has a conservator. See Prob C §§3100-3154. The other spouse or partner must either have legal capacity to consent to the proposed transaction or be represented by a conservator. See Prob C §3101(a)(2).

In contrast, a DPOA agent can enter into any transaction on the principal's behalf that the principal authorizes the agent to undertake. The agent, however, has no authority over those assets belonging to the principal that are not included within the scope of the DPOA instrument.

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§2.21 b. Coordination of DPOA, Community Property, and Conservatorship

If community property is involved and a person (other than a spouse, same-sex spouse, or registered domestic partner) is the agent under a DPOA or appointed conservator of the estate, the law is ambiguous about who has ultimate authority over that asset. The Probate Code sections covering DPOA law, community property, and conservatorship law do not specifically cross-reference each other. Therefore, if no conservatorship exists, either the DPOA agent or the spouse with capacity can manage community property. The spouse must act within the scope of Family Code §§1100 and 1102, and the agent must act within the scope of the DPOA document. See §2.20.

If a conservatorship has been established, the spouse with capacity has exclusive management and control. Prob C §3051. In this situation, Prob C §3071 requires the consent or joinder of both the spouse with capacity and the conservator, while the agent has no authority. Under Prob C §3054, a court order can be obtained to exclude property from a conservatorship, returning the parties to the situation in which either the spouse with capacity or the agent may act. With court approval, a conservator can also revoke a DPOA. See Prob C §4206(b). The situation can become complicated and uncertain if the spouse with capacity, the conservator, and the agent are not the same person or cannot work together.

If the couple owns community property and an agent is desired for property management, then one solution involves mutually executed DPOAs by each spouse granting immediately effective powers to the other. This procedure eliminates the need to petition the court when Fam C §§1100 and 1102 actions are anticipated. However, both spouses are often elderly or infirm and concerned about possible incapacity. In this event, each spouse can execute a DPOA that does the following:

(1) Refers to Fam C §§1100, 1102, and Prob C §3051(a);

(2) Delegates management and control of property to the same third party of their mutual selection; and

(3) Nominates the same third party as the conservator of each spouse under Prob C §4126(a). For further discussion of Prob C §§3000-3154, see California Conservatorship Practice §§13.58-13.68 (Cal CEB 2005).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/§2.22 5. Bank Accounts, Safe Deposit Boxes, and Similar Services

§2.22 5. Bank Accounts, Safe Deposit Boxes, and Similar Services

A special statutory power of attorney for accounts and contracts concerning safe deposit services with a financial institution can be created under Prob C §5204, allowing a principal to appoint "agents" rather than joint owners when the account owner or contracting party actually intends an agency relationship. See §5.9. A common reason to create such an agency, *e.g.,* for a bank account, is to give someone signature authority for the convenience of a traveling or ill account owner. A power of attorney that is or may be durable must contain the language specified in Prob C §5204.

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B. Alternative Devices to AHCD

§2.23 1. Conservatorship of the Person

In a conservatorship of the person, the conservator manages the personal care of a person who cannot properly provide for his or her personal needs regarding physical health, medical care, food, clothing, or shelter. See Prob C §1801(a). If a power of attorney for health care (PAHC) is not a viable option (see §2.7), or if the person is unable or unwilling to accept help or intervention on a voluntary basis, a conservatorship of the person is the most comprehensive solution. Before approving the conservatorship, an allegation in the mandatory Confidential Supplemental Information (CSI) form filed along with the petition must explain why informal assistance or powers of attorney are not sufficient to meet the needs of the proposed conservatee.

A conservatorship is a drastic solution, and the need for one must be clear. For a detailed discussion of conservatorship of the person, see California Conservatorship Practice (Cal CEB 2005).

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a. Medical Treatment Under Conservatorship

§2.24 (1) Conservatee's Capacity for Informed Consent

Unless the court determines that the conservatee lacks capacity to give informed consent for medical treatment, the conservatee retains control of his or her own medical care, and he or she may consent or refuse consent to any treatment. If the conservatee has the capacity to give informed consent, the conservator may not make medical decisions without this consent. See Prob C §2354(a). If the conservatee has capacity, a cautious health care provider may nevertheless request the conservator's consent, even though this consent is not required; the provider is legally obligated to follow the conservatee's instructions if the conservator and the conservatee do not agree. See California Conservatorship Practice §§11.25, 13.20-13.68 (Cal CEB 2005). However, the conservator may require the conservatee to receive medical treatment under the following conditions:

- The medical treatment is specifically ordered by the court (Prob C §2354(b)); or
- In cases of emergency, when the conservator determines in good faith and on the basis of a physician's advice that treatment is needed to alleviate severe pain or that the condition will lead to serious disability or death if left untreated. Prob C §2354(c). See also Prob C §2357 (petition for court order to treat existing or continuing medical condition).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/§2.25 (2) Conservatee's Lack of Capacity

§2.25 (2) Conservatee's Lack of Capacity

If the court determines that the conservatee lacks the capacity to make health care decisions, then the conservator has the exclusive authority to give consent for medical treatment that the conservator, in good faith and on the basis of medical advice, deems necessary. The conservator may require the conservatee to receive medical treatment without the conservatee's consent and despite the conservatee's objections. Prob C §2355(a). But see discussion in §2.29 on conservatee's appointing a health care agent under an AHCD or PAHC.

NOTE: To conform to the terminology in the Health Care Decisions Law, operative July 1, 2000, Prob C §2355(a) uses the broader terminology of "making health care decisions" rather than "giving informed consent to medical treatment," although Prob C §2354 has not been similarly amended.

The conservator must make health care decisions in accordance with any of the conservatee's individual health care instructions or other wishes known to the conservator. See Probate Code §2355(a). If there are no known instructions or wishes, the conservator must consider the conservatee's personal values and make all such decisions in accordance with the conservatee's best interest. This standard parallels the standard applicable to an agent under a power of attorney for health care (see Prob C §4684). See also 29 Cal L Rev'n Comm'n Reports 181 (1999).

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§2.26 (3) Conservatee's Belief in Prayer for Healing

If the conservatee, before being conserved, adhered to a religion whose tenets and practices require reliance on prayer alone for healing, then the conservator must use an accredited practitioner of that specific religion when seeking treatment for the conservatee. Prob C §2355(b).

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§2.27 (4) Conservator's Limited Authority

A conservator's authority to make medical decisions is limited by statute. A conservator may not place the conservatee in a mental health facility or allow the use of an experimental drug on the conservatee. Prob C §2356(a)-(b). Additionally, no convulsive treatment may be performed on the conservatee. Prob C §2356(c). For discussion of a conservator's authority to withhold or withdraw life-sustaining treatment, see §9.17. For a detailed discussion of conservatorships, see California Conservatorship Practice (Cal CEB 2005).

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§2.28 b. Disadvantages of Conservatorship

A conservatorship of the person requires a minimum of one court hearing, and perhaps several. It is often very expensive. The proposed conservator may have to bear the expenses if the proposed conservatee's estate is small.

The proceeding is also (mostly) public and can be humiliating to the proposed conservatee, whose problems are presented in open court. Because the allegations made on the petition to appoint a conservatorship of the person must address the proposed conservatee's needs for food, clothing, shelter, and physical health, the disclosures can be very detailed. For example, a disclosure may reveal the proposed conservatee's being swindled by phone solicitors, failing to bathe, or marrying someone met over the Internet from a foreign country. These disclosures in open court may exceed the personal standards of appropriateness for the proposed conservatee.

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§2.29 c. Interaction Between Conservator and Agent

The agent named in a power of attorney for health care (PAHC) has priority over all others, including a conservator, to act for the principal in all matters relating to health care decisions. Prob C §4685. See 29 Cal L Rev'n Comm'n Reports 94 (1999). California legislators have recognized that decisions about one's medical care are highly personal and should not be compromised. This policy decision is reflected in the high priority given to an agent for a PAHC by the Probate Code. See §7.47 for discussion of the interaction of a conservator and an agent under a power of attorney for personal care.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/§2.30 2. Court-Ordered Health Care Decisions for Adult Without Conservator

§2.30 2. Court-Ordered Health Care Decisions for Adult Without Conservator

A petition may be filed to determine that a patient without a conservator lacks the capacity to make health care decisions and to appoint a designated person to make health care decisions on behalf of the patient concerning a specified treatment. Prob C §3201(b). The court requires a finding that (Prob C §3208(a))

(1) the patient has an existing or continuing condition that requires the recommended health care;
(2) the condition, if left untreated, is likely life endangering or will result in a serious threat to the patient's physical or mental health; and
(3) the patient is unable to consent to the recommended health care.

The court order may also authorize withholding or withdrawing artificial nutrition or hydration and all other forms of health care and designate a person to give or withhold consent to the recommended health care on the patient's behalf. Prob C §3208(c). The court must find in these circumstances that (Prob C §3208(c))

(1) the recommended health care is in accordance with the patient's best interest, considering the patient's personal values known to the petitioner; and
(2) the patient is unable to consent to the recommended health care.

For procedures and limitations, see Prob C §§3200-3212. For petition and order, see California Conservatorship Practice §§2.29-2.36 (Cal CEB 2005).

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§2.31 3. Ability of Spouse to Make Health Care Decisions

In *Cobbs v Grant* (1972) 8 C3d 229, 104 CR 505, the California Supreme Court embraced the concept of identifying a patient's "closest available relative" as the person to make health care decisions on behalf of a patient who is incompetent, has no written advance health care directive and is not under a conservatorship of the person. 8 C3d at 244. If the patient is married or in a registered domestic partnership, this relative is generally the spouse, same-sex spouse, or registered domestic partner. See Note in §2.20 for discussion of same-sex spouse.

NOTE: Under the Domestic Partner Rights and Responsibilities Act of 2003 (DPRRA), registered domestic partners have the same rights and responsibilities as spouses. Making health care decisions for an incapacitated domestic partner is expressly extended to registered domestic partners by both the Family Code and the Probate Code. Fam C §297.5(a), (j), (k)(1); Prob C §4716(a).

However, the extent to which a spouse, same sex spouse, or registered domestic partner may make these decisions is unclear. In *Conservatorship of Wendland* (2001) 26 C4th 519, 110 CR2d 412, a wife and conservator of a brain-injured patient sought to assert her husband's right to refuse the use of an artificial feeding tube on the basis of previous statements he had made. Such statements included that he "would never want to live like that," referring to his father-in-law, who was near death at the time and unable to breathe without a ventilator. 26 C4th at 528. In addition to Mr. Wendland's wife, his brother and his children supported the decision to forgo artificial feeding. His attending physician, the health facility's ombudsman, a 20-member ethics committee, and other physicians supported the decision. Mr. Wendland's mother and sister, however, obtained a restraining order, after which Mrs. Wendland successfully petitioned for appointment as conservator. A trial court reserved judgment on removing the feeding tube, and Mr. Wendland died while the matter was being appealed to the supreme court. The supreme court held that, under Prob C §2355, a conservator may not withhold artificial nutrition and hydration from the conservatee without clear and convincing evidence that the conservator's decision is in accordance with the conservatee's own wishes or best interest. 26 C4th at 523. The trial court had found that Mr. Wendland's oral statements did not rise to the level of "clear and convincing evidence." 26 C4th at 543. The amount of evidence required to meet this "clear and convincing evidence" threshold remains an open question. For further discussion of *Wendland,* see §9.23.

Counsel should advise clients about the importance of appointing a health care agent and drafting formal, written instructions concerning health care decisions that are important to the client. Simply being a patient's spouse or domestic partner is not enough to allow the withdrawal of life-sustaining treatment; there must also be clear and convincing evidence of the incompetent spouse's or partner's wishes.

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§2.32 4. Surrogate Designation

Under the Health Care Decisions Law, a patient may designate, orally or in writing, a surrogate who may make health care decisions for the patient. Prob C §4711. A surrogate is defined as an adult, other than a patient's agent or conservator, authorized under the Health Care Decisions Law to make health care decisions for the patient. Prob C §4643. If an oral designation of a surrogate is made, it must be promptly recorded in the patient's health care record. The surrogate must make health care decisions according to the patient's instructions or wishes, if known, or in the patient's best interests as determined by the patient's personal values. Prob C §4714.

Unless the patient specifically designates a shorter period, an oral surrogacy designation is effective only during the course of treatment or illness or during the stay in the health care institution when the designation is made, or for 60 days, whichever period is shorter. Prob C §4711. To eliminate confusion, Prob C §4711 provides that when a patient has designated an agent under a PAHC but orally chooses to designate another to serve as surrogate during the course of treatment, the surrogate has priority over the agent for the period specified in Prob C §4711(b). The designation of a PAHC agent is not revoked unless the formal requirements of revocation under Prob C §4695(a) are met. Prob C §4711(d).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/§2.33 V. HEALTH CARE AND PERSONAL CARE DECISIONS FOR MINORS

§2.33 V. HEALTH CARE AND PERSONAL CARE DECISIONS FOR MINORS

A minor is not prohibited from contracting for medical services. Fam C §6920. However, Fam C §6710 permits a minor to disaffirm a contract made while in his or her minority, except as otherwise provided by statute. For exceptions, including the exception for medical necessity, see Fam C §§6711-6713, 6751, 7050(e)(2). Thus, as a practical matter, a parent or legal guardian's consent for nonemergency medical treatment of a minor is required if the medical provider wishes to be paid.

NOTE: While an unemancipated minor may not establish a DPOA (see Fam C §6701), there is no limitation on the minor's delegating medical decision authority (see Fam C §§6920-6929). A minor (depending on his or her age) may make decisions about treatments for mental health, pregnancy, communicable disease, rape, assault, and drug or alcohol issues. The consent of a parent is unnecessary (see Fam C §6920). Presumably, a minor could delegate this decision-making authority to a trusted agent through a power of attorney for health care (PAHC) or advanced health care directive (AHCD). See §2.41 for discussion of medical decisions a minor can make. An emancipated minor can also execute an AHCD or PAHC. See §2.42.

Decisions relating to a minor's care can be delegated by means other than an AHCD or PAHC in the following ways:

- Family Code §6910 authorizes those having legal custody to name a person who may consent to medical or dental treatment of a minor by written authorization (see §2.34);
- Family Code §6550 authorizes voluntary caregivers to enroll a minor in school or authorize medical care by written affidavit (see §§2.36-2.37);
- A minor (of a certain age) may petition for court consent to medical or dental care (see §§2.38-2.40); or
- A minor may make (or delegate) medical or personal care decisions on his or her own under certain conditions or if emancipated (see §§2.41-2.42).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/§2.34 A. Parent's or Legal Guardian's Authority to Delegate Decisions for Medical or Dental Care

§2.34 A. Parent's or Legal Guardian's Authority to Delegate Decisions for Medical or Dental Care

The following people may give any adult person into whose care the minor has been entrusted written authority to consent to medical care, dental care, or both, for the minor (Fam C §6910):

- A minor's parent (or parents, if both have legal custody);
- The person having legal custody; or
- The legal guardian of a minor, or the caregiver of a minor who is a relative of the minor (who may authorize medical and dental care under Fam C §6550).

For a sample form, see §2.35.

Medical care for which a custodian may consent includes X-ray examination, anesthesia, medical or surgical diagnosis and treatment, and hospital care to be provided under the supervision and on the advice of a licensed physician. Fam C §6902. Dental care includes X-ray examination, anesthesia, dental and surgical diagnosis or treatment, and hospital care rendered by a licensed dentist. Fam C §6901. See also Prob C §2353 (guardian's right to consent to medical treatment).

Under Health & S C §1283, the parent or other person having legal custody of a child under the age of 16 may authorize a health facility to surrender the child's physical custody to a person other than the parent. The authorization must be in writing and delivered to the health facility that has physical custody. The form in §2.35 includes optional language to provide this authorization.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/§2.35 B. Form: Authorization for Care Provider to Consent to Medical or Dental Treatment of Minor (Fam C §6910)

§2.35 B. Form: Authorization for Care Provider to Consent to Medical or Dental Treatment of Minor (Fam C §6910)

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2.35-1 Authorization for care provider to consent to medical or dental treatment of minor (Fam C §6910)

To Whom It May Concern:

The undersigned, _ _[*the parents/one of the parents having legal custody/the parent having legal custody/the legal guardian/a caregiver with authority under Fam C §6550*]_ _ of _ _[*name*]_ _, a minor, born on _ _[*date*]_ _, authorizes _ _[*name*]_ _, an adult person into whose care the minor has been entrusted, to consent to X-ray examination, anesthesia, medical or surgical diagnosis and treatment, and hospital care to be rendered to the minor under the general or special supervision of a physician and surgeon licensed under the Medical Practice Act or to consent to an X-ray examination, anesthesia, dental or surgical diagnosis and treatment, and hospital care to be rendered to the minor by a dentist licensed under the Dental Practice Act, or both.

[*If applicable, add one or both of the following options*]

[*Option 1: Authority to surrender minor to person other than parent*]

The undersigned authorizes any hospital that has treated the minor to surrender physical custody of _ _[*him/her*]_ _ to _ _[*name of custodian*]_ _.

[*Option 2: Dates of validity of authorization*]

This authorization is valid from _ _[*date*]_ _ to _ _[*date*]_ _.

[*Continue*]

IN WITNESS WHEREOF, _ _[*I/we*]_ _ have executed this medical authorization at _ _[*City*]_ _ , California, on _ _[*date*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

While not required by statute, the signature(s) of the foregoing have been notarized.

State of California)
)
County of _ _[*name of county*]_ _)
)
_____)

On _ _[*date*]_ _ before me, _ _[*name and title of officer*]_ _, personally appeared _ _[*name(s)*]_ _, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal:

__[*Signature of officer*]__ [*Officer's seal*]

Comment: Family Code §6910 does not require that the authorization be notarized. However, many hospitals and medical providers view the authorization form as equivalent to a health care power of attorney, requiring either two witnesses or acknowledgment by a notary. Although notarization is not required by statute, this form includes the notary jurat because it is often less time-consuming to have the form notarized than to argue with the provider.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/§2.36 C. Voluntary Caregiver's Authority to Enroll Minor in School and Authorize Medical Care

§2.36 C. Voluntary Caregiver's Authority to Enroll Minor in School and Authorize Medical Care

In an effort to alleviate problems for voluntary caregivers, the legislature enacted Fam C §6550, under which any adult caregiver in whose home a minor resides may enroll the minor in school and authorize school-related medical care as defined in Fam C §6550(h)(3). To do so, the caregiver must complete items 1 through 4 of the prescribed affidavit (see form in §2.37). If the caregiver is a relative of the minor as defined in Fam C §6550(h)(2), the caregiver may authorize medical care to the same extent as a guardian under Prob C §2353, including mental health treatment (subject to the limitations in Prob C §2356), by completing items 1 through 8 of the affidavit. Fam C §6550(a). Completion of the affidavit requires no court supervision.

The affidavit must be in substantially the same form as set forth in Fam C §6552. See §2.37 for a copy of the form.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/§2.37 D. Form: Caregiver's Authorization Affidavit (Fam C §6552)

§2.37 D. Form: Caregiver's Authorization Affidavit (Fam C §6552)

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2.37-1 Caregiver's authorization affidavit (Fam C §6552)

Use of this affidavit is authorized by Part 1.5 (commencing with §6550) of Division 11 of the California Family Code.

Instructions: Completion of items 1-4 and the signing of the affidavit is sufficient to authorize enrollment of a minor in school and authorize school-related medical care. Completion of items 5-8 is additionally required to authorize any other medical care. Print clearly.

The minor named below lives in my home and I am 18 years of age or older.

1. Name of minor: _ _[*name*]_ _

2. Minor's birth date: _ _[*date*]_ _

3. My name (adult giving authorization): _ _[*name*]_ _

4. My home address: _ _[*address*]_ _

5. [ ] I am a grandparent, aunt, uncle, or other qualified relative of the minor (see below for a definition of "qualified relative").

6. Check one or both (for example, if one parent was advised and the other cannot be located):

[ ] I have advised the parent(s) or other person(s) having legal custody of the minor of my intent to authorize medical care, and I have received no objection.

[ ] I am unable to contact the parent(s) or other person(s) having legal custody of the minor at this time to notify them of my intended authorization.

7. My date of birth: _ _[*date*]_ _

8. My California driver's license or identification card number: _ _[*number*]_ _

Warning: Do not sign this form if any of the statements above are incorrect, or you will be committing a crime punishable by a fine, imprisonment, or both.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

NOTICES

1. This declaration does not affect the rights of the minor's parents or legal guardian regarding the care, custody, and control of the minor and does not mean that the caregiver has legal custody of the minor.

2. A person who relies on this affidavit has no obligation to make any further inquiry or investigation.

ADDITIONAL INFORMATION TO CAREGIVERS:

1. "Qualified relative," for purposes of item 5, means a spouse, parent, stepparent, brother, sister, stepbrother, stepsister, half-brother, half-sister, uncle, aunt, niece, nephew, first cousin, or any person denoted by the prefix "grand" or "great," or the spouse of any of the persons specified in this definition, even after the marriage has been terminated by death or dissolution.

2. The law may require you, if you are not a relative or a currently licensed foster parent, to obtain a foster home license in order to care for a minor. If you have any questions, please contact your local department of social services.

3. If the minor stops living with you, you are required to notify any school, health care provider, or health care service plan to which you have given this affidavit. The affidavit is invalid after the school, health care provider, or health care service plan receives notice that the minor no longer lives with you.

4. If you do not have the information requested in item 8 (California driver's license or I.D.), provide another form of identification, such as your Social Security number or Medi-Cal number.

TO SCHOOL OFFICIALS:

1. Section 48204 of the Education Code provides that this affidavit constitutes a sufficient basis for a determination of residency of the minor, without the requirement of a guardianship or other custody order, unless the school district determines from actual facts that the minor is not living with the caregiver.

2. The school district may require additional reasonable evidence that the caregiver lives at the address provided in item 4.

TO HEALTH CARE PROVIDERS AND HEALTH CARE SERVICE PLANS:

1. A person who acts in good faith reliance upon a caregiver's authorization affidavit to provide medical or dental care, without actual knowledge of facts contrary to those stated on the affidavit, is not subject to criminal liability or to civil liability to any person and is not subject to professional disciplinary action for that reliance if the applicable portions of the form are completed.

2. This affidavit does not confer dependency for health care coverage purposes.

Comment: The form must be executed under a declaration under penalty of perjury but does not require notarization. The affidavit may be submitted to a school, health care provider, or health care service plan.

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§2.38 E. Application by Minor for Court Consent to Medical or Dental Care

If a minor age 16 or over requires the consent of a parent or guardian and no parent or guardian is available, the minor can file a petition in superior court for consent for medical care, dental care, or both. Fam C §6911. The minor must reside in California when applying, and presumably the application must be made in the county of residency. No filing fee may be charged for the application. No notice appears to be required, because Fam C §6911 provides that the court may "summarily" grant such consent, although a court's grant of such consent is discretionary. See §2.39 for application form.

The verified application should allege the parent or guardian's unavailability to consent. See Fam C §6911(a). If the application is for consent for medical or dental care, the court will likely inquire into the nature of the treatment and its necessity. It is helpful to submit a physician's declaration to the court providing supplemental information regarding these issues.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/§2.39 1. Form: Application by Minor for Consent to Medical or Dental Care

§2.39 1. Form: Application by Minor for Consent to Medical or Dental Care

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2.39-1 Application by minor for consent to medical or dental care

Application of	)	**No. _ _ _ _ _ _**
_ _[*name*]**_ _, a minor**	)	
	)	**MINOR'S APPLICATION FOR**
	)	**CONSENT TO**
	)	**_ _**[*MEDICAL/DENTAL/MEDICAL*
	)	*AND DENTAL*]**_ _ CARE**
_____	)	**(FAM C §6911)**

The application of _ _[*name*]**_ _ alleges the following:**

Applicant is a minor, age _ _[*minor's age*]**_ _ years, and is a resident of _ _**[*county of residence*]**_ _ County, California. Applicant has no parent or guardian available to consent to the _ _**[*medical/dental/medical and dental*]**_ _ care _ _**[*he/she*]**_ _ needs.**

The nature of Applicant's _ _[*medical/dental/medical and dental*]**_ _ condition requiring care is _ _**[*describe condition*]**_ _. Attached to this application, made a part of it and marked Exhibit "A," is the Medical Declaration of _ _**[*name*]**_ _, M.D., describing the _ _**[*medical/dental/medical and dental*]**_ _ condition and the care recommended as a course of treatment for the condition.**

No notice need be given of the filing or hearing of this application.

WHEREFORE, Applicant requests that the Court make its order granting consent to permit the care described above, and for such other order as it considers proper.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]**_ _**

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/§2.40 2. Form: Order Granting Consent for Medical or Dental Care of Minor

§2.40 2. Form: Order Granting Consent for Medical or Dental Care of Minor

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2.40-1 Order granting consent for medical or dental care of minor

Application of	)	**No. _ _ _ _ _ _**
_ _[name]_ _**, a minor**	)	
	)	**ORDER GRANTING CONSENT**
	)	**TO _ _**[*MEDICAL/DENTAL/*
	)	*MEDICAL AND DENTAL*]_ _
	)	**CARE FOR A MINOR**
_____	)	**(FAM C §6911)**

The application of _ _[*name*]_ _**, a minor, for consent to _ _**[*medical/dental/medical and dental*]_ _ **care came before this Court on _ _**[*date*]_ _**, in Department _ _**[*number/letter*]_ _**. The Court finds that no notice need be given, that Applicant is a minor age 16 or older and is a resident of _ _**[*county of residence*]_ _ **County, California, needs _ _**[*medical/dental/medical and dental*]_ _ **care, and has no parent or guardian available to give consent. Good cause appearing,**

IT IS ORDERED that this Court consents to the _ _[*medical/dental/medical and dental*]_ _ **care for _ _**[*name*]_ _**, a minor, as described in the Medical Declaration attached to the application filed by the minor.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/ F. Instances in Which Minor's Consent Alone Is Sufficient/§2.41 1. Minor of Certain Age and for Certain Treatments

F. Instances in Which Minor's Consent Alone Is Sufficient

§2.41 1. Minor of Certain Age and for Certain Treatments

A minor's consent alone is sufficient for medical care in several situations:

- A minor of any age is on active duty with the armed services. See Fam C §7002(b).
- A minor of any age needs surgical care related to prevention or treatment of pregnancy. See Fam C §6925.
- A minor age 15 or older is living apart from his or her parent or guardian. See Fam C §6922.
- A minor age 12 or older needs surgical care related to diagnosis or treatment of a contagious disease. See Fam C §6926.
- A rape victim age 12 or older needs surgical care related to diagnosis or treatment. Fam C §6927.
- A minor of any age who is a victim of sexual assault needs surgical care related to diagnosis or treatment. See Fam C §6928.
- A minor age 12 or older needs HIV testing. See Health & S C §121020.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/2 Alternatives to Powers of Attorney and Advance Health Care Directives/§2.42 2. Emancipated Minor

§2.42 2. Emancipated Minor

An emancipated minor is anyone under the age of 18 who has entered into a valid marriage, is on active duty in the United States armed forces, or has received a declaration of emancipation. Fam C §7002. The essential requirements for securing a declaration of emancipation are the following (Fam C §§7120, 7122(a)):

(1) The minor must be at least age 14;
(2) The minor must willingly be living separately and apart from his or her parents or legal guardian with the consent of the minor's parents or legal guardian;
(3) The minor must be managing his or her own financial affairs;
(4) The source of the minor's income must be legal; and
(5) The court must find emancipation not contrary to the minor's best interests.

Unless all of the statutory criteria for emancipation are satisfied, the court cannot declare the minor emancipated. *Bonnie P. v Superior Court* (2005) 134 CA4th 1249, 37 CR3d 77 (minor living separately and apart from her parents but without their consent not emancipated). Further, the court in *Bonnie P.* held that the Evidence Code requirements for evidentiary hearings (see Evid C §300) apply and that failure to swear witnesses is a violation of the parents' due-process right to make child-rearing decisions.

Once emancipated, a minor is considered an adult having capacity to do any of the following (Fam C §7050(e)):

- Consent to medical, dental, or psychiatric care without parental consent, knowledge, or liability;
- Establish his or her own residence;
- Enroll in a school or college;
- Enter into a binding contract or give a delegation of power;
- Make or revoke a will;
- Make a gift outright or in trust;
- Exercise or release powers of appointment;
- Create a revocable or irrevocable trust;
- Revoke a revocable trust;
- Elect to take under or against a will;
- Disclaim interests; and
- Make various Probate Code elections.

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3

Ethical Considerations When Drafting Powers of Attorney and Advance Health Care Directives

Sarah A. Kirland

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/3 Ethical Considerations When Drafting Powers of Attorney and Advance Health Care Directives/§3.1 I. OVERVIEW

§3.1 I. OVERVIEW

When a client plans for incapacity, a power of attorney for financial management (DPOA) and an advance health care directive (AHCD) are essential parts of the plan. Although the uses of the DPOA and the AHCD differ, the ethical issues facing the attorney drafting these documents are often identical.

Potential ethical pitfalls that routinely appear can involve the following issues:

- Recognition and identification of the client;
- Attorney's performance of duties;
- Principal's capacity and attorney's obligations; and
- Custody and location of documents.

For a sobering discussion of potential for abuse of a DPOA, see Barringer & Lawrence, *The Perils of Durable Powers of Attorney for Property Management,* 16 CEB Est Plan Rep 85 (Feb. 1995).

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II. RULES OF PROFESSIONAL CONDUCT

§3.2 A. Sources of Authority

Unlike most other states, California has not officially adopted the ethical guidelines in the ABA Model Rules. In fact, California's rules are not even derived from the Model Rules, although they are partially based on the former ABA Code of Professional Responsibility. See 48 State Bar J 328 (1973).

Unfortunately for the practitioner, the California rules are found in many places, including the California Rules of Professional Conduct (promulgated by the California Supreme Court), the Business and Professions Code, the Probate Code, the Evidence Code, the Penal Code, and the Welfare and Institutions Code. Interpretive authority is found in case law, formal opinions issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California, and informal opinions of county bar associations.

For a thorough guide on all ethical obligations, see House & Ross, Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel (2d ed 2008).

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B. Consequences of Violating Rules

§3.3 1. Discipline by State Bar

Aside from breaching obligations to a client, the most obvious consequence of violating an ethical rule is discipline by the California State Bar. Sanctions can include probation, suspension, and even disbarment. Disciplinary proceedings most commonly arise from commingling the client's funds with the attorney's funds, failure to perform work for which the attorney was engaged, and participation in certain marketing plans. For example, an estate planning attorney who became involved in preparing living trusts in conjunction with a marketer who held seminars strongly urging attendees to obtain living trusts violated Cal Rules of Prof Cond 1-600 (participating in an organization or program furnishing, recommending, or paying for legal services that allows a third party to interfere with the lawyer's independent judgment), Rule 1-310 (forming a partnership with a nonlawyer), Rule 1-320 (financial arrangements with a nonlawyer), Rule 1-400 (advertising and solicitation), and Rule 3-110 (failing to act competently). See California State Bar Formal Opinion No. 1997-148 (Apr. 21, 1997).

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§3.4 2. Civil Liability for Malpractice

Less obvious to some attorneys is the potential malpractice liability arising from ethical violations. Violation of an ethical duty by the estate planning attorney (*e.g.,* representing multiple clients despite a conflict of interest without first obtaining the clients' informed written waiver) is often the most valuable tool a malpractice plaintiff's attorney has, first to force settlement and ultimately to impose liability at the trial level. For a discussion of the interplay between the attorney's ethical duty and his or her liability for malpractice, see *Day v Rosenthal* (1985) 170 CA3d 1125, 217 CR 89. In *Day,* the court stated that

> [a]n attorney's duty, the breach of which amounts to negligence, is not limited to his failure to use the *skill* required of lawyers. Rather, it is a wider obligation to exercise due care to protect a client's best interests in all ethical ways and in all circumstances.

170 CA3d at 1147.

Technically, there is no independent cause of action for the breach of a disciplinary rule. See *Wilhelm v Pray, Price, Williams & Russell* (1986) 186 CA3d 1324, 1333 n5, 231 CR 355. See also Cal Rules of Prof Cond 1-100(A) (rules are not intended to create new civil causes of action). Nevertheless, there is overlap between attorney conduct that is subject to ethical regulation and attorney conduct that is subject to civil claims. For example, Cal Rules of Prof Cond 3-110 requires an attorney to act "competently" as an ethical matter. In general, however, the ethical rules state an attorney's duties to the public at large. Enforcement is brought by the State Bar, whether or not there is an additional damage claim that could be brought by an individual.

In a civil action for an attorney's breach of fiduciary duty to a client, the applicable rule of professional conduct does not establish an independent cause of action, but it does provide the standard by which the attorney's duty is measured. Testimony regarding the rules is therefore admissible and may be the basis for jury instructions. *Mirabito v Liccardo* (1992) 4 CA4th 41, 5 CR2d 571. A violation of the ethical rules may be evidence of a breach of fiduciary duties. Compliance with ethical rules, however, does not provide an attorney with a defense against a malpractice claim. For example, the Official Discussion to Rule 3-310 (conflicts of interest) states, "There are some matters in which the conflicts are such that written consent may not suffice for nondisciplinary purposes."

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III. ATTORNEY-CLIENT RELATIONSHIP

§3.5 A. Identifying Client

The first, and most important, threshold issue for any attorney is "Who is the client?" Beginning with the initial consultation, the attorney should identify and clearly communicate to all parties involved whom he or she represents. For example, adult children may bring their parents to the appointment with the attorney with the expectation of being involved in the parents' planning. The attorney should make the extent of his or her representation very clear to everyone concerned. Status as a client is required to trigger an attorney's duties, including the duty to avoid conflicts of interest. Furthermore, clearly identifying the client will often shed light on other important related ethical issues, such as confidentiality and diminished capacity.

PRACTICE TIP: The ethical issues facing the drafting attorney may be obscured by the client's need for immediate assistance and the attorney's desire to help. Even in the most compelling situation, however, the attorney must clarify who the client is and must identify any conflicts of interest the attorney may have or that may exist between the principal and the would-be agent. Failure to do so may lead to a breakdown of the plan for incapacity, the disciplining or unwilling participation of the attorney in a lawsuit, or even possible criminal elder abuse sanctions, depending on the severity of the conflict.

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§3.6 B. Creation of Attorney-Client Relationship

The attorney-client relationship is created by contract (express or implied) and governed by the general rules of agency. See, *e.g., Sullivan v Dunne* (1926) 198 C 183, 192, 244 P 343; *Fidelity & Cas. Co. v Abraham* (1945) 70 CA2d 776, 783, 161 P2d 689. See also 1 Witkin, California Procedure, *Attorneys* §§68-69 (4th ed 1996). The conduct of both the principal and the agent must indicate acceptance of the relationship.

An attorney-client relationship arises without any formality, fee payment, or fee agreement between the parties. See *Miller v Metzinger* (1979) 91 CA3d 31, 39, 154 CR 22. In *Miller,* an attorney-client relationship was found to exist even though the attorney did not agree to represent the client, charged no fee for his services, did not have the client sign a retainer agreement, and believed that his function was purely investigatory. When a party seeking legal advice consults an attorney at law and secures that advice, the relationship of attorney and client is established prima facie. *Perkins v West Coast Lumber Co.* (1900) 129 C 427, 62 P 57.

Although its formation may be informal, the attorney-client relationship does not exist merely because a party believes that an attorney is representing his or her interests. See *Fox v Pollack* (1986) 181 CA3d 954, 959, 226 CR 532, in which the court held that an attorney did not owe a duty of professional care to an unrepresented party in a real estate exchange in which the attorney represented the opposing party. For purposes of application of the attorney-client privilege, Evid C §951 defines a client as a person who consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice in the lawyer's professional capacity.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/3 Ethical Considerations When Drafting Powers of Attorney and Advance Health Care Directives/§3.7 C. Written Representation Agreement

§3.7 C. Written Representation Agreement

Business and Professions Code §6148 requires, in general terms, that the nature and rates of an attorney's fees be spelled out in a written contract with any noncorporate client when the reasonably foreseeable expenses will exceed $1000. The attorney must give the client a signed copy of the contract when it is entered into. Many fee agreements must be in writing and contain the following (Bus & P C §6148(a)):

- The hourly rate and other standard rates, fees, and charges applicable to the representation;
- The general nature of the legal services to be provided to clients; and
- The respective responsibilities of the attorney and the client.

Comparable requirements also apply to bills sent after services are rendered. Bus & P C §6148(b). A lawyer who does not comply with Bus & P C §6148 can still recover on the basis of quantum meruit.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/3 Ethical Considerations When Drafting Powers of Attorney and Advance Health Care Directives/§3.8 D. Joint Representation

§3.8 D. Joint Representation

It is common for the estate planning attorney to have multiple clients in a single representation. In California in such situations, unless the parties specifically agree otherwise, the attorney who represents multiple clients regarding related legal matters is presumed to represent them jointly. The most common example of joint representation in estate planning is a husband and wife seeking to plan their estates to benefit each other and their children.

Joint representation rests on the premise that, absent contrary evidence, no actual adversity exists between the parties. It also implies that all information received by the attorney on the subject of the representation (*e.g.,* their mutual DPOAs and AHCDs) will be shared between the clients and that confidentiality will be maintained regarding all other matters and other people. When no actual conflict of interest exists, multiple parties are often better served by joint representation because it produces a more coordinated result at a lower cost than if each party were individually represented by different attorneys.

When the estate planning attorney represents a husband and wife in the preparation of their DPOAs and AHCDs, there must be both a written engagement letter explaining the issues of confidentiality and potential conflict and a written waiver by the clients. The parties should assume nothing: in any dual representation, failure to address all ethical issues in writing violates Cal Rules of Prof Cond 3-310.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/3 Ethical Considerations When Drafting Powers of Attorney and Advance Health Care Directives/§3.9 E. Representing Principal

§3.9 E. Representing Principal

Frequently, the would-be agent, who thinks he or she will be the client, contacts the attorney first. If the attorney will be drafting a DPOA or AHCD for the principal, the attorney must carefully explain to the would-be agent that the principal is, or will be, the attorney's client. To avoid forming an attorney-client relationship with the would-be agent, the attorney should refrain from offering that person legal advice. Instead, the attorney should advise the would-be agent that it is in the principal's best interest (and possibly the would-be agent's best interest) for the principal to contact the attorney directly.

At the initial consultation with the principal, the attorney should exclude everyone but the principal from the meeting. The attorney is ethically obligated to consult with the client to learn his or her desires. Family members or friends may accompany the client to the initial interview, but the lawyer should advise in advance that the meeting will be with the principal alone. This allows the attorney to gather information from the principal in confidence and to determine whether the principal may be subject to undue influence or fraud. The attorney may explain to the principal's family or friends that this precaution protects them from later allegations of undue influence or fraud. A private meeting also provides the attorney an opportunity to create a record of independent advice and client response to rebut a potential later claim by other family members of undue influence. Taking this precaution is particularly important when the principal has one or more children who are not involved in the planning process or when the principal's capacity may later be challenged. See, *e.g., In re Disciplinary Proceedings Against John W. Strasberg* (Wis 1990) 452 NW2d 152 (attorney's license suspended for, among other things, preparing, at the request of an elderly woman's daughter, a durable power of attorney and other documents transferring elder's assets to daughter without supervising execution of documents).

In the initial client meeting, the attorney should explain the attorney-client privilege and the nonconfidential nature of any conversations held in the presence of third parties. The attorney should gather all the information necessary to draft the DPOA and should ensure that the client is not requesting a DPOA simply because of encouragement from a family member. If the client is reluctant to discuss sensitive information with certain family members, the attorney should caution the client against naming any of these persons as agents.

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§3.10 1. Advising Agent That He or She Is Not Client

When representing the principal, it is important that the attorney make clear to the would-be agent that, although the agent may be participating to some degree in the estate planning process, the attorney does not represent him or her. The attorney should advise the would-be agent in writing that he or she is not the client and that independent legal advice should be obtained if any legal concerns arise.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/3 Ethical Considerations When Drafting Powers of Attorney and Advance Health Care Directives/§3.11 2. Payment of Attorney Fees

§3.11 2. Payment of Attorney Fees

The client must personally pay for all legal work rendered unless a waiver allowing payment by another is obtained under Cal Rules of Prof Cond 3-310(F). Under Cal Rules of Prof Cond 3-310(F), the attorney must receive the client's informed written consent after full disclosure that another party will be paying the legal fees.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/3 Ethical Considerations When Drafting Powers of Attorney and Advance Health Care Directives/ IV. DUTIES AND LIMITATIONS/§3.12 A. Duties to Client

IV. DUTIES AND LIMITATIONS

§3.12 A. Duties to Client

All attorneys are presented with the initial task of identifying the client. See §3.5. Upon this identification, the attorney owes the client significant legal and ethical duties. An attorney drafting a client's DPOA or AHCD is most concerned with the following duties:

- The duty of loyalty;
- The duty to maintain the client's confidences (Bus & P C §6068(e));
- The duty to avoid both actual and potential conflicts of interest (Cal Rules of Prof Cond 3-310); and
- The duty to perform services competently and diligently (Cal Rules of Prof Cond 3-110).

Other ethical duties include the duty to communicate with the client (Cal Rules of Prof Cond 3-500); to enter into a written contract (Bus & P C §6148(a)); to not participate in an organization or program furnishing, recommending, or paying for legal services that allows a third party to interfere with the lawyer's independent judgment (Cal Rules of Prof Cond 1-600(A)); and to not charge unconscionable fees (Cal Rules of Prof Cond 4-200(A)).

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§3.13 1. Duty of Loyalty

The California Supreme Court has stated that an attorney has a duty of undivided loyalty to the client. The duty exists to avoid undermining public confidence in the legal profession and the judicial process. The duty is fiduciary in nature and binds the attorney to the highest legal fidelity. *People ex rel Dep't of Corps. v SpeeDee Oil Change Sys.* (1999) 20 C4th 1135, 1146, 86 CR2d 816; *Flatt v Superior Court* (1994) 9 C4th 275, 282, 36 CR2d 537.

Although the duty of loyalty is a primary duty of the attorney, neither the State Bar Act nor the Rules of Professional Conduct explicitly refer to it. Rather, these authorities focus on corollaries to the duty of loyalty, *i.e.,* on the duty to keep client confidences (see §3.14) and the duty to not represent adverse interests (see §§3.15-3.19). In its Comment to Model Rules of Prof Cond 1.7, the American Bar Association refers to loyalty as an essential element of the attorney-client relationship.

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§3.14 2. Duty to Keep Client Confidences

Although the California Rules of Professional Conduct do not directly deal with the duty to keep confidences, the State Bar Act (Bus & P C §§6000-6237) sets out this duty with particular emphasis. It states that it is the attorney's duty "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Bus & P C §6068(e). A formal State Bar opinion states that the attorney-client relationship involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning, which culminates in a state of trust and confidence between a client and his or her attorney. California State Bar Formal Opinion No. 87-93.

Everything the attorney sees or hears during the course of the attorney-client relationship may be a client secret protected by this rule. The scope of the confidentiality rule is much broader than that of the Evidence Code privilege. In other words, it is not necessary that the secret be a protected communication as defined in Evid C §952, which governs confidential communications between clients and attorneys. Even nonverbal communications with the attorney are covered by the duty of confidentiality. If the information would be embarrassing or detrimental to the client if divulged by the attorney to a third party, it is a protected secret. California State Bar Formal Opinion No. 89-112.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/3 Ethical Considerations When Drafting Powers of Attorney and Advance Health Care Directives/ 3. Duty to Avoid Conflicts of Interest/§3.15 a. Avoiding Representation of Adverse Interests Generally

3. Duty to Avoid Conflicts of Interest

§3.15 a. Avoiding Representation of Adverse Interests Generally

A corollary of the duty of loyalty is the duty to avoid representing adverse interests. The California Rules of Professional Conduct cover this duty in detail. California Rules of Professional Conduct 3-310 regulates, but does not bar, the representation of adverse interests. Rule 3-310 provides in part:

> (C) A member shall not, without the informed written consent of each client:
> (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
> (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict….
> (E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

For a comprehensive discussion of conflicts of interest, see House & Ross, Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel, chap 4 (2d ed 2008).

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§3.16 b. Concurrent Representation of Multiple Parties

The duty to avoid representing adverse interests includes the concurrent representation of multiple parties. The Official Discussion to Cal Rules of Prof Cond 3-310 states that Paragraph (C) applies to "the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship."

The Discussion specifically includes the preparation of husband and wife joint or reciprocal wills as an example of multiple representation. Although in such situations the parties may prefer one attorney for reasons of convenience or economy, the attorney must still disclose the potential adverse aspects of such multiple representation and must obtain the spouses' informed written consent. (The written consents needed to comply with Rule 3-310 are commonly known as "conflicts waivers.") The Discussion singles out Evid C §962 (lack of privilege of confidentiality in later civil proceedings between joint clients) as an example of an adverse aspect that must be disclosed. The mandatory disclosure must inform the clients in writing of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences of multiple representation.

If the attorney already represents the would-be agent in another matter, before undertaking to represent the principal, the attorney must obtain written waivers of conflict from both. Cal Rules of Prof Cond 3-310. In representing the principal, the attorney may have a duty to disclose any facts about the proposed agent that might affect the principal's perception of the agent's trustworthiness and competence. Although the principal could waive such disclosure (Cal Rules of Prof Cond 3-310), the judgment of an attorney who seeks such a waiver may be criticized. Therefore, if an attorney has learned facts in an earlier representation that suggest that a client is a poor choice as agent, the best practice is for the attorney to refuse to represent the principal.

The attorney must consider how extensively to review potential conflicts of interest between the principal and the agent. The attorney should specifically discuss with the client issues such as these:

- Whether, and in what circumstances, to authorize the agent to make gifts to himself or herself or to the agent's issue;
- Whether to give authority to an agent who is a child of the principal to amend a principal's living trust when the principal's heirs include children of several marriages; and
- Whether to authorize self-dealing by the agent.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/3 Ethical Considerations When Drafting Powers of Attorney and Advance Health Care Directives/§3.17 c. Distinguishing Potential and Actual Conflict

§3.17 c. Distinguishing Potential and Actual Conflict

Without an informed written waiver by both clients, the attorney may not represent multiple clients in one matter in which the interests of the clients potentially conflict. Cal Rules of Prof Cond 3-310(C)(1). This rule is unique to California and does not exist in the ABA Model Rules of Professional Conduct. See ABA Model Rules of Prof Cond 1.7, 1.8, 1.9, 2.2.

If a potential conflict becomes actual, the attorney must obtain further informed written consent. Cal Rules of Prof Cond 3-310(C)(2). It is unclear at what point a conflict progresses from potential to actual, triggering the requirement for additional written consent.

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§3.18 d. Degree of Disclosure Required

Paragraph (A) of Cal Rules of Prof Cond 3-310 limits the scope of required disclosure to "the relevant circumstances and … the actual and reasonably foreseeable adverse consequences to the client or former client." It is unclear whether the disclosure should be a formal statement of general problems handled by standard clauses in a form letter or a specific analysis applying general principles to the unique facts of each client's situation.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/3 Ethical Considerations When Drafting Powers of Attorney and Advance Health Care Directives/§3.19 e. Representing Client With Interests Adverse to Former Client

§3.19 e. Representing Client With Interests Adverse to Former Client

Informed written consent by the client or former client is required if the new employment is adverse to the former client and the attorney had obtained confidential information "material to the employment" during the representation of the former client. Cal Rules of Prof Cond 3-310. The rule against representing clients with adverse interests also applies when the party seeking representation may have interests that are adverse to a former client. In the DPOA and AHCD context, this situation typically arises when a former client becomes incapacitated and a family member seeks the attorney's advice on how to handle the incapacitated person's affairs.

Note that the duties to a former client are not absolute and, at least in theory, exceptions are allowed. The Official Discussion to Cal Rules of Prof Cond 3-310 makes clear that Paragraph (B) is not intended to require either the disclosure to a former client of a conflicting new engagement or the consent of the former client to the engagement. Instead, it says that such disclosure and consent are required only if Cal Rules of Prof Cond 3-310(E) applies. Under Rule 3-310(E), "informed written consent of the client or former client" is required only if the employment is "adverse" to the former client and the attorney had obtained confidential information "material to the employment" during the representation of the former client. There is no further interpretation of this language in the Discussion, which skips over Rule 3-310(E).

Rule 3-310(E) has ordinarily been read to require consents from both the client *and* the former client because this is the only reading that implements the obvious intention to protect the former client.

NOTE: Under ABA Model Rules of Prof Cond 1.9, a consent is required from a former client when a new client's interests are *materially* adverse to those of the former client. This rule is similar to Rule 3-310(E), except that Rule 1.9 is not limited to the issue of receiving "confidential information" from the former client.

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§3.20 4. Duty to Act Competently

The California Rules of Professional Conduct are explicit about the duty to act competently. Chapter 3 on professional relationships with clients includes Cal Rules of Prof Cond 3-110, "Failing to Act Competently." Paragraph (A) of Cal Rules of Prof Cond 3-110 provides that a member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence. Paragraph (B) of Cal Rules of Prof Cond 3-110 states that competence in any legal service shall mean to apply the (1) diligence, (2) learning and skill, and (3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

Paragraph (C) of Cal Rules of Prof Cond 3-110 requires an attorney to associate or consult with another member reasonably believed to be competent if the attorney lacks the knowledge and skill needed to perform his or her duties. An attorney who does not have the expertise to handle a particular problem must refer the client to a specialist or research the issues until understanding them sufficiently. *Horne v Peckham* (1979) 97 CA3d 404, 158 CR 714, disapproved on other grounds in *ITT Small Bus. Fin. Corp. v Niles* (1994) 9 C4th 245, 36 CR2d 552 (attorney's reliance on consultation with specialist, in which issues were informally discussed, did not protect attorney from malpractice claim).

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§3.21 B. Duty to Client With Limited Mental Capacity

In many cases, when meeting with a potential client seeking a durable power of attorney for financial management (DPOA) or an advance health care directive (AHCD), the estate planning attorney is confronted with a client with apparently impaired or questionable mental capacity. An attorney's duty is to represent his or her client's interest, which may be different from representing the client's best interest. A client's best interest is a subjective judgment based on society's standards overlaid by the attorney's personal morals. On one hand, the attorney does not want to stand in the way of a client's attaining his or her goals. On the other hand, the attorney does not want to assist the client in doing things that he or she would not have done with undiminished capacity. This problem is particularly acute when the attorney knows that the client's proposed course of action diverges from past practices, differs widely from that customarily done by people in similar circumstances, or seems suspiciously like the product of undue third party influence. Thus, the attorney must confront the ethical dilemma of what to do.

A very helpful resource on assessing capacity is Capacity and Undue Influence: Assessing, Challenging, and Defending (Cal CEB Action Guide February 2008).

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§3.22 1. California Law

California gives attorneys and courts guidance in assessing mental capacity in Prob C §§810-813, 6100.5, and 6104. See §§3.28-3.39. However, if, after considering these sections, the attorney has doubts about the client's mental capacity, he or she will find that California has no rule that specifically addresses the duty of an attorney representing a mentally impaired client.

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§3.23 a. Estate Planning Documents

With regard to drafting estate planning documents, San Diego Bar Ass'n Ethics Opinion No. 1990-3 advises that an attorney "must be satisfied that the client is competent to make a will and is not acting as a result of fraud or undue influence." The opinion suggests that once the issue of capacity arises in the attorney's mind, it must be resolved. The attorney should schedule an extended interview with the client alone, keep a detailed and complete record of the interview, and, if the attorney is still not satisfied that the client has capacity and is free of undue influence and fraud, decline to act. Then the attorney should permit the client to seek other counsel, or recommend a conservatorship.

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§3.24 b. Protecting Client From Abuse, Undue Influence, or Fraud

In addition to handling estate planning issues, the attorney may also become concerned either that the client is no longer able to care for personal and financial affairs or that there are one or more third parties who are a threat to the client's financial well-being. It is one thing for an attorney to refuse to participate in preparing documents to change the client's estate plan; it is another to take action to protect the client. The duty of loyalty, the duty to maintain the client's confidences, and the duty to avoid conflicts of interest are significant issues for the attorney. California has no rule that specifically addresses these issues.

The authority that does exist, contained in ethics opinions, essentially states that an attorney is prohibited from seeking appointment of a guardian or conservator for an apparently impaired client, or even seeking the consultation of a physician, without the client's written consent. This position is contrary to that of a majority of jurisdictions in the United States. There are four ethics opinions dealing with the subject: California State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) Formal Opinion No. 89-112; LA County Bar Ass'n Ethics Opinion No. 1988-450; San Diego Bar Ass'n Ethics Opinion No. 1978-1; Bar Ass'n of San Francisco Ethics Opinion No. 1999-2.

The San Francisco opinion concludes that an attorney who reasonably believes that a client is substantially unable to manage his or her own financial resources or resist fraud or undue influence may, but is not required to, take protective action with respect to the client's person and property, including recommending appointment of a trustee, conservator, or guardian ad litem. The opinion also states that the attorney has the implied authority to make limited disclosures necessary to achieve the client's best interests. Before relying on the San Francisco opinion, the attorney should read the discussion of California State Bar Formal Opinion No. 89-112 in §3.25.

At this writing, the Executive Committee of the Trusts and Estates Section of the State Bar of California has proposed adding §6068.5 to the Business and Professions Code to allow an attorney to make limited disclosures about a client to one who has the ability to take action to protect the client. The proposed statute would create an exception to Bus & P C §6068(e), which imposes the attorney-client duty of loyalty and confidentiality, and would allow disclosure only if the client's decision-making capacity is sufficiently impaired to support a determination of incapacity under Prob C §811 and the client is at risk of substantial physical, financial, or other harm. The proposed statute virtually mirrors ABA Model Rules of Prof Cond 1.14, with the major exception that the attorney for the impaired client could not file, or represent a person filing, a petition for conservatorship or similar protective proceeding. The Board of Directors of the State Bar must approve the proposal before a legislative sponsor is sought.

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§3.25 c. California State Bar Formal Opinion No. 89-112

The State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC), in California State Bar Formal Opinion No. 89-112, determined that an attorney who institutes conservatorship proceedings on a client's behalf without the client's consent violates the duties to protect client secrets and to avoid conflicts of interest. It expressly rejected ABA Model Rules of Prof Cond 1.14(b), which permits such an action in certain circumstances. The Committee also found that an attorney would be acting competently by not seeking appointment of a conservator, but would likely be allowed to withdraw.

In its Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel (2d ed 2008), the Estate Planning, Trust and Probate Law Section of the State Bar was troubled by COPRAC's opinion and urged California to adopt a rule similar to ABA Model Rules of Prof Cond 1.14.

After examining ABA Model Rule 1.14(b) and several California civil cases, the Legal Ethics Committee of the Bar Association of San Francisco, in Opinion 1999-2, disagreed with COPRAC's Opinion No. 89-112 and concluded that an attorney who reasonably believes that a client is substantially unable to manage his or her own financial resources or resist fraud or undue influence may, but need not, take protective action with respect to the client's person and property.

At present, the weight of California authority in this area seems to exalt confidentiality over all other interests of the impaired client, including the interest to be free from financial and physical abuse and predation. Caught in a serious dilemma, the attorney apparently may choose only between (1) slavishly following the client's directions (even if capacity to give directions is uncertain) regardless of likely detriment to the client, or (2) withdrawing from the representation (as one would do with a competent client), leaving the former client at the mercy of his or her own failings and the possible abuse of third parties. Until further statutory or judicial guidance is propounded, the California attorney who takes affirmative action to protect a client from harm (against the client's wishes) does so at the attorney's own peril.

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§3.26 2. ABA Model Rules

Unlike the California Rules of Professional Conduct, the ABA Model Rules of Prof Cond 1.14 and Comments to it specifically address the issues of estate planning for a "client with diminished capacity" and protecting a client with diminished capacity. Rule 1.14 states:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
>
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment 1 to Rule 1.14 recognizes that a client with diminished capacity often has the ability to understand, deliberate on, and reach conclusions about matters affecting the client's own well-being. Comments 5-8 to Rule 1.14 bolster the attorney's right to take protective action on behalf of the client and clarify how far the attorney may go:

> Taking Protective Action
>
> [5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in [Rule 1.14(a)] because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.
>
> [6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.
>
> [7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.
>
> Disclosure of the Client's Condition
>
> [8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to [Rule

1.14(b)], the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

WARNING: Until California clarifies the rules governing attorneys in this area, especially with regard to protective actions and disclosure of confidential information, the ABA Model Rule is not controlling, and the California attorney is ethically bound to represent his or her client's interests as defined by a client who may not be acting in his or her own best interests or to withdraw from representation.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/3 Ethical Considerations When Drafting Powers of Attorney and Advance Health Care Directives/§3.27 C. Duty to Maintain Documents

§3.27 C. Duty to Maintain Documents

An attorney has no legal obligation to retain original documents of the client. However, some attorneys routinely retain the client's original estate planning documents because this practice tends to encourage the client to return for subsequent estate planning and makes it more likely that the nominated executor or successor trustee will retain the attorney for administration of the estate after the client's death. However, the attorney may find that the disadvantages of retaining original documents outweigh the advantages.

Probate Code §§700-735 outline the responsibilities of an attorney with whom a client "deposits" his or her estate planning documents. If the attorney retains custody of the original documents, the attorney must use ordinary care to preserve them, whether or not the client pays the attorney to hold the documents. The attorney must keep the documents in a safe, vault, safe deposit box, or other secure place where they will be reasonably protected against loss or destruction. Prob C §710.

The client can terminate the deposit at any time on demand, but the attorney is limited to certain methods for terminating the deposit and returning the documents to the client (Prob C §§720, 731):

- By personal delivery of the document to the client;
- By mailing to the last-known address by registered or certified mail, return receipt requested, and receiving a signed receipt; or
- By a method agreed on by the client and the attorney.

The attorney should be aware that once he or she agrees to hold the originals, it may be difficult and time-consuming to return the documents to the client, especially if the client has moved without giving the attorney the new address.

If the attorney decides to hold the client's original documents, Prob C §715 provides a form of notice that the attorney may give the client to acknowledge that the client has the obligation to keep the attorney advised of any changes in the client's address. If the client has signed such a form, and if the attorney gives the client notice of termination of the deposit but the client fails to collect the documents, the attorney can transfer the documents to another attorney, or, if the custodial attorney has died or becomes unable to practice, the documents can be delivered to the clerk of the superior court of the county of the depositor's last-known address. Prob C §732.

If a client fails to collect the documents on notice, the duty of the attorney retaining the documents or receiving documents under a §732 transfer is reduced to using "at least slight care" for preservation of the documents. Prob C §716. There does not seem to be any provision releasing the custodial attorney entirely from the duty to preserve the documents or addressing the situation when no acknowledgment has been received from the client (*e.g.,* for documents received before enactment of the statute). If the client fails to keep in contact with the attorney, it appears that the duty to preserve the original documents can continue almost indefinitely.

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§3.28 V. DETERMINING MENTAL CAPACITY OF CLIENTS

The attorney representing a principal in the drafting of a durable power of attorney for financial management (DPOA) or an advance health care directive (AHCD) may be confronted with an ethical dilemma: determining the mental capacity of the client. Most clients clearly have capacity or definitely lack capacity. It is those who fall in between who create problems for the attorney.

NOTE: Capacity for the execution of each document is set by statute. The capacity required to execute an AHCD is defined in the context of health care decision making as "a person's ability to understand the nature and consequences of a decision and to make and communicate a decision." Prob C §4609. The capacity required to execute a DPOA is the same capacity a natural person has in making a contract. Prob C §4120. See also CC §2296, which provides that "[a]ny person having capacity to contract may appoint an agent." Civil Code §1556 provides that "[a]ll persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights." See §§3.33-3.35.

Determining capacity is sometimes difficult, and in some cases, the determination of capacity must be made over a period of time. The best rule for an attorney to follow is to refuse to draft a DPOA or AHCD if the attorney has determined that the individual lacks the requisite capacity to sign one. In uncertain situations, it is advisable to consult with the client's doctor and perhaps obtain a written evaluation of the client's mental capacity.

If capacity later becomes an issue, establishing capacity through litigation may be required. On proving incapacity, see §§11.17-11.20.

A very helpful resource on assessing capacity is Capacity and Undue Influence: Assessing, Challenging, and Defending (Cal CEB Action Guide February 2008).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/3 Ethical Considerations When Drafting Powers of Attorney and Advance Health Care Directives/§3.29 A. Lawyer's Obligation to Determine Client's Capacity

§3.29 A. Lawyer's Obligation to Determine Client's Capacity

What is the lawyer's legal obligation to determine the mental capacity of a client? Two recent court of appeal cases may shed some light on this ethical dilemma. In *Moore v Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 CA4th 1287, 135 CR2d 888, the court stated (109 CA4th at 1299):

> The attorney who is persuaded of the client's testamentary capacity by his or her own observations and experience, and who drafts the will accordingly, fulfills that duty of loyalty *to the testator.*

While the court in *Moore* encouraged attorneys to take reasonable steps to assess a testator's capacity, the attorney does not owe a duty to beneficiaries under an earlier will or trust to ascertain and document a client's competence when the client makes amendments. The court held that imposing such a duty might unjustifiably deny many persons the opportunity to make or amend their wills (109 CA4th at 1306). Further, in *Boranian v Clark* (2004) 123 CA4th 1012, 20 CR3d 405, the court held that an attorney who drafted a will for a dying testator who was taking morphine and subject to hallucinations did not owe a duty of care to individuals who were to receive the testator's estate under an earlier will.

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B. Standards and Tests for Legal Capacity

§3.30 1. Due Process in Competence Determinations Act

The Due Process in Competence Determinations Act (DPCDA) (Prob C §§810-813, 1801, 1881, 3201, 3204) codifies standards for determining whether a person has the capacity to perform particular acts, including the capacity to contract and to make health care decisions. These sections reject the old notion that a diagnosis or a physical disorder, in itself, equals incapacity. The statute outlines specific mental functions and deficits in those functions and how those deficits may affect specific acts or decisions. In other words, a link must be shown between mental function and the task in question, and a standard set of concepts and language must be used.

NOTE: Except for their implied use in the title of the DPCDA, the words "competent" and "incompetent" are not used; they are too general to be useful.

The DPCDA creates a rebuttable presumption that all persons have the capacity to make decisions and be responsible for their acts or decisions. Prob C §810(a). A determination that a person lacks capacity is based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a mental or physical disorder. Prob C §810(c). A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions. Prob C §810(b).

For a checklist for assessing capacity under the DPCDA, see Capacity and Undue Influence: Assessing, Challenging, and Defending (Cal CEB Action Guide February 2008).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/3 Ethical Considerations When Drafting Powers of Attorney and Advance Health Care Directives/§3.31 a. Evidence to Support Finding of Unsound Mind or Incapacity

§3.31 a. Evidence to Support Finding of Unsound Mind or Incapacity

A determination that a person lacks the capacity to make a decision or do a certain act must be supported by evidence of a deficit in at least one of the following mental functions (Prob C §811(a)):

- Alertness and attention;
- Information processing;
- Thought processes; and
- Ability to modulate mood and affect.

Each of these functions is further broken down into specific manifestations by the Probate Code as follows:

- To determine alertness and attention, courts look to the person's level of arousal or consciousness, orientation to time, place, person, and situation, and the ability to attend and concentrate. Prob C §811(a)(1).
- To determine whether there is a deficit in information processing, the courts look to short- and long-term memory and the ability to understand and communicate with others; to recognize familiar objects and persons; to understand quantities; to reason using abstract concepts; to plan, organize, and carry out actions; and to reason logically. Prob C §811(a)(2).
- Deficits in thought processes may be demonstrated by the presence of severely disorganized thinking, hallucinations, delusions, or uncontrollable, repetitive, or intrusive thoughts. Prob C §811(a)(3).
- A deficit in the ability to modulate mood and affect is demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy, or indifference that is inappropriate in degree to the individual's circumstances. Prob C §811(a)(4).

When any of these mental functions is impaired, the frequency, severity, and duration of periods of impairment may be taken into account. Prob C §811(c). Furthermore, there must be not only evidence of a deficit in one of the four listed mental functions but also evidence of a correlation between the deficit and the decision or acts in question. Prob C §811(a).

A deficit in any of the specified mental functions is relevant only if, by itself or in combination with other mental function deficits, it significantly impairs the person's ability to understand the consequences of his or her actions with regard to the type of act or decision in question. Prob C §811(b). The mere diagnosis of a mental or physical disorder (*e.g.,* autism) alone is not sufficient to support a determination that a person is of unsound mind or lacks the capacity to do a certain act. Prob C §811(d).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/3 Ethical Considerations When Drafting Powers of Attorney and Advance Health Care Directives/§3.32 b. Ability to Communicate Decision and Understand Its Consequences

§3.32 b. Ability to Communicate Decision and Understand Its Consequences

Although there is some uncertainty, it appears that Prob C §812 is intended to provide a general minimum standard for capacity of any type. Section 812 states that a person lacks the capacity to make a decision unless he or she has the ability to *communicate,* verbally or by any other means, the decision, and to *understand* and *appreciate,* to the extent relevant, the following:

- The rights, duties, and responsibilities created by or affected by the decision;
- The probable consequences for the decision-maker and, if appropriate, the persons affected by the decision; and
- The significant risks, benefits, and reasonable alternatives involved in the decision.

Section 812 carves out two specific areas to which these standards do not apply: medical decisions and wills. The capacity standards for medical decisions are defined by Prob C §813, and testamentary capacity continues to be defined by statutory and decisional law. See, *e.g.,* Prob C §§6100.5, 6104. Furthermore, a conservatorship determination, which is imposed on the basis of a loss of functional skills, is not governed by §812's communication standard.

In addition to its two specific exceptions, Prob C §812 provides that its standards apply "[e]xcept where otherwise provided by law." The extent of this exception is uncertain, because the standards stated in §812 were intended to codify prior case law on contractual capacity and therefore apply generally.

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§3.33 2. Specific Statutes Regarding Capacity

In addition to considering the test under the Due Process in Competence Determinations Act (DPCDA) (Prob C §§810-813, 1801, 1881, 3201, 3204), including the Prob C §810(a) rebuttable presumption that all persons have the capacity to make decisions and to be responsible for their acts and decisions, the attorney must consider various other statutes that codify the standards for determining a person's capacity to do or make a particular kind of act or decision, including standards regarding what must be communicated and the cases that clarify and amplify those statutes. See generally Capacity and Undue Influence: Assessing, Challenging, and Defending (Cal CEB Action Guide February 2008).

A brief summary of specific statutes other than the DPCDA regarding capacity determinations that apply when drafting DPOAs and AHCDs is set forth in §§3.34-3.35.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/3 Ethical Considerations When Drafting Powers of Attorney and Advance Health Care Directives/§3.34 a. Capacity to Contract, Convey, or Make Agency Appointments

§3.34 a. Capacity to Contract, Convey, or Make Agency Appointments

Civil Code §1556 provides that all persons are capable of contracting except minors, persons of unsound mind, and persons deprived of civil rights. A person entirely without understanding has no power to make a contract of any kind. CC §38. A conveyance or contract made by a person of unsound mind, but not entirely without understanding, and made before the person's incapacity has been judicially determined (see CC §40), is subject to rescission (CC §39(a)). The term "conveyance" includes gifts. See, *e.g., Stafford v Groff* (1950) 99 CA2d 67, 221 P2d 246. Under CC §39(b), a rebuttable presumption of unsound mind exists if a person is substantially unable to manage his or her own financial resources or resist fraud or undue influence. However, §39(b) is apparently intended to clarify when a *presumption* of unsound mind will be imposed, but not to define it generally. "Entirely without understanding" means a lack of capacity to understand the particular act or transaction being contemplated. 1 Witkin, Summary of California Law, *Contracts* §52 (10th ed 2005).

A conservatee may still have the right to enter into transactions to the extent reasonable to provide the necessaries of life to the conservatee and to the conservatee's spouse and minor children (Prob C §1871(d)), as well as other transactions authorized by the court (Prob C §1873).

Anyone with the capacity to contract may appoint an agent (CC §2296) and execute a power of attorney (Prob C §4120). An adult having capacity may execute a power of attorney for health care. See Prob C §§4609 and 4671. A patient is presumed to have the capacity to designate or disqualify a surrogate. Prob C §4657.

For a thorough discussion of capacity to contract, see California Law of Contracts, chap 2 (Cal CEB 2007).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/3 Ethical Considerations When Drafting Powers of Attorney and Advance Health Care Directives/§3.35 b. Capacity to Manage Personal and Financial Affairs and to Make Medical Decisions

§3.35 b. Capacity to Manage Personal and Financial Affairs and to Make Medical Decisions

A person's capacity to manage his or her personal and financial affairs is measured by whether he or she can adequately manage his or her life. The inability to manage one's own personal or financial affairs may give rise to a conservatorship petition, which involves a court proceeding. See generally California Conservatorship Practice (Cal CEB 2005).

A patient is presumed to have capacity to make a health care decision and to give or revoke an advance health care directive. Prob C §4657. Probate Code §4609 defines "capacity" in the context of health care decision making as "a person's ability to understand the nature and consequences of a decision and to make and communicate a decision."

Under Prob C §813, a person has the capacity to give informed consent to a proposed medical treatment if the person is able to do all of the following:

- Respond knowingly and intelligently to queries about the treatment;
- Participate in the treatment decision through a rational thought process; and
- Understand all of the following with respect to that treatment: (1) The nature and seriousness of the illness, disorder, or defect; (2) the nature of the treatment being recommended by the health care providers; (3) the probable degree and duration of any benefits and risks of any medical intervention recommended by the health care providers and the consequences of lack of treatment; and (4) the nature, risks, and benefits of any reasonable alternatives.

Probate Code §812 expressly does not apply in cases involving capacity to make medical decisions; only §813 applies.

Unless otherwise specified in a written advance health care directive, a determination that a patient lacks or has recovered capacity, or that another condition exists that affects an individual health care instruction or the authority of an agent or surrogate, shall be made by the primary physician. Prob C §4658. The physician, in making the §4658 determination, must apply the Prob C §813 criteria.

Probate Code §1881 addresses the specific circumstances in which a determination is sought that a conservatee lacks the capacity to give informed consent to any form of medical treatment; Prob C §§3200-3212 address the specific circumstances in which a determination is sought that an adult without a conservator either has or lacks the capacity to give informed medical consent to a specified medical treatment.

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§3.36 C. Attorney Assessment of Client Capacity

If, in the first meeting, the client is unable to provide the attorney with the information necessary to create the durable power of attorney for financial management (DPOA) or advance health care directive (AHCD), the attorney may wish to schedule further meetings. This will also allow the attorney to create a good record of the principal's capacity to execute the document. The attorney should never compromise his or her opinion on the issue of capacity, although there may be cases in which a DPOA or AHCD makes so much sense that he or she may be tempted to do so.

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§3.37 1. Evaluation Under Statutory Standards

In practice, attorneys have always been called on to make reasonable assessments of the client's mental functions and deficits for purposes of determining capacity. Because it is unclear whether an attorney may be liable for providing services to a client who is later found by a court to have lacked capacity at the time of a challenged transaction, prudent practitioners should be aware of the standards under Prob C §811 for determination of capacity, the characteristics of specified deficits in mental functions, and "evidence of a correlation between the deficit(s) and the decision or acts in question." Prob C §811(a). In addition to the Due Process in Competence Determinations Act (DPCDA) tests (see §§3.31-3.33), the attorney should be aware of any specific statutory definitions of capacity to execute any documents that the attorney is asked to prepare for signature by the client. See §3.35 for capacity to execute an advance health care directive (AHCD) and §3.34 for capacity to execute a durable power of attorney for financial management (DPOA).

NOTE: Mental capacity deficits can become obvious during an extended conversation. Signs of a problem can be a client's relying on a child or spouse to "fill in the blanks" or provide information on dates, size of estate, or where money is sheltered; repeating information; or forgetting the purpose of the meeting with the attorney.

Even if the person is found to have capacity, there may be undue influence. Some people will pass a capacity test but are subject to undue influence. See Capacity and Undue Influence: Assessing, Challenging, and Defending (Cal CEB Action Guide February 2008).

See §3.38 on the use of a professional assessment of capacity before representing the client in the transaction.

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§3.38 2. Mental Status Assessment

If there is significant ambiguity about the person's capacity, the attorney may consider recommending that the client undergo a mental status assessment, which can be obtained from psychologists who specialize in such matters. The test can be undertaken only if the person with questionable mental status has consented and agreed to pay for its cost. The assessment can be geared toward the standards for judicial determinations of capacity specified in Prob C §811 (see §3.37). If the services of a diagnostician are used, the attorney should condition legal representation on a diagnosis confirming capacity both to retain counsel and to engage in the particular legal transactions.

For two forms that may be used, see §§3.39-3.40.

NOTE: A neuropsychologist may provide insight about particular deficits and what abilities they affect. For example, can a severely depressed person make his or her own medical decision? Is a person able to understand and appreciate the consequences of his or her decision to drive, given his or her functional impairments?

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/3 Ethical Considerations When Drafting Powers of Attorney and Advance Health Care Directives/§3.39 D. Form: Declaration Regarding Mental Functions

§3.39 D. Form: Declaration Regarding Mental Functions

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3.39-1 Declaration regarding mental functions

DECLARATION REGARDING MENTAL FUNCTIONS

Re: _ _[*Name*]_ _

I am acquainted with _ _[*name*]_ _.

I most recently saw him/her on _ _[*date*]_ _ at _ _[*place*]_ _.

I believe him/her to have the following mental functions/deficits:

	Yes	*No*	*Don't Know/Comments*
I. ALERTNESS AND ATTENTION			
Consciousness	___	___	_____
Orientation to time	___	___	_____
Orientation to place	___	___	_____
Orientation to person	___	___	_____
Orientation to situation	___	___	_____
Ability to pay attention	___	___	_____
Ability to concentrate on task	___	___	_____
II. INFORMATION PROCESSING			
***Short-term* memory deficits**	___	___	_____
***Long-term* memory deficits**	___	___	_____
Immediate recall	___	___	_____
Ability to understand others	___	___	_____
Ability to communicate,	___	___	_____

verbally or otherwise

Ability to recognize familiar objects and persons	___	___	_____
Ability to understand and appreciate quantities	___	___	_____
Ability to reason using abstract concepts	___	___	_____
Ability to plan, organize, and carry out actions in his/her own rational self-interest	___	___	_____
Ability to reason logically	___	___	_____

III. THOUGHT PROCESSES

Severely disorganized thinking	___	___	_____
Hallucinations	___	___	_____
Delusions	___	___	_____
Uncontrollable, repetitive, or intrusive thoughts	___	___	_____

IV. ABILITY TO MODULATE MOOD AND AFFECT

Does he/she exhibit the following pervasive and persistent or recurrent moods inappropriate in degree to his/her circumstances?

Euphoria	___	___	_____
Anger	___	___	_____
Anxiety	___	___	_____
Fear	___	___	_____
Panic	___	___	_____
Depression	___	___	_____
Hopelessness	___	___	_____
Despair	___	___	_____

Helplessness	___	___	_____
Apathy	___	___	_____
Indifference	___	___	_____

I declare under penalty of perjury that the foregoing is true and correct within my personal knowledge.

Executed in _ _[*city*]_ _, California, on _ _[*date*]_ _.

Signed: _____

Print Name: _____

Address: _____

Comment: This form may be completed by anyone with personal knowledge and does not elicit any conclusion. The connection required by the Due Process in Competence Determinations Act (DPCDA) (Prob C §§810-813, 1801, 1881, 3201, 3204) would then be drawn by a judicial officer on the basis of common knowledge or expert interpretation, by an attorney advising a client, or by anyone needing to form an opinion about capacity for the particular act or decision, using the information presented on the form.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/3 Ethical Considerations When Drafting Powers of Attorney and Advance Health Care Directives/§3.40 E. Form: Capacity Declaration--Conservatorship (Judicial Council Form GC-335)

§3.40 E. Form: Capacity Declaration—Conservatorship (Judicial Council Form GC-335)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CONSERVATORSHIP OF THE ☐ PERSON ☐ ESTATE OF *(Name)*: ☐ CONSERVATEE ☐ PROPOSED CONSERVATEE	
CAPACITY DECLARATION—CONSERVATORSHIP	CASE NUMBER

TO PHYSICIAN, PSYCHOLOGIST, OR RELIGIOUS HEALING PRACTITIONER

The purpose of this form is to enable the court to determine whether the (proposed) conservatee *(check all that apply):*

A. ☐ is able to attend a court hearing to determine whether a conservator should be appointed to care for him or her. The court hearing is set for *(date):* _____. *(Complete item 5, sign, and file page 1 of this form.)*

B. ☐ has the capacity to give informed consent to medical treatment. *(Complete items 6 through 8, sign page 3, and file pages 1 through 3 of this form.)*

C. ☐ has dementia and, if so, (1) whether he or she needs to be placed in a secured-perimeter residential care facility for the elderly, and (2) whether he or she needs or would benefit from dementia medications. *(Complete items 6 and 8 of this form and form GC-335A; sign and attach form GC-335A. File pages 1 through 3 of this form and form GC-335A.)*

(If more than one item is checked above, sign the last applicable page of this form or form GC-335A if item C is checked. File page 1 through the last applicable page of this form; also file form GC-335A if item C is checked.)

COMPLETE ITEMS 1–4 OF THIS FORM IN ALL CASES.

GENERAL INFORMATION

1. *(Name):*
2. *(Office address and telephone number):*
3. I am
   a. ☐ a California licensed ☐ physician ☐ psychologist acting within the scope of my licensure ☐ with at least two years' experience in diagnosing dementia.
   b. ☐ an accredited practitioner of a religion whose tenets and practices call for reliance on prayer alone for healing, which religion is adhered to by the (proposed) conservatee. The (proposed) conservatee is under my treatment. *(Religious practitioner may make the determination under item 5 ONLY.)*
4. (Proposed) conservatee *(name):*
   a. I last saw the (proposed) conservatee on *(date):*
   b. The (proposed) conservatee ☐ is ☐ is NOT a patient under my continuing treatment.

ABILITY TO ATTEND COURT HEARING

5. A court hearing on the petition for appointment of a conservator is set for the date indicated in item A above. *(Complete a or b.)*
   a. ☐ The proposed conservatee is able to attend the court hearing.
   b. ☐ Because of medical inability, the proposed conservatee is NOT able to attend the court hearing *(check all items below that apply)*
      (1) ☐ on the date set *(see date in box in item A above)*.
      (2) ☐ for the foreseeable future.
      (3) ☐ until *(date):*
      (4) **Supporting facts** *(State facts in the space below or check this box* ☐ *and state the facts in Attachment 5):*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

Form Adopted for Mandatory Use
Judicial Council of California
GC-335 [Rev. January 1, 2004]

CEB

Probate Code, §§ 811, 813, 1801, 1825, 1881, 1910, 2356.5

Print

CONSERVATORSHIP OF THE ☐ PERSON ☐ ESTATE OF *(Name)*: ☐ CONSERVATEE ☐ PROPOSED CONSERVATEE	CASE NUMBER:

6. EVALUATION OF (PROPOSED) CONSERVATEE'S MENTAL FUNCTIONS

Note to practitioner: This form is ***not*** a rating scale. It is intended to assist you in recording your *impressions* of the (proposed) conservatee's mental abilities. Where appropriate, you may refer to scores on standardized rating instruments.

(Instructions for items 6A–6C): *Check the appropriate designation as follows:* ***a*** *= no apparent impairment;* ***b*** *= moderate impairment;* ***c*** *= major impairment;* ***d*** *= so impaired as to be incapable of being assessed;* ***e*** *= I have no opinion.)*

A. **Alertness and attention**

(1) Levels of arousal (lethargic, responds only to vigorous and persistent stimulation, stupor)
a ☐ b ☐ c ☐ d ☐ e ☐

(2) Orientation (types of orientation impaired)
a ☐ b ☐ c ☐ d ☐ e ☐ Person
a ☐ b ☐ c ☐ d ☐ e ☐ Time (day, date, month, season, year)
a ☐ b ☐ c ☐ d ☐ e ☐ Place (address, town, state)
a ☐ b ☐ c ☐ d ☐ e ☐ Situation ("Why am I here?")

(3) Ability to attend and concentrate (give detailed answers from memory, mental ability required to thread a needle)
a ☐ b ☐ c ☐ d ☐ e ☐

B. **Information processing.** Ability to:

(1) Remember (ability to remember a question before answering; to recall names, relatives, past presidents, and events of the past 24 hours)
i. Short-term memory a ☐ b ☐ c ☐ d ☐ e ☐
ii Long-term memory a ☐ b ☐ c ☐ d ☐ e ☐
iii Immediate recall a ☐ b ☐ c ☐ d ☐ e ☐

(2) Understand and communicate either verbally or otherwise (deficits reflected by inability to comprehend questions, follow instructions, use words correctly, or name objects; use of nonsense words)
a ☐ b ☐ c ☐ d ☐ e ☐

(3) Recognize familiar objects and persons (deficits reflected by inability to recognize familiar faces, objects, etc.)
a ☐ b ☐ c ☐ d ☐ e ☐

(4) Understand and appreciate quantities (deficits reflected by inability to perform simple calculations)
a ☐ b ☐ c ☐ d ☐ e ☐

(5) Reason using abstract concepts. (deficits reflected by inability to grasp abstract aspects of his or her situation or to interpret idiomatic expressions or proverbs)
a ☐ b ☐ c ☐ d ☐ e ☐

(6) Plan, organize, and carry out actions (assuming physical ability) in one's own rational self-interest (deficits reflected by inability to break complex tasks down into simple steps and carry them out)
a ☐ b ☐ c ☐ d ☐ e ☐

(7) Reason logically.
a ☐ b ☐ c ☐ d ☐ e ☐

C. **Thought disorders**

(1) Severely disorganized thinking (rambling thoughts; nonsensical, incoherent, or nonlinear thinking)
a ☐ b ☐ c ☐ d ☐ e ☐

(2) Hallucinations (auditory, visual, olfactory)
a ☐ b ☐ c ☐ d ☐ e ☐

(3) Delusions (demonstrably false belief maintained without or against reason or evidence)
a ☐ b ☐ c ☐ d ☐ e ☐

(4) Uncontrollable or intrusive thoughts (unwanted compulsive thoughts, compulsive behavior).
a ☐ b ☐ c ☐ d ☐ e ☐

(Continued on next page)

Print

CONSERVATORSHIP OF THE ☐ PERSON ☐ ESTATE OF *(Name)*: ☐ CONSERVATEE ☐ PROPOSED CONSERVATEE	CASE NUMBER:

6. *(continued)*

D. **Ability to modulate mood and affect.** The (proposed) conservatee ☐ has ☐ does NOT have a pervasive and persistent or recurrent emotional state that appears inappropriate in degree to his or her circumstances. *(If so, complete remainder of item 6D.)* ☐ I have no opinion.

***(Instructions for item 6D:** Check the degree of impairment of each inappropriate mood state (if any) as follows: **a** = mildly inappropriate; **b** = moderately inappropriate; **c** = severely inappropriate.)*

Anger	a ☐	b ☐	c ☐	Euphoria	a ☐	b ☐	c ☐	Helplessness	a ☐	b ☐	c ☐
Anxiety	a ☐	b ☐	c ☐	Depression	a ☐	b ☐	c ☐	Apathy	a ☐	b ☐	c ☐
Fear	a ☐	b ☐	c ☐	Hopelessness	a ☐	b ☐	c ☐	Indifference	a ☐	b ☐	c ☐
Panic	a ☐	b ☐	c ☐	Despair	a ☐	b ☐	c ☐				

E. The (proposed) conservatee's periods of impairment from the deficits indicated in items 6A–6D

(1) ☐ do NOT vary substantially in frequency, severity, or duration.

(2) ☐ do vary substantially in frequency, severity, or duration *(explain; continue on Attachment 6E if necessary):*

F. ☐ *(Optional)* Other information regarding my evaluation of the (proposed) conservatee's mental function (e.g., diagnosis, symptomatology, and other impressions) is ☐ stated below ☐ stated in Attachment 6F.

ABILITY TO CONSENT TO MEDICAL TREATMENT

7. Based on the information above, it is my opinion that the (proposed) conservatee

a. ☐ has the capacity to give informed consent to any form of medical treatment. This opinion is limited to medical consent capacity.

b. ☐ lacks the capacity to give informed consent to any form of medical treatment because he or she is ***either*** (1) unable to respond knowingly and intelligently regarding medical treatment ***or*** (2) unable to participate in a treatment decision by means of a rational thought process, ***or both***. The deficits in the mental functions described in item 6 above significantly impair the (proposed) conservatee's ability to understand and appreciate the consequences of medical decisions. This opinion is limited to medical consent capacity.

(Declarant must initial here if item 7b applies: _____.)

8. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

Comment: This form, to be completed by a physician, psychologist, or practitioner, is intended for use in

conservatorship proceedings. Outside a court context, this specific form is not required, but because it will be widely used and familiar to medical practitioners, it is advisable to use or adapt it—for example, to determine whether a person has current capacity to execute a DPOA or an AHCD. For purposes of determining, in a court context or otherwise, a patient's capacity to make medical decisions, answers to items 1-4 and 6-7 are needed. If used in a nonconservatorship or noncourt context to determine capacity for other actions, such as capacity to contract, answers to items 1-4 and 6 are needed, and it may be helpful to add the following question: "Do the above-indicated deficits significantly impair the patient's ability to understand and appreciate the consequences of the patient's actions or decisions?"

See §§7.76-7.85 for discussion of the regulations (see 45 CFR §§160.101-106.316, 160.400-160.426, 160.500-160.552, 164.102-164.534) adopted under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub L 104-191, 110 Stat 1936), and in addition see California's Confidentiality of Medical Information Act (CMIA) (CC §§56-56.37); see also §§8.34-8.38 for different types of attorney-drafted forms for release of medical information.

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4

Durable Powers of Attorney for Financial Management: The Fundamentals

W. Vito Lanuti
Susan A. Katzen

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§4.1 I. INTRODUCTION

Powers of attorney for financial management are an essential part of any client's plan for incapacity. Even clients whose estate plans are centered on a revocable trust need powers of attorney because trustees only have the power to administer trust assets. For example, trustees cannot transfer nontrust assets to the trust, negotiate with the Social Security Administration, or represent an injured or incapacitated client in a personal injury suit. Thus, estate planning attorneys should always discuss creating a durable power of attorney for financial management (DPOA) with their clients.

Powers of attorney are extremely powerful documents. Their scope is limited only by public policy, common and statutory law, the principal's directions, sound judgment, and the attorney's imagination. The DPOA should therefore be individualized to suit the client's specific needs and desires. The attorney must review the client's circumstances and help the client determine whether he or she may safely and properly grant the desired authority to a trusted agent. There are many advantages that a well-drafted DPOA can provide. However, a DPOA that is not carefully planned can be ineffective as well as potentially counterproductive in achieving the principal's goals and objectives.

This chapter focuses on the basic elements of a DPOA. It assumes a basic knowledge of the general concept of the power of attorney, as discussed in chapter 1. It describes the difference between durable and nondurable powers, between general and limited powers, and between immediately effective and springing powers. It briefly compares statutory powers of attorney, printed-form powers of attorney, and attorney-drafted powers of attorney; it then discusses the eligibility and roles of the principal and agent. Finally, the chapter explains the requirements for execution and termination of a DPOA and addresses how the documents should be stored.

NOTE: Unless otherwise explicitly stated, all references in this chapter to Probate Code sections regarding durable powers of attorney refer only to DPOAs and durable powers of attorney for personal care and do not refer to powers of attorney for health care (PAHC) or advance health care directives (AHCD). On PAHC and AHCD, see chaps 7-9.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/ II. TYPES OF POWERS OF ATTORNEY FOR FINANCIAL MANAGEMENT/ A. Durable Versus Nondurable Powers of Attorney/§4.2 1. Discussion

II. TYPES OF POWERS OF ATTORNEY FOR FINANCIAL MANAGEMENT

A. Durable Versus Nondurable Powers of Attorney

§4.2 1. Discussion

Often, the principal's primary motivation in executing a power of attorney for financial management is to provide for continuing management of assets in case of future incapacity. In such case, the principal needs a durable power of attorney, *i.e.,* either a power that remains effective despite the principal's later incapacity or a power that becomes effective upon the principal's incapacity.

To create durable powers of attorney for financial management, the attorney must include language meeting the requirements of Prob C §4124. See form in §4.3.

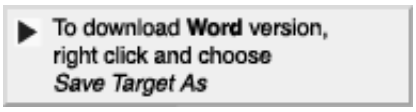
PRACTICE TIP: There is no statutory requirement to place the durable language in any particular portion of the document, but the language dictated in Prob C §4124 must be included in order for the power of attorney to be durable.

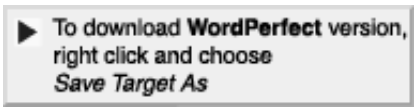
Pre-1982 powers of attorney for financial management are not valid if the principal becomes incapacitated, regardless of any language in the instrument attempting to prevent termination beyond such a point, because legislation providing for DPOAs did not apply to powers of attorney created before 1982. Stats 1981, ch 511, §5(a). The attorney should advise a client with sufficient capacity who has a pre-1982 power of attorney to consider executing a new power in durable form.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.3 2. Form: Power of Attorney Is Durable

§4.3 2. Form: Power of Attorney Is Durable





4.3-1 Power of attorney is durable

[*Add one of the following alternatives*]

[*Alternative 1: Effective immediately*]

This power of attorney is effective upon the execution of this document and shall not be affected by the subsequent incapacity of the Principal.

[*Alternative 2: Effective on principal's incapacity*]

This power of attorney shall become effective on the Principal's incapacity.

Comment: Alternative 2 creates what is referred to as a "springing power." See §4.10.

PRACTICE TIP: The drafting attorney must use language showing that the principal intends that the authority conferred is to be exercisable notwithstanding the principal's subsequent incapacity.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/ B. General Versus Limited Powers of Attorney/§4.4 1. General Power of Attorney

B. General Versus Limited Powers of Attorney

§4.4 1. General Power of Attorney

A power of attorney is general unless it is specifically limited by the instrument creating it. See Prob C §4261. There may be circumstances in which the principal wants to limit the agent's authority in some way. On the uses of a limited power of attorney, see §4.5. A general power of attorney gives the agent broad authority to transact business for the principal. It allows the agent to do almost anything necessary to manage the principal's property. See Prob C §4261. There are, however, limits to the authority that can be delegated in a general power. See §4.68.

Even if the principal wants to create a general power of attorney, a simple grant of broad authority without additional clauses clarifying or expounding on the authority the principal is granting is not recommended. There are certain actions that must be expressly authorized in the DPOA, *e.g.,* amending or revoking a trust. See §§4.72-4.75. Many title companies also want specific provisions authorizing the agent to take actions affecting real property. The DPOA should include specific provisions authorizing actions with partnership interests and granting authorization to vote shares of stock. Unusual matters should be addressed in a general DPOA in order to eliminate any question of whether the principal had such acts in mind.

PRACTICE TIP: If a general grant of authority is intended, the instrument should list the primary areas where power is to be granted and should conclude with a general authorization to do other necessary acts (see §5.49).

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§4.5 2. Limited (or Special) Power of Attorney

A limited (or special) power of attorney is one that grants the agent specific and restrictive authority to manage the principal's property for a specific purpose. See Prob C §4262. Authority can be limited to a specific period of time, to certain specific assets covered by the power, or to certain specific actions or special conditions. If a power grants limited authority, the agent will be limited to the specified permissible actions, subjects, or purposes and will have the authority incidental, necessary, or proper to carry out the authority granted. Prob C §4262. The specific authority granted and limitations thereto should be clearly stated in the instrument.

A sample limited DPOA for management and disposition of real property is included in §4.6. This instrument includes the authority to sell the principal's interest in the property. If the power of sale is not intended, language to this effect should be deleted in both the title and body of the instrument. A common use of a limited DPOA is that employed by an absent property owner authorizing another to sign legal documents necessary for close of escrow on purchase or sale of real property. The form in §4.6 can be adapted for this purpose. See §4.7 for forms limiting a power of attorney to a specific time period, and see §§2.35, 2.37 for a basic limited DPOA for care of minor children during their parents' absence.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/ 3. Limited Power of Attorney Forms/§4.6 a. Form: Limited Durable Power of Attorney for Management and Disposition of Specific Real Property

3. Limited Power of Attorney Forms

§4.6 a. Form: Limited Durable Power of Attorney for Management and Disposition of Specific Real Property

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

4.6-1 Limited durable power of attorney for management and disposition of specific real property

RECORDING REQUESTED BY
_ _[*name*]_ _
_ _[*address*]_ _
AND WHEN RECORDED MAIL TO
_ _[*name*]_ _
_ _[*address*]_ _

Space above this line for recorder's use

_ _[*Name*]_ _**, Principal, to** _ _[*Name*]_ _**, Agent:**

LIMITED DURABLE POWER OF ATTORNEY FOR MANAGEMENT AND DISPOSITION OF SPECIFIC REAL PROPERTY

NOTICE TO PERSON EXECUTING THIS DOCUMENT:

THIS IS AN IMPORTANT LEGAL DOCUMENT. IT CREATES A DURABLE POWER OF ATTORNEY. BEFORE EXECUTING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS.

1. THIS DOCUMENT MAY PROVIDE THE PERSON YOU DESIGNATE AS YOUR ATTORNEY-IN-FACT WITH BROAD POWERS TO MANAGE, DISPOSE OF, SELL, CONVEY, AND ENCUMBER YOUR REAL AND PERSONAL PROPERTY, AND TO USE YOUR PROPERTY AS SECURITY IF YOUR AGENT BORROWS MONEY ON YOUR BEHALF.

2. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH CARE DECISIONS FOR YOU.

3. THESE POWERS WILL EXIST FOR AN INDEFINITE PERIOD OF TIME UNLESS YOU LIMIT THEIR DURATION IN THIS DOCUMENT. THESE POWERS WILL CONTINUE TO EXIST NOTWITHSTANDING YOUR SUBSEQUENT INCAPACITY.

4. YOU HAVE THE RIGHT TO REVOKE OR TERMINATE THIS DURABLE POWER OF ATTORNEY AT ANY TIME.

5. YOUR AGENT HAS NO DUTY TO ACT UNLESS YOU AND YOUR AGENT AGREE OTHERWISE IN WRITING.

TO WHOM IT MAY CONCERN:

_ _[*Name*]_ _ **(the Principal), presently a resident of** _ _ _ _ _ _ **County, California, appoints** _ _[*name*]_ _ **(the Agent), presently a resident of** _ _ _ _ _ _ **County, California, as the Principal's true and lawful attorney-in-fact for the Principal and in the Principal's name, place, and stead:**

1. To manage, control, lease, sublease, and otherwise act concerning the Principal's interest in the real property described in this instrument; to collect and receive rents or income therefrom; to pay taxes, charges, and assessments on the same; to repair, maintain, protect, preserve, alter, and improve the same; to commit the Principal's resources and contract on the Principal's behalf regarding the same; and to do all things necessary or expedient to be done in the Agent's judgment in connection with the property.

2. To grant, sell, transfer, mortgage, deed in trust, convey, pledge, and otherwise encumber and deal in the real property described in this instrument and to execute such instruments as the Agent considers proper, specifically including but not limited to the power to do the following:

(a) Represent the Principal in negotiations for the sale of the real property described in this instrument, including but not limited to entering into listing agreements with brokers or other Agents regarding such sale.

(b) Execute, acknowledge, and deliver contracts of sale, escrow instructions, deeds, covenants, agreements, assignments of agreements, and all other documents needed with respect to the sale of the real property described in this instrument.

3. Without limiting the generality of the foregoing, generally to do, execute, and perform any other act, deed, matter, or thing that in the Agent's opinion ought to be done, executed, or performed in conjunction with this power of attorney, of every kind and nature, including the power to bring suit against any institution, person, or other entity that fails or refuses to honor this durable power of attorney, as fully and effectively as the Principal could do if personally present.

This power of attorney shall be effective on execution and shall not be affected by the Principal's subsequent incapacity.

The Principal does hereby ratify and confirm all that the Agent shall do, or cause to be done, by virtue of this power of attorney.

The property affected by this limited power of attorney is that real property in the City of _ _ _ _ _ _, County of _ _ _ _ _ _, State of California, commonly known as _ _ _ _ _ _, more particularly described in Exhibit A attached to and incorporated by reference in this instrument.

IN WITNESS WHEREOF, the Principal has signed this limited durable power of attorney for management and disposition of specific real property on _ _[*date*]_ _.

__[*Signature*]__
_ _[*Typed name*]_ _

State of California)
)
County of _ _[*name of county*]_ _)
)
)
_____)

On _ _[*date*]_ _ before me, _ _[*name and title of officer*]_ _, personally appeared _ _[*name(s)*]_ _, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

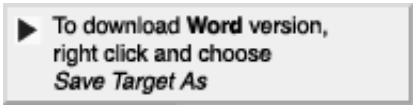
WITNESS my hand and official seal:

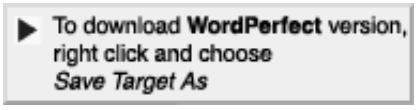
__[*Signature of officer*]__ [*Officer's seal*]

Comment: The warnings at the top of the draft are not required in an attorney-drafted power of attorney. Many attorneys include the warnings as proof that they advised their client of the risks and nature of the power. This warning could be provided by letter instead of—or in addition to—inclusion in the document itself. The attorney may also want to review the more extensive warnings required by Prob C §4128 to be included in a printed form DPOA distributed in California for use by a person who does not have the advice of legal counsel. See §4.21. Any of the warnings set out in Prob C §4128 that are not stated in the form in this section but that may be relevant may be added to the attorney-drafted warnings listed above.

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§4.7 b. Form: Introductory Clause if Power of Attorney Limited to Specific Time Period





4.7-1 Introductory clause if power of attorney limited to specific time period

[*Add one of the following alternatives*]

[*Alternative 1: Power of attorney limited to specific time period*]

This power of attorney is granted for a limited period of time, becoming effective on _ _[*date*]_ _, and terminating on _ _[*date*]_ _.

[*Alternative 2: Power of attorney limited to specific time period but with extension if principal's return is delayed*]

The Principal intends to depart on _ _[*date*]_ _ for a trip to _ _[*destination*]_ _. The Principal intends to return on or about _ _[*date*]_ _. This power of attorney is intended for temporary use during the period when the Principal is absent on the above trip. It shall commence on _ _[*date*]_ _ and shall terminate on the later of _ _[*date*]_ _ or the Principal's return from the above trip, if the Principal's return is delayed for any reason. The Agent's written declaration of the Principal's continued absence past the intended date of return or a letter from the Principal signed and transmitted to the Agent, including by facsimile, may be relied on by third parties with whom the Agent may deal without further evidence of the Principal's delayed return.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/ C. Immediately Effective Versus Springing DPOA/ 1. Immediately Effective DPOA/§4.8 a. Discussion

C. Immediately Effective Versus Springing DPOA

1. Immediately Effective DPOA

§4.8 a. Discussion

A DPOA can be drafted to be effective immediately or to be effective only after a triggering event occurs, *e.g.,* the principal becomes incapacitated. An immediately effective durable power is somewhat easier for the agent to use because the agent need not prove that the principal is unwilling or unable to handle his or her own affairs. Under an immediately effective DPOA, the agent is authorized to act on the principal's behalf whenever appropriate and whether the principal has capacity or is incapacitated. See §4.9 for a form that includes a declaration by the principal that he or she understands that the durable power of attorney immediately grants to the agent very broad authority over the principal's assets. A client may hesitate to choose an immediately effective DPOA, however, for several reasons. A primary reason is that the client is not yet ready to authorize control of his or her affairs by another person. On springing power and forms, see §§4.10-4.16.

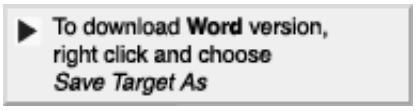
CAVEAT: A client may also hesitate to execute an immediately effective DPOA because of the potential for abuse by the agent, and many attorneys are reluctant to recommend them for the same reason. See, *e.g.,* Barringer & Lawrence, *The Perils of Durable Powers of Attorney for Property Management,* 16 CEB Est Plan Rep 85 (Feb. 1995). Abuse is always a concern and should be thoroughly discussed with the client before execution of either type of DPOA. If the client expresses any concern about the agent's possible abuse of power under the DPOA, the attorney should discuss with the client whether that person should be named as the agent and whether there are possible alternatives to a DPOA. See chap 3 on ethical considerations in drafting a DPOA.

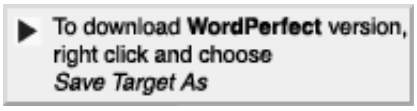
Apparently, some clients and even some practitioners mistakenly believe that the principal relinquishes all authority to the agent on signing an immediately effective DPOA document. On the contrary, by doing so, the principal does not give up his or her authority to act. As long as the principal has capacity, either the principal or the agent may act on the principal's behalf. In contrast, with a springing power of attorney, the transfer of authority from the principal to the agent or conservator occurs only when there is a determination that the triggering event, *e.g.,* incapacity, has occurred. Therefore, it is crucial to emphasize the need for good communications between principal and agent under an immediately effective DPOA, to prevent the agent from taking actions that are at cross-purposes with the principal's. On triggering events for springing powers, see §§4.11-4.13.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.9 b. Form: Power of Attorney Immediately Effective and Durable, and Principal Understands Instrument

§4.9 b. Form: Power of Attorney Immediately Effective and Durable, and Principal Understands Instrument





4.9-1 Power of attorney immediately effective and durable, and principal understands instrument

This power of attorney shall not be affected by the subsequent incapacity of the Principal.

The Principal declares that _ _[*he/she*]_ _ understands the importance of this durable power of attorney, recognizes that _ _[*he/she*]_ _ is granting the Agent broad power to hold, administer, and control the Principal's assets, and recognizes that this durable power of attorney will become effective immediately on execution and will continue indefinitely until specifically revoked, or terminated by death, even if the Principal later becomes incapacitated.

Comment: For a sample form of a complete general DPOA that is immediately effective, see §5.69.

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§4.10 2. Springing (Contingent, Standby, or Conditional) DPOA

A springing DPOA becomes effective at a specified future time or on the occurrence of a specified future event or contingency. Prob C §4030. A springing DPOA may designate one or more persons who, by a written declaration under penalty of perjury, have the power to determine conclusively that the specified event or contingency has occurred. Prob C §4129. The triggering event may be the principal's departure on a trip, but the most common triggering event for a springing DPOA is the principal's incapacity. Whatever the triggering event is, a springing DPOA should specify who determines that the triggering event has occurred and how that determination is made.

The springing power may be durable or nondurable. Prob C §4030. A power that is both springing and durable must contain either the words "This power of attorney shall become effective upon the incapacity of the principal" or similar words showing the principal's intent that the authority conferred shall be exercisable on the principal's later incapacity. Prob C §4124. See form in §4.4.

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§4.11 a. Triggering Event

The instrument creating the springing DPOA must sufficiently define the triggering event. If that event is the principal's incapacity, the DPOA should describe how incapacity will be ascertained and by whom, whether it is the principal's physician(s), spouse, or a panel of individuals. See Prob C §4129. If the springing DPOA is to terminate on the principal's restoration of capacity, the instrument should define and describe the meaning and determination of restoration. See §§4.15-4.17 for sample forms.

NOTE: Declaration of incapacity by a court is never recommended as the primary method of determining incapacity, because the principal's intent in executing a springing DPOA is often to avoid the time, expense, intrusiveness, and publicity of a court incapacity proceeding. More importantly, a judicial determination of incapacity can be quite costly and may require expert testimony. Nevertheless, the court can be referred to as a final finder of capacity if declared methods fail or are unacceptable to third parties. Even if a court proceeding to determine incapacity is required, the DPOA may have been structured to eliminate the need for a full conservatorship proceeding. For example, the DPOA can require that the court need only find that the principal lacks sufficient understanding or ability to make or communicate decisions about property, about any financial and business affairs, or about the principal's personal care if the instrument authorizes the agent to make personal care decisions for the principal.

PRACTICE TIP: The definition of the triggering event should be clearly stated in language that a title company or bank officer can easily understand. The definition should also be easy to locate in the instrument.

Whatever method is selected for establishing incapacity or other triggering event, the instrument should provide that a written declaration under penalty of perjury attached to the DPOA may be relied on by third parties dealing with the agent without further evidence of incapacity. Probate Code §4129(b) protects third parties who rely on the declaration regardless of whether the specified event or contingency has actually occurred. The DPOA may include the language of the statute that protects third parties. Finally, the instrument should waive any patient-physician privilege that might arise with respect to the physician's execution of a certificate or opinion of incapacity. See §5.70 for a form of general springing DPOA instrument, in which the powers in §5.71 can be inserted.

NOTE: Many attorneys fail to address the issue of the principal's restoration to capacity in the DPOA. A springing DPOA should include a provision that the power shall terminate on the principal's restoration to capacity, as determined by written declarations similar to those originally establishing incapacity. This provision may comfort the principal, but more importantly it provides a mechanism for the restoration of power to the principal that third parties can rely on without the need for court involvement. See the form in §4.16.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.12 (1) Physician Statement

§4.12 (1) Physician Statement

Rather than requiring a court-issued opinion of incapacity, the principal may prefer that the triggering event be a physician-issued written statement that, in the physician's opinion, the person lacks capacity. For example, many instruments provide that incapacity is presumed on the written opinion of one or more licensed physicians that the principal is incapable of handling financial transactions. Alternatively, the instrument may require that the principal's treating physician give such an opinion.

There are several problems with this triggering mechanism. If there are multiple treating physicians, none may be willing to take the lead in issuing an opinion. If there is only one treating physician, he or she may be overly cautious. In addition, many physicians are reluctant to discuss a patient's conditions with anyone other than the patient because of concerns about violating the privacy rules adopted under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub L 104-191, 110 Stat 1936) (42 USC §§1320d—1320d-9) and California's Confidentiality of Medical Information Act (CMIA) (CC §§56-56.37).

For a full discussion of HIPAA and CMIA releases, see §§7.76-7.85, and for HIPAA Release Forms, see §§8.34-8.38.

NOTE: An individual's protected health information may be disclosed by an entity covered by HIPAA if the individual authorizes the disclosure in writing. 45 CFR §164.502(a). For sample attorney-drafted authorizations, see §§8.36-8.38. Covered entities, *e.g.,* doctors, may also disclose protected information when disclosure is necessary to prevent or lessen a serious or imminent threat to a person or the public, but disclosure must be made to a person the doctor reasonably believes may prevent or lessen the harm. 45 CFR §164.512(j). Thus, an agent nominated under a springing power of attorney might convince a physician to issue the triggering opinion if the nominated agent can persuade the physician that the principal will come to harm if the power of attorney is not activated. Finally, covered entities may disclose protected health information to the patient's "personal representative," which term includes agents under a power of attorney for health care. 45 CFR §164.502(a), (g). However, because most advance health care directives are springing, effective only on the principal's incapacity, the agent under the health care power has no authority to act until the principal is declared incapacitated, creating a paradoxical problem. One solution is to create an immediately effective health care power. On HIPAA and for authorization forms, see §§7.76-7.85 and 8.34-8.38.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.13 (2) Third Person or Incapacity Panel

§4.13 (2) Third Person or Incapacity Panel

To avoid the publicity and expense of a court proceeding and the difficulty of obtaining a physician's statement of opinion, the principal may bestow on one or more persons the power to determine conclusively that the triggering event —for example, incapacity—has occurred. Prob C §4129(a). The challenge with this mechanism is that although the principal may trust his or her agent to act *if* the principal is incapacitated, the principal may be offended by the idea of a nonphysician's determining *whether* the principal is incapacitated. As an alternative, the principal could create an incapacity panel that includes one or more persons who decide incapacity in consultation with a physician and possibly a medical specialist. See form in §4.15 concerning incapacity and restoration from incapacity as determined by an incapacity panel.

PRACTICE TIP: Enlisting the spouse or children to act in concert with a physician to form the incapacity panel is often the best solution.

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§4.14 b. Practical Problems

Springing powers based on a finding of incapacity can create some practical problems:

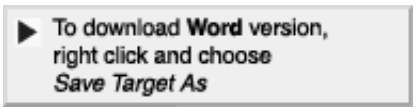
- If the principal's descent into incapacity is gradual, it may be unclear, even to a physician, at what point the principal no longer has capacity, as defined in the DPOA. The same problem arises in determining that the principal is no longer incapacitated.
- Third parties may be unwilling to accept a springing DPOA. Some title companies and financial institutions refuse to accept a springing DPOA no matter how carefully the instrument is drafted and the principal's incapacity is documented. In this situation, it may be necessary to obtain a court order. This happens more frequently with individuals who have dealt with the principal personally for a long period of time and as a result may not feel comfortable with family members' attempts to take control.
- A springing DPOA may not be recognized in a state where the principal unexpectedly acquires property or where the agent must do business on behalf of the principal. However, the trend is toward interstate recognition of all durable powers that are valid in another state. See Prob C §§4052-4053.

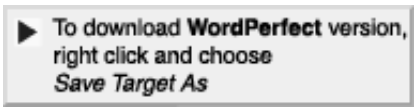
In spite of these practical problems, the springing power as a document used in planning for future incapacity can provide peace of mind and safety for the client. The effective date will differ with each client and must be discussed. A springing power should avoid the problem of dual control when the principal and agent are both engaging in financial transactions. See discussion in §4.8.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.15 c. Form: Springing DPOA

§4.15 c. Form: Springing DPOA





4.15-1 Springing DPOA

This power of attorney shall become effective on the Principal's incapacity. The Principal shall be conclusively presumed to lack capacity when any two of the following persons execute written declarations under penalty of perjury that in their opinion _ _[*e.g., the principal does not have sufficient understanding or ability to make or communicate decisions about the principal's property, financial, or business affairs*]**_ _, and when such certificates have been delivered to the Agent:**

(a) The Principal's treating physician;

(b) The Agent named in this document;

(c) _ _[*Name, address, and relationship to principal*]**_ _;**

(d) _ _[*Name, address, and relationship to principal*]**_ _.**

The effective date of incapacity shall be the date of receipt of the declarations by the Agent. The declarations, when received, shall be attached to the originals, and copies attached to all copies, of this power of attorney and shall be filed _ _[*and recorded*]**_ _ where the power of attorney was previously filed _ _**[*or recorded*]**_ _.**

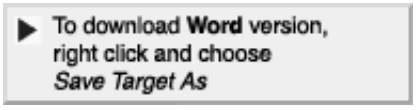
No licensed physician designated above who executes a declaration of the Principal's incapacity shall be subject to liability because of such execution. The Principal hereby waives any privilege that may apply to release of information included in such a declaration or to the execution of the declaration.

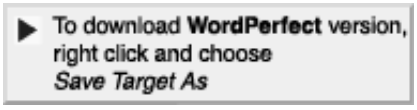
Comment: For a sample form of a complete general springing DPOA, see §5.70. For a form authorizing a physician to disclose otherwise privacy-protected health information, see §§8.36-8.38.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.16 d. Form: Termination of Springing DPOA on Principal's Restoration to Capacity

§4.16 d. Form: Termination of Springing DPOA on Principal's Restoration to Capacity





4.16-1 Termination of springing DPOA on principal's restoration to capacity

The Principal shall conclusively be presumed to have been restored to capacity when any two of the following persons execute written declarations under penalty of perjury that in their opinion the Principal has _ _[*e.g., the capacity to contract*]_ _, and when two such certificates have been delivered to the Agent:

(a) The Principal's treating physician;

(b) The Agent named in this document;

(c) _ _[*Name, address, and relationship to principal*]_ _;

(d) _ _[*Name, address, and relationship to principal*]_ _.

The effective date of restoration to capacity shall be the date of receipt of the declarations by the Agent. The declarations, when received, shall be attached to the original durable power of attorney. Copies of the declarations shall be attached to all copies of this durable power of attorney. The power of attorney and attached declarations shall be filed _ _[*and recorded*]_ _ where the power of attorney was previously filed _ _[*or recorded*]_ _.

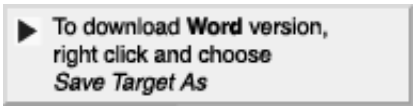
The Principal hereby waives any privilege which may apply to the execution of such a declaration by the Principal's physician.

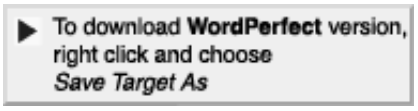
Alternatively, the Principal shall be considered to have been restored to capacity when a court of competent jurisdiction finds the Principal no longer incapacitated. The effective date of restoration to capacity in this case shall be the earlier of the date such order is delivered to the Agent or is recorded in the Principal's county of residence or the county where real property affected by the power of attorney is located.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.17 e. Form: Springing DPOA and Termination of Springing DPOA on Principal's Restoration to Capacity--Incapacity Panel

§4.17 e. Form: Springing DPOA and Termination of Springing DPOA on Principal's Restoration to Capacity—Incapacity Panel





4.17-1 Springing DPOA and termination of springing DPOA on principal's restoration to capacity—incapacity panel

This power of attorney shall become effective on the Principal's incapacity.

1. *Incapacity Determination by Incapacity Panel.* The Principal shall be conclusively presumed to be incapacitated for all purposes of this power of attorney whenever, in the written _ _[*unanimous/majority*]_ _ opinion of the Principal's Incapacity Panel, signed under penalty of perjury, the Principal cannot effectively care for _ _[*himself/herself*]_ _ or manage _ _[*his/her*]_ _ property or financial affairs because of age, illness, use of prescription medications, drugs, or other substances, or any other cause.

The effective date of incapacity shall be the date of receipt of the sworn written opinions by the Agent. When received, the sworn written opinions shall be attached to the original durable power of attorney, and copies of the sworn written opinions attached to all copies of this power of attorney.

The Principal's Incapacity Panel shall initially consist of the following individuals, who may decide in consultation with the Principal's primary care physician and an appropriate specialist recommended by the Principal's primary care physician and approved by the Principal's Incapacity Panel:

(a) _ _[*Name, address, and relationship to principal*]_ _**;**

(b) _ _[*Name, address, and relationship to principal*]_ _**;**

(c) _ _[*Name, address, and relationship to principal*]_ _**.**

Consultation with the Principal's doctor and any specialist means that the Principal's Incapacity Panel _ _[*shall/may*]_ _ discuss the Principal's situation with the Principal's doctors to the extent that the Panel members deem necessary in order to come to a conclusion regarding the Principal's ability to manage _ _[*his/her*]_ _ property and financial affairs. The Principal's doctor and any specialist are not members of the Principal's Incapacity Panel. The Principal voluntarily waives any physician-patient privilege or psychiatrist-patient privilege that may exist in _ _[*his/her*]_ _ favor, and the Principal authorizes physicians and psychiatrists to examine the Principal and disclose _ _[*his/her*]_ _ physical or mental condition to the Principal's Agent for purposes of this power of attorney.

2. *Termination of Springing DPOA on Principal's Restoration to Capacity; Determination by Incapacity Panel.* The Principal is conclusively presumed to be restored to capacity whenever the Principal's Incapacity Panel provides a written _ _[*unanimous/majority*]_ _ opinion under penalty of perjury that the Principal can effectively manage _ _[*his/her*]_ _ property and financial affairs.

The effective date of restoration to capacity shall be the date of receipt of the sworn written opinions by the Agent. The sworn written opinions, when received, shall be attached to the original durable power of attorney, and copies of the sworn written opinions attached to all copies of this power of attorney.

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§4.18 D. Statutory, Printed, and Attorney-Drafted DPOAs

There are three types of commonly used DPOAs:

- The California statutory form (see §§4.19, 4.27 for a discussion of the form, and §5.71 for a complete form);
- Preprinted form DPOAs (see §4.20), which must contain the warning found in Prob C §4128 (see §4.21); and
- Attorney-drafted forms, which are the primary focus of chapter 5.

For a discussion of practical issues concerning the use of the California statutory form and preprinted forms, see §4.22.

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§4.19 1. California Statutory Form DPOA

A DPOA is a Uniform Statutory Form Power of Attorney if the language substantially complies with the wording of the form set forth in Prob C §4401 and meets certain specific and other technical execution requirements. Prob C §4402. See §4.27 on the technical requirements for execution, and §5.71 for a complete form.

Statutory forms are becoming more readily recognized by many third parties and accordingly are preferred by some attorneys, particularly when the DPOA is supplementing a revocable trust. Some attorneys will prepare both a Uniform Statutory Form DPOA and an attorney-drafted DPOA, in the event that a third party is unwilling to accept the attorney-drafted DPOA. Statutory forms can be modified and special provisions added. For example, statutory forms do not grant the power to make a will or give the agent extensive estate planning authority, but as the Comment to Prob C §4401 notes,

> several of the powers, especially lines (G), (H), and (L) of the statutory form, may be useful in planning the disposition of an estate. An individually tailored power of attorney can be used if the principal wants to give the agent extensive estate planning authority, or additional estate planning powers can be granted to the agent by stating those additional powers in the space provided in the form for "Special Instructions."

A power of attorney not executed on the statutory form can incorporate by reference all powers authorized by the Uniform Statutory Form Power of Attorney Act (Prob C §§4400-4465). Prob C §4263(a)(1).

NOTE: Practitioners should be aware that many of the statutory form DPOAs were prepared without explanation to the client. As a consequence, many of these are currently in use without advice of counsel or appropriate modification.

NOTE: Effective January 1, 1985, a "statutory short form" of a DPOA first became available in California (former CC §2450). This form was repealed and, effective January 1, 1991, replaced with a new Uniform Statutory Form Power of Attorney (former CC §2475). Effective January 1, 1995, that form was repealed and replaced by the form that now appears in Prob C §4401. Probate Code §4401 was amended in 2005 to eliminate the disclosure of the principal's Social Security number on the form and to allow third parties to seek identification from the agent. Properly executed forms under these prior laws are still valid. See Prob C §§4054, 4409.

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§4.20 2. Preprinted DPOA Forms

Preprinted DPOA forms come from numerous sources. A practitioner should check to see if the form is valid under California law. Often, these forms are created and distributed as valid in all 50 states but may miss important legal requirements for execution in California. Under Prob C §4128(a), a preprinted DPOA form that is sold or otherwise distributed in California for use by a person who does not have the advice of legal counsel must contain, in not less than 10-point boldface type or a reasonable equivalent, an express warning statement. See §4.22 for a copy of the warning statement.

However, nothing in Prob C §4128(a) invalidates any transaction in which a third person relied in good faith on the authority created by the DPOA. Prob C §4128(b). Furthermore, the section does not apply to a statutory form DPOA. Prob C §4128(c).

The provisions of Prob C §4128 do not affect any legally sufficient power of attorney executed before January 1, 2001. Stats 2000, ch 999, §2. The provisions also do not affect a durable power of attorney under Prob C §4128 executed before March 1, 2001. After March 1, 2001, all printed forms under Prob C §4128 must conform to those provisions. Stats 2000, ch 999, §3. Note, however, that the bill does not address the effect of its provisions on a printed form DPOA executed on March 1, 2001.

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§4.21 3. Practical Problems in Using Statutory Form or Preprinted Forms

The biggest problem attorneys and their clients encounter with all types of DPOAs is getting third parties to honor the document. This problem is magnified for the Uniform Statutory DPOA form or preprinted form because there is often very little discussion of the form before execution. While these forms are relatively easy to execute, that has the unfortunate effect of making them the document of choice for scam artists to take over a person's finances. Moreover, these forms often do not include language that is required (or thought to be required) by some third parties. This has caused many institutions to reject the document as invalid or to create numerous barriers to the document's acceptance. The most problematic institutions are the following:

- **Title Companies.** Many title companies hesitate to accept the statutory or preprinted form for real property options or exchanges because the language in the form does not specifically authorize those types of transactions.

PRACTICE TIP: Some title companies hesitate to accept the statutory form because they are concerned that an agent may have added powers by fraudulently placing the principal's initials in front of the listed powers. In using the statutory form, it is recommended, though not required, that the principal cross out each power withheld in addition to initialing the line in front of each power granted.

- **Real Estate Brokers, Banks, Landlords, and Escrow Agents.** Many individuals or institutions will not honor a DPOA if it does not expressly authorize the real property transaction contemplated. The most common acts not specifically enumerated in the forms include leases, rentals, and sales. Even for real property transactions explicitly authorized by Prob C §4451, institutions generally may balk because the institutions are unaware of this provision, and an attorney must point out and explain the provision before the transaction will be authorized. This increases the delay and cost of the transaction or may even cause loss of the deal.

NOTE: Increasingly, banks and other financial institutions are either making it difficult for the agent under a DPOA to accomplish a specific task or refusing to honor the DPOA at all. Some institutions reject the DPOA and insist that they will honor only their own form DPOAs, or DPOAs that were executed within the last 6 months (or some other arbitrary period). In other words, these financial institutions are increasingly writing their own rules and attempting to rewrite the law. If a third party refuses to honor a properly executed DPOA, it could be liable for attorney fees or costs incurred to compel acceptance of the DPOA. On a petition to compel acceptance of a DPOA, see chap 11. This is another reason why some attorneys will prepare both attorney-drafted and statutory form DPOAs. On practical solutions to third party acceptance of DPOAs, see chap 10.

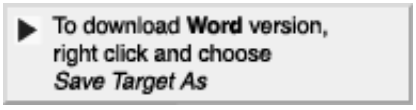
Because of the relative ease of execution, a principal may have simply downloaded the form from the Internet or completed one without competent legal advice. This may result in unintended tax consequences. For example, Prob C §4462, which defines the scope of the statutory form power regarding retirement plan transactions, may create an unintended power of appointment in the agent and does not specifically allow the agent to make transfers to other accounts. For discussion of suggested attorney-drafting solutions that can be added to the statutory form to address these problems, see §6.26.

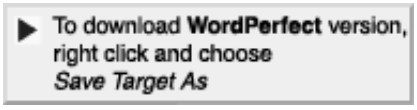
Acts of an agent involving real property transactions require a specific form of signature. See §4.32. Because the statutory form does not indicate how the agent should sign, the result could be improperly executed documents invalidating the desired transaction. The attorney, therefore, should inform the principal in writing—preferably on the form itself—of the correct form for the agent to use in signing documents for transactions on behalf of the principal.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.22 4. Form: Warning Statement Required for Preprinted Forms Sold or Distributed

§4.22 4. Form: Warning Statement Required for Preprinted Forms Sold or Distributed





4.22-1 Warning statement required for preprinted forms sold or distributed

NOTICE TO PERSON EXECUTING
DURABLE POWER OF ATTORNEY

A durable power of attorney is an important legal document. By signing the durable power of attorney, you are authorizing another person to act for you, the Principal. Before you sign this durable power of attorney, you should know these important facts:

Your Agent (attorney-in-fact) has no duty to act unless you and your Agent agree otherwise in writing.

This document gives your Agent the powers to manage, dispose of, sell, and convey your real and personal property, and to use your property as security if your Agent borrows money on your behalf. This document does not give your Agent the power to accept or receive any of your property, in trust or otherwise, as a gift, unless you specifically authorize the Agent to accept or receive a gift.

Your Agent will have the right to receive reasonable payment for services provided under this durable power of attorney unless you provide otherwise in this power of attorney.

The powers you give your Agent will continue to exist for your entire lifetime, unless you state that the durable power of attorney will last for a shorter period of time or unless you otherwise terminate the durable power of attorney. The powers you give your Agent in this durable power of attorney will continue to exist even if you can no longer make your own decisions respecting the management of your property.

You can amend or change this durable power of attorney only by executing a new durable power of attorney or by executing an amendment through the same formalities as an original. You have the right to revoke or terminate this durable power of attorney at any time, so long as you are competent.

This durable power of attorney must be dated and must be acknowledged before a notary public or signed by two witnesses. If it is signed by two witnesses, they must witness either (1) the signing of the power of attorney or (2) the Principal's signing or acknowledgment of the power of attorney or his or her signature. A durable power of attorney that may affect real property should be acknowledged before a notary public so that it may easily be recorded.

You should read this durable power of attorney carefully. When effective, this durable power of attorney will give your Agent the right to deal with property that you now have or might acquire in the future. The durable power of attorney is important to you. If you do not understand the durable power of attorney, or any provision of it, then you should obtain the assistance of an attorney or other qualified person.

NOTICE TO PERSON ACCEPTING THE APPOINTMENT AS ATTORNEY-IN-FACT

By acting or agreeing to act as the Agent (attorney-in-fact) under this power of attorney, you assume the fiduciary and other legal responsibilities of an Agent. These responsibilities include the following:

1. The legal duty to act solely in the interest of the Principal and to avoid conflicts of interest.

2. The legal duty to keep the Principal's property separate and distinct from any other property owned or controlled by you.

You may not transfer the Principal's property to yourself without full and adequate consideration or accept a gift of the Principal's property unless this power of attorney specifically authorizes you to transfer property to yourself or accept a gift of the Principal's property. If you transfer the Principal's property to yourself without specific authorization in the power of attorney, you may be prosecuted for fraud or embezzlement or both. If the Principal is 65 years of age or older at the time that the property is transferred to you without authority, you may also be prosecuted for elder abuse under Penal Code §368. In addition to criminal prosecution, you may also be sued in civil court.

I have read the foregoing notice and I understand the legal and fiduciary duties that I assume by acting or agreeing to act as the Agent (attorney-in-fact) under the terms of this power of attorney.

Date: _ _ _ _ _ _ __[*Signature of agent*]__

Comment: This warning is required for all preprinted DPOA forms that are executed without advice of an attorney. Prob C §4128. For further discussion, see §4.20.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/ III. REQUIREMENTS FOR EXECUTION/§4.23 A. Execution of DPOA Generally

III. REQUIREMENTS FOR EXECUTION

§4.23 A. Execution of DPOA Generally

A DPOA must be in writing. Prob C §§4022, 4124. A power of attorney is legally sufficient if it (Prob C §4121)

- contains the date of its execution;
- is signed either (1) by the principal or (2) in the principal's name by another adult in the principal's presence and at the principal's direction; and
- is either acknowledged before a notary public or signed by at least two witnesses who meet the requirements of Prob C §4122. See §4.24.

For special rules under Prob C §4402 that apply to a Uniform Statutory Form Power of Attorney, see §4.27.

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§4.24 1. Notary or Witness Requirements

To be valid, a DPOA may be either acknowledged before a notary public or signed by at least two witnesses. Prob C §4121. See §4.23 for other requirements. When the DPOA is notarized in California, the notary public must use the all-purpose form of certificate of acknowledgment found in CC §1189(a). Any certificate of acknowledgment taken in another place shall be sufficient in California if it is taken in accordance with the laws of the place where the acknowledgment is made. CC §1189(b).

NOTE: The California Legislature amended CC §1189, effective January 1, 2008, to alter the required wording of the certificate of acknowledgment form. For a copy of the correct form, see §5.69. One of the new requirements is that the notary must include the signer's thumbprint in the notary journal when acknowledging a power of attorney. Govt C §8206(a)(2)(G). Civil Code §1189(d), however, does provide a savings clause for acknowledgments provided before January 1, 1993, that conform to former CC §§1189, 1190, 1190a, 1190.1, 1191, and 1192.

If the power of attorney is signed by witnesses, the following requirements must be satisfied (Prob C §4122):

- The witnesses shall be adults.
- The attorney-in-fact may not act as a witness.
- Each witness signing the DPOA shall witness either the signing of the instrument by the principal or the principal's acknowledgment of the signature or the DPOA.

If a power of attorney is to be acknowledged by two witnesses, it is not necessary that the witnesses be present and view the principal's execution of the document. Nor must the principal show the DPOA to the witnesses; it is enough for the principal to tell the witnesses about the document. In addition, the witnesses may sign attestation clauses to the power of attorney in which they state that the principal told them about the DPOA shortly after the principal executed it, even if the attestation clauses are signed after the principal's death. *Estate of Rabinowitz* (2003) 114 CA4th 635, 7 CR3d 722.

WARNING: In *Estate of Saueressig* (2006) 38 C4th 1045, 44 CR3d 672, the court held that a will must be signed by the witnesses before the testator's death pursuant to Prob C §6110(c). While the holding in *Saueressig* concerned postdeath will attestation, it could have a major impact on whether the court will continue to apply the *Rabinowitz* decision to future cases involving powers of attorney that have not been signed by the witness until after the death of the principal, have been witnessed after the principal lacks capacity, or have not been witnessed until after action has been attempted by the attorney-in-fact that is the subject matter of a dispute before the court.

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§4.25 2. Recordable Format

The DPOA should be in recordable form. Although a California DPOA need not be in recordable form or be recorded to be valid, the instrument should be prepared for possible recording in the future. This means that the DPOA should be acknowledged by a notary public. The all-purpose form of the certificate of acknowledgment that the notary must use is found in CC §1189(a). See Note in §4.24 to make sure the correct acknowledgment form is used.

Any DPOA that may be used to acquire, encumber, sell, or otherwise deal with real property should be in recordable form and acknowledged by a notary public. For rules on recordation, see CC §§1169-1231. If a special DPOA is executed to deal with particular real property, the instrument should contain a legal description, the assessor's parcel number, and the commonly known address of the property.

A general DPOA for broad asset management should contain language authorizing the agent to attach a copy of the legal description of any real property affected by the DPOA.

PRACTICE TIP: Because of a variety of approaches around the state, practitioners should check local rules or contact experienced counsel to determine whether a DPOA to be filed with a county recorder should include only the real property by address or property description.

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§4.26 B. Execution Requirements if Power to Petition Is Limited

Occasionally, the principal knows that one family member or a class of family members may be troublesome or litigious. To eliminate the ability of such persons to petition the court for any of the purposes listed in Prob C §4541 (see §§11.47-11.53), the following requirements, set out in Prob C §4503(a), must be satisfied:

- The power of attorney must be executed by the principal at a time when the principal has the advice of a lawyer authorized to practice law in the state where the power of attorney is executed; and
- The principal's lawyer must sign a certificate, the substance of which can be found in §5.55.

See §5.56 for a sample form eliminating the ability of persons to petition. A DPOA may not limit the authority of the agent, the principal, the conservator of the person or of the estate of the principal, or the public guardian to petition under Prob C §§4500-4545. Prob C §4503(b). See §11.26.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.27 C. Requirements for Execution of California Uniform Statutory Form DPOA

§4.27 C. Requirements for Execution of California Uniform Statutory Form DPOA

A statutory form DPOA must be acknowledged, and the Probate Code requires that

- the wording of the form complies substantially with Prob C §4401 (Prob C §4402(a));
- the form is properly completed (Prob C §4402(b)); and
- the principal's signature is acknowledged (Prob C §4402(c)).

However, an executed "statutory form" durable power of attorney that does not meet all the technical requirements may be sufficient to appoint an attorney-in-fact when the document meets most of these requirements. *Torres v Torres* (2006) 135 CA4th 870, 37 CR3d 754. In *Torres,* the principal had indicated desired powers using an "X" rather than her initials. The court held that even though the form was not "properly completed" as required by Prob C §4402(b), it satisfied the general requirements for a power of attorney under Prob C §4121. It should be noted, however, that the court found no evidence of fraud or undue influence. A case involving such evidence would be distinguishable.

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§4.28 D. Execution of Joint DPOA

Generally, a joint DPOA is not recommended. In certain limited situations, however, a single document appointing a single agent to act on behalf of two principals may be advisable, such as when husband and wife own undivided interests in a piece of real property and the character of the property (whether community or separate) is unclear. A joint power will authorize conveyance of whatever interest either or both parties have in the property affected by the instrument. *Cousino v Western Shore Lumber Co.* (1918) 179 C 1, 3, 175 P 406, 407. Thus, a joint power will be effective to transfer the entire subject property despite its nature as separate property, community property, or both. For further discussion of the relationship of the DPOA to community property, see §§2.20-2.21.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.29 E. Review and Execution of New DPOA by Principal

§4.29 E. Review and Execution of New DPOA by Principal

Review and possible execution of a new DPOA should be considered when certain events occur, such as the principal's marriage, separation, or divorce; a death in the family; changes in health; relocation of family members; or the simple passage of time. At the time the power is drafted, the attorney should discuss with the client the desirability of periodic review and the kinds of circumstances giving rise to the need for immediate review.

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F. Execution of Documents by Agent

§4.30 1. Acceptance by Agent

The DPOA need be signed only by the principal because it is a unilateral grant of authority rather than a mutual contract. Some practitioners routinely have the agent sign the DPOA to establish the agent's acceptance of the authority granted by the principal and the concurrent fiduciary responsibilities as an agent. See §4.31 for form of acceptance by agent. See §§4.63-4.64 on agent's increased duty to act on express acceptance of duties as agent.

CAUTION: By having the agent sign the DPOA, the practitioner may be creating the impression that he or she represents the agent as well as the principal. This could have unintended ethical consequences. It is important that the practitioner explain (and have expressly understood) that he or she represents only the principal's interest. See chap 3 for further discussion of an attorney's ethical obligations.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.31 2. Form: Acceptance by Agent

§4.31 2. Form: Acceptance by Agent

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

4.31-1 Acceptance by agent

The undersigned acknowledges and accepts appointment as Agent and agrees to serve as Agent under this durable power of attorney.

Date: _ _ _ _ _ _ __[*Signature of agent*]__
_ _[*Typed name*]_ _

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§4.32 3. Signing as Agent

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

When transacting business as an agent under a DPOA, the agent should first sign the name of the principal and then his or her own name. For example:

_ _[*Principal's signed name*]_ _ **by** _ _[*agent's signed name*]_ _**,** _ _[*his/her*]_ _ **Attorney-in-Fact under power of attorney dated** _ _[*date*]_ _**.**

The inclusion of both the principal's name and the agent's name as agent is required by law for transactions affecting real estate. CC §1095. The agent should not use either the principal's name alone or the agent's name alone when the agent does business on the principal's behalf.

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IV. THE PRINCIPAL

A. Eligibility of Principal to Execute DPOA

§4.33 1. Individuals

Under the Probate Code, a natural person having the capacity to contract may execute a California power of attorney. Prob C §4120. See also CC §2296. All persons are capable of contracting except minors, persons of unsound mind, and persons deprived of civil rights. CC §1556.

If there is a question about the principal's capacity to contract and therefore execute a DPOA, the question of capacity may be assessed under the provisions of the Due Process in Competence Determinations Act (DPCDA) (Prob C §§810-813, 1801, 1881, 3201, 3204, 3208), discussed in §§3.28-3.40.

See also Capacity and Undue Influence: Assessing, Challenging, and Defending (Cal CEB Action Guide February 2008).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.34 2. Fiduciaries

§4.34 2. Fiduciaries

Individuals serving in a fiduciary capacity generally cannot delegate their fiduciary functions to an agent under a DPOA. The term "fiduciary" includes the following persons:

- A director of a corporation (see Corp C §309(a));
- An executor (or personal representative) (see Prob C §§9600-9606);
- A trustee (see Prob C §§16000-16249);
- A conservator (see Prob C §2102); and
- A custodian under the California Uniform Transfers to Minors Act (CUTMA) (see Prob C §§3900-3925).

However, under the Uniform Prudent Investor Act (UPIA) (Prob C §§16045-16054), trustees (but not other fiduciaries such as conservators, guardians, and probably agents under a durable power of attorney) may delegate investment and management functions to an agent, subject to certain safeguards. See Prob C §16052.

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§4.35 3. Agent's Delegation to Secondary Agents

Generally, it is not advisable for an agent under a DPOA to execute a DPOA from the agent (as principal) in favor of a secondary agent (or subagent). However, Prob C §4205(a) provides for an agent to revocably delegate authority to perform mechanical acts to one or more qualified persons. See also CC §2349. The delegating agent remains responsible to the principal for the exercise or nonexercise of the delegated authority. Prob C §4205(b); CC §2349. If a principal wishes not to give the agent the authority to appoint secondary agents, the original instrument should contain language specifically limiting the agent's authority in this regard. See Prob C §4101.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.36 B. Establishing Capacity of Principal at Execution of DPOA to Prevent Later Challenge

§4.36 B. Establishing Capacity of Principal at Execution of DPOA to Prevent Later Challenge

If a challenge to the DPOA is anticipated, or if the principal is unusually frail, the attorney should interview the principal in depth during preparation and execution of the DPOA. The attorney should carefully document each client conference in a memo to the file, detailing the principal's requests, comments, and responses to discussion of the DPOA. In addition, the memo should memorialize evidence of the principal's capacity as determined under the provisions of Prob C §811. The presence of a neutral third party or a videotape of the initial and final interview or both can also be helpful. With respect to videotaping the principal, the standard question arises about whether a videotape does more harm than good in establishing capacity. A videotape may either signal the attorney's concern about the principal's capacity—unless the attorney videotapes signings as a matter of course—or capture unintended eccentricities of the principal. If there is an expected challenge, or if the principal's capacity is at all in question, a physician's written opinion of capacity is perhaps the most effective aid to establishing capacity, if the principal's physician is willing to provide the certificate.

In the event of a challenge, whether the principal has the capacity to contract and therefore to execute a power of attorney will be measured under the provisions of the Due Process in Competence Determinations Act (DPCDA) (Prob C §§810-813, 1801, 1881, 3201, 3204, 3208), discussed in §§11.17-11.20.

See also Capacity and Undue Influence: Assessing, Challenging, and Defending (Cal CEB Action Guide February 2008).

PRACTICE TIP: The attorney should routinely perform some form of capacity screening even when there is no evidence of impairment. A simple form like the one reprinted at §3.39 can be used to quickly document evidence of capacity or incapacity under the standard set forth in Prob C §§811 and 812.

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V. THE AGENT

§4.37 A. Eligibility to Serve as Agent

To act as an agent, a person must have the capacity to contract. Prob C §4200. Civil Code §1556 states that "[a]ll persons are capable of contracting" except for minors (see Fam C §§6500-7143), persons of unsound mind (see CC §§38-41), and persons deprived of civil rights. A "person" includes not only an individual but also a corporation, any government or governmental subdivision or agency, business trust, estate trust, partnership, limited liability company, association, or other entity. Prob C §56. There is no legal requirement that an agent be a California resident.

For further discussion on capacity to contract, see California Law of Contracts, chap 2 (Cal CEB 2007).

PRACTICE TIP: Only persons and entities willing to act should be appointed. As a practical matter, the principal may be unable, for a variety of reasons, to find an institution that is willing to serve as an agent, *e.g.,* because of institutional financial considerations. On the selection of agents, see §§4.38-4.45.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.38 B. Selection of Agent

§4.38 B. Selection of Agent

The selection of the appropriate agent may be the principal's most important decision. In the selection of an agent, the principal should trust the proposed agent implicitly, the agent should possess common sense, and the agent must be willing and able to act in the principal's best interest. Also, the principal should be reminded of the important interrelationship between the proposed DPOA agent and the agent under a power of attorney for health care (PAHC). This is particularly important if they are different people. For a discussion of this interrelationship, see §§1.9, 4.38, 7.23.

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§4.39 1. Spouse or Domestic Partner

A spouse or registered domestic partner is frequently the client's first choice as candidate for agent. In general, a client's spouse or domestic partner best knows the client's preferences. The client's spouse or domestic partner may also make a good choice because of the interrelationship between California's DPOA and community property laws.

However, counsel should not overlook the possibility of future discord, dissolution, or termination of the marriage or domestic partnership. For these reasons, the attorney cannot routinely assume that spouses or domestic partners should execute mirror-image mutual DPOA instruments to manage their affairs. Among the factors to consider are the status of the relationship, who manages the assets, the prospective agent's health, and the relationship between the heirs of the principal's estate and the agent. For a discussion of revocation or termination of the DPOA upon annulment or dissolution of a marriage or domestic partnership, see §4.92. The DPOA can terminate by its own terms upon separation or dissolution of the marriage or domestic partnership if an appropriately worded clause is drafted in the DPOA. See §5.51.

It is always advisable to name alternate agents to serve in the event the first named agent is unable or unwilling to act. If DPOA agents are the same for both parties, and both parties are elderly, the nominated successor agents become even more important. See §§4.49-4.61 for a discussion of alternate agents.

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§4.40 2. Adult Children

The principal's adult children are another possible selection as agent. If there are multiple children, they may be either named jointly or named as agents to act successively. Alternates may be selected in order of age, residential proximity, skills, temperament, or other factors. In considering the nomination of the client's adult child, however, the attorney should be wary of the client's nomination of an irresponsible child. The attorney should review with the client the current status of the children's lives and consider the children's age, where they live, whether they have demonstrated sound financial judgment or have pressing financial obligations of their own, whether they have problems with alcohol or substance abuse, whether they take an interest in their parent's affairs, and how well they get along with each other.

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§4.41 3. Friend

A close personal friend or someone with a special relationship to the principal's family may also be a good choice for agent. For example, a godparent is a possible candidate for legal responsibility for children during the parents' temporary absence from the country. The attorney should review with the client the current status of the friend's life and consider the friend's age, location, financial judgment or pressing financial obligations, whether he or she may have problems with alcohol or substance abuse, whether the friend takes an interest in the affairs of the principal, and how well the friend gets along with members of the principal's family.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.42 4. Professional Adviser

§4.42 4. Professional Adviser

Clients frequently propose their advisers (*e.g.,* ministers, rabbis, accountants, brokers, attorneys, other professional advisers) as agents. Except in unusual cases, nominating such advisers as agents is generally not recommended. The role of those professionals should normally be limited to advising and counseling clients, and not assuming the full responsibility of managing their client's property. The professional adviser is often busy and may not have the time or personal commitment to pay sufficient attention to the details of potentially extensive duties. Furthermore, some professions and organizations have organizational rules that prohibit certain individuals from acting as a client's fiduciary or agent. A CPA, for example, may not act as a fiduciary for a client holding stock in a corporation for which the CPA's firm serves as the independent auditor. Therefore, it is generally not practical or recommended to nominate such professionals as agents for a DPOA over the principal's assets.

WARNING: Clients sometimes ask their attorneys to serve as their agents. The attorney should exercise extreme caution before agreeing to act as a DPOA agent. If the agency is limited in scope (*e.g.,* serving as an agent under a limited DPOA at the close of escrow for a property sale while the client is temporarily absent), this arrangement may be appropriate. However, acts of an agent under a DPOA are frequently specifically excluded from malpractice insurance coverage as acts taken in a fiduciary capacity. Before agreeing to serve as agent, even under a limited DPOA, attorneys should review their malpractice insurance policies to make sure they are covered. Moreover, even in the unlikely event that such acts are not specifically excluded, the insurance company may later take the position that such acts are not included within the definition of an attorney's practice of law.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.43 5. Corporate Agent

§4.43 5. Corporate Agent

While a bank, trust company, or other corporation is a "person" (Prob C §56) having the capacity to contract and is therefore qualified to act as an agent (Prob C §4200), many such entities are unwilling to do so. The tasks involved, such as monitoring the principal's health and capacity, may be incompatible with corporate staff resources and fee structures.

PRACTICE TIP: Counsel should never assume that a bank or other corporate entity will be willing to act as an agent. Some corporate entities' legal limitations or reluctance to serve may make it infeasible for them to do so. Therefore, the attorney should always consult with a bank officer before naming it as an agent.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.44 6. Private Professional Fiduciary

§4.44 6. Private Professional Fiduciary

Sometimes a client's situation makes it unrealistic to name a spouse, child, or corporate fiduciary as agent. For example, there may be no children or such strong sibling rivalry that naming a child is ill-advised, and no other relatives or friends are available to act. The client should be counseled on the availability of services by a private professional fiduciary. A carefully selected professional fiduciary can provide the financial skills of an institution without its restrictive policies and procedures. A professional fiduciary who is an individual is more likely to agree to act and can be more responsive to the personal needs of the principal than a corporate fiduciary.

NOTE: Effective July 1, 2008, the Professional Fiduciaries Act (Bus & P C §§6500-6597) creates a Professional Fiduciaries Bureau in the Department of Consumer Affairs and requires the bureau to license and regulate professional fiduciaries. Beginning January 1, 2009, any person who acts as a professional fiduciary, or holds himself or herself out to the public as a professional fiduciary, must be licensed as a professional fiduciary unless that person is licensed as an attorney or a certified public accountant or is enrolled as an agent to practice before the IRS. Bus & P C §6530.

NOTE: The Professional Fiduciary Association of California (PFAC) provides a list of private professionals who can serve as agents under a power of attorney in both Northern and Southern California. PFAC can be reached at One Capitol Mall, Suite 320, Sacramento, CA 95814, telephone: (916) 669-5330, http://www.pfac-pro.org/pages/index.htm. To determine if a private professional fiduciary is licensed, visit http://www.fiduciary.ca.gov/licensees.

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§4.45 7. Nonresident Agent

There is no legal requirement in California that an agent under a DPOA be a California resident. If the attorney's client nominates a non-California resident, counsel should consider whether the nonresident agent can adequately perform his or her duties from out of state. Counsel should further be mindful that if court enforcement of an agent's duties under a DPOA becomes necessary, venue and court enforcement will be affected by an agent's nonresident status. See Prob C §4523 and chap 11 on venue and court enforcement.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.46 8. Problem of Disqualified Persons as Agents

§4.46 8. Problem of Disqualified Persons as Agents

If the principal intends to authorize the agent to make gifts to persons disqualified under Prob C §21350, including a relative, friend, or the attorney whom the principal wants to name as the agent, the attorney should carefully review Prob C §§21350-21355 before including such a provision. Those sections invalidate gifts to a disqualified person.

"Disqualified persons" includes the following (Prob C §21350(a)):

(1) The person who drafted the instrument;

(2) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, the person who drafted the instrument;

NOTE: A person related by blood or marriage includes (a) the person's spouse or predeceased spouse, (b) relatives within the third degree of the person and of the person's spouse, and (c) the spouse of any person described in (2). Prob C §21350(b)(2).

(3) Any partner or shareholder of any law partnership or law corporation in which the person described in (1) has an ownership interest, and any employee of that law partnership or law corporation;

(4) Any person who has a fiduciary relationship with the transferor, including, but not limited to, a conservator or trustee, who transcribes the instrument or causes it to be transcribed;

NOTE: A care custodian who provides information to the attorney who drafts documents does not cause the instrument to be transcribed within the meaning of Prob C §21350. *Rice v Clark* (2002) 28 C4th 89, 120 CR2d 522.

(5) Any person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, a person who is described in (4);

(6) A care custodian of a dependent adult who is the transferor; and

(7) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, a person who is described in (6).

PRACTICE TIP: Unless drafted for a close family member, an attorney is well advised to avoid drafting documents that may benefit himself or herself. See §4.48 for times when it may be acceptable for an attorney to draft these type of documents.

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§4.47 a. Care Custodian as Disqualified Person

A care custodian includes any person who provides health or social services to elders or dependent adults (Welf & I C §15610.17). This includes an unrelated person who renders these services as a direct result of a preexisting personal friendship. *Bernard v Foley* (2006) 39 C4th 794, 47 CR3d 248. In *Bernard,* the court applied a presumptive bar to donative transfer to an individual who had been a preexisting friend and provided services to the elder. The court analyzed Prob C §21350(a) and concluded that the legislature did not intend to exclude caregivers who had preexisting personal relationships with the elder from the classes of individuals to whom the presumption of undue influence applies. The court further pointed out that Prob C §21351 notably does not include such an exemption for situations in which the transferor and transferee otherwise have a preexisting social relationship.

It is not required that an individual receive compensation to be a disqualified care custodian. *Bernard v Foley* (2006) 39 C4th 794, 47 CR3d 248; *Estate of Shinkle* (2002) 97 CA4th 990, 1006, 119 CR2d 42. The term "care custodian" includes both professional, compensated persons and nonprofessional, uncompensated persons who care for an elder or dependent adult. Welfare and Institutions Code §15610.17 does not impose a professional or occupational limitation on the definition. *Bernard v Foley, supra*. The administration of medications and application of topical ointments by a nonprofessional, uncompensated individual qualifies as providing health services within the meaning of Prob C §21350, and the individual providing these services falls into the category of a disqualified care custodian. *Bernard v Foley, supra.*

Social services includes the personal services provided by an in-home caregiver. *Estate of Odian* (2006) 145 CA4th 152, 51 CR3d 390. In *Odian,* the court noted that the specific services rendered by the paid live-in caregiver (which included cooking, cleaning, and driving the elder person to appointments, meetings, and shopping) amounted to "social services" within the meaning of Prob C §21350. It is apparent that household employees would likely fall within the definition of a disqualified care custodian particularly if the nature of their services is similar to those in either *Bernard* or *Odian*. Accordingly, the drafting attorney should review the situation to determine whether any of the statutory exceptions discussed in §4.48 (certificate of independent review, court approval of gift, gift under $3000, or instrument executed by nonresident Californian) applies. See Montgomery, *Alert: AB21 Requires Careful Advice to Testator Making Gifts to Household Employees,* 9 Cal Trusts & Estates Q 34 (Spring 2003).

A recipient's status as a care custodian does not end if the recipient or the donor leaves the care facility. *Shinkle,* 97 CA4th at 1006. The court applied prohibition to a former care ombudsman who left a skilled nursing facility in which an elder no longer resided. The court reasoned that allowing prohibition to end if the care custodian changes jobs in order to benefit from a donative transfer from someone with whom the care custodian previously had a fiduciary relationship would frustrate the purpose of Prob C §21350.

WARNING: *Conservatorship of McDowell* (2004) 125 CA4th 659, 23 CR3d 10, *Conservatorship of Davidson* (2003) 113 CA4th 1035, 6 CR3d 702, and *Estate of Shinkle, supra,* are disapproved by *Bernard v Foley, supra,* to the extent they interpreted Prob C §21350 as allowing an exception for a preexisting personal friendship.

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§4.48 b. Exceptions to Disqualified-Person Rule

An exception to the disqualification under Prob C §21350 is provided if the transferor is related by blood or marriage to, is a cohabitant with, or is a registered domestic partner of, the transferee or the person who drafted the instrument. Prob C §21351(a). For purposes of this exception, a person related by blood or marriage includes persons within the fifth degree of consanguinity or heirs of the transferor. Prob C §21351(g).

There are ways to overcome the prohibition of gifts to disqualified persons, such as by having the instrument reviewed by another, independent attorney who counsels the client about the nature and consequences of the intended transfer; attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence; and signs and delivers to the transferor an original and to the drafter a copy of a Certificate of Independent Review (Prob C §21351(b)). Another exception arises if a court order is obtained approving the transfer under Prob C §21351(c)-(e). Under Prob C §21351(d), a "care custodian" is not disqualified if the court determines, on clear and convincing evidence, but not solely on the basis of the testimony of the care custodian, that the transfer was not the product of fraud, menace, duress, or undue influence. Certain nonprofit organizations are also excepted under Prob C §21351(f). An exception also exists for transfers that do not exceed $3000, unless the total value of property in the estate of the transferor does not exceed the amount prescribed in Prob C §13100, *i.e.,* $100,000. Prob C §21351(h). Finally, there is an exception for a transfer made by an instrument executed by a nonresident of California who was not a resident when the instrument was executed and the instrument was not signed in California. Prob C §21351(i).

A contrary provision in the instrument attempting to negate the statutory disqualification rule itself will not suffice. Prob C §21354.

WARNING: In *Osornio v Weingarten* (2004) 124 CA4th 304, 21 CR3d 246, a will beneficiary was given standing to sue the testator's attorney for negligence, even though she was a nonclient. The court in *Osornio* concluded that an attorney who drafts an instrument to transfer property to a presumptively disqualified person under Prob C §21350(a) owes a duty of care (1) to advise the client that, absent steps taken under Prob C §21351(b), the subject transfer to the proposed transferee, if challenged, will have a significant likelihood of failing because of the presumptive disqualification, and (2) to recommend that the client seek independent counsel in an effort to obtain a Certificate of Independent Review provided under §21351(b).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.49 9. Multiple Agents

§4.49 9. Multiple Agents

Under the Probate Code, multiple agents may serve under the DPOA. Prob C §4202. Attorneys should advise their clients of the potential communication and record-keeping problems that may occur when multiple agents serve. Additionally, there is potential for disagreements between or among agents when multiple agents serve. If the client nominates multiple agents, the DPOA instrument should state clearly whether joint decisions are required or whether either agent can act alone.

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§4.50 a. Authority to Act

When multiple agents are nominated, and there is no statement in the DPOA that provides otherwise, the agents must act unanimously if they are all available. Prob C §4202. For a form creating a joint agency in which the agents must act jointly but either agent may act alone on the death or incapacity of the other, see §4.52. For a form creating a joint agency in which either agent may act alone, see §4.53.

When both agents must act together, logistical problems and conflicts can arise. For a form that provides for settling disputes between joint agents when both must act together, see §4.54. When either agent may act alone, there is a possibility that they will take conflicting actions or act in ignorance of the other's actions, and disputes can arise.

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§4.51 b. Disagreement, Incapacity, or Death

Whether agents may act alone or must act jointly, the attorney should discuss with the client what happens when one agent is unable to serve or when the agents cannot agree about a particular course of action. The DPOA may authorize the remaining agent to serve alone or may name a successor (or series of successors) to serve as co-agent with the remaining agent. Prob C §4203. If only one agent serves, the principal may designate a successor or successors to serve in the event the authority of the predecessor agent terminates. Prob C §4203.

If both agents are required to act jointly and one becomes incapacitated, the principal should immediately revoke the DPOA and execute a new instrument, unless there is a provision in the DPOA for the remaining agent to act alone or for a successor agent to replace the incapacitated agent. If the principal is already incapacitated and unable to act in this situation, the remaining agent must handle the issue of proving the incapacity of his or her co-agent.

PRACTICE TIP: Well-thought-out planning by the principal and attorney, providing a method for determining the incapacity of an agent and what is to happen on the agent's incapacity, may avoid potential problems if the principal becomes incapacitated before the agent. For a form to establish the incapacity of a joint agent, see §4.55. This form may be modified.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.52 c. Form: Joint Agency--Joint Action Required

§4.52 c. Form: Joint Agency—Joint Action Required

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4.52-1 Joint agency—joint action required

_ _[*Name*]_ _ (the Principal), presently a resident of _ _ _ _ _ _ County, California, appoints _ _[*name*]_ _, presently a resident of _ _ _ _ _ _ County, California, and _ _[*name*]_ _, presently a resident of _ _ _ _ _ _ County, California, as the Principal's true and lawful attorneys-in-fact (the Agents) for the Principal and in the Principal's name, place, and stead:

[*Insert powers*]

[*Add one of the following alternatives*]

[*Alternative 1: Signatures of both agents required*]

All acts of the Agents under this power of attorney shall require the approval and signature of both Agents acting jointly. However, on the death or incapacity of either Agent, the other Agent shall have the authority to act as sole Agent. Any third party may rely on a written resignation, certified death certificate, or other documentation, such as a signed affidavit by the Agent that states that the other Agent is not available or is incapable of acting, a certificate showing that a guardian or conservator has been appointed for the other Agent, a letter from a physician stating that the Agent is incapable of managing his or her own affairs, or a letter from the other Agent stating his or her unwillingness to act without further proof of the remaining Agent's sole authority.

[*Alternative 2: Agent's affidavit of agreement permitted*]

All acts of the Agents under this power of attorney shall require the joint consent of both Agents. The affidavit of either Agent shall be conclusive evidence to third parties that any act of such Agent has been authorized by joint agreement of both Agents.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.53 d. Form: Joint Agency--Either Agent Authorized to Act Alone

§4.53 d. Form: Joint Agency—Either Agent Authorized to Act Alone

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4.53-1 Joint agency—either agent authorized to act alone

_ _[*Name*]_ _ (the Principal), presently a resident of _ _ _ _ _ _ County, California, appoints _ _[*name*]_ _, presently a resident of _ _ _ _ _ _ County, California, and _ _[*name*]_ _, presently a resident of _ _ _ _ _ _ County, California, as the Principal's true and lawful attorneys-in-fact (the Agents) for the Principal and in the Principal's name, place, and stead:

[*Insert powers*]

The Agents may exercise alone or jointly the powers set forth above. Notwithstanding the power granted to either Agent to act alone, each Agent shall have no power to perform any act to which the other Agent objects. Any third person who receives a written objection signed by the other Agent before acting on the instructions of one Agent shall not be entitled to rely on such instructions. Third persons who do not receive a written objection from the other Agent shall, however, be entitled to rely on the instructions of only one Agent without further proof of the other Agent's joinder.

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§4.54 e. Form: Settlement of Disputes Between Joint Agents

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4.54-1 Settlement of disputes between joint agents

[*Add one of the following alternatives*]

[*Alternative 1: Adult children to resolve disputes*]

If disputes between the Agents arise that they are unable to resolve promptly, the Principal's adult children by majority vote shall determine the action to be taken on the disputed matter. Their jointly signed declaration of resolution of the dispute shall be presented to the Agents and shall be legally binding on the Agents concerning the disputed matter.

[*Alternative 2: Arbitration to resolve disputes*]

If the Agents cannot agree on a decision of action under the authority delegated to them in this instrument, that dispute shall be resolved by binding arbitration. The arbitration shall be referred to a single arbitrator. The following persons shall serve as arbitrator in the order named:

1. _ _ _ _ _ _

2. _ _ _ _ _ _

3. _ _ _ _ _ _

The arbitration shall begin within 10 days after written notice from an Agent to the arbitrator that a dispute has arisen that the Agents have been unable to resolve. The arbitration procedure shall be determined by the arbitrator, whose written decision shall be binding on the Agents and any other party concerned.

[*Alternative 3: Independent party to resolve disputes*]

If the Agents cannot agree on a decision of action under the authority delegated to them in this instrument, that dispute shall be resolved by _ _[*name*]_ _. _ _[*His/Her*]_ _ signed declaration of resolution of the dispute shall be presented to the Agents and shall be legally binding on the Agents concerning the disputed matter.

Comment: Under Alternative 2, unless the arbitrator is someone personally known to the parties who can be available on short notice, it may be unreasonable to expect that the arbitration can begin within 10 days after written notice as specified in the form. Under Alternative 3, a third party can be named to act as arbiter of disputes rather than relying on a majority of the children or the expense of a full arbitration. This provision generally makes sense in a modest estate when the children do not get along.

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§4.55 f. Form: Joint Agent Unable to Act

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4.55-1 Joint agent unable to act

An Agent serving jointly with another Agent may establish that the joint Agent is no longer able to serve as Agent, by signing an affidavit in good faith that states that the other Agent is not available or is incapable of acting. The affidavit may (but need not) be supported by a death certificate of the Agent; a certificate showing that a guardian or conservator has been appointed for the Agent; a letter from a physician stating that the Agent is incapable of managing his or her own affairs; a letter from the Agent stating his or her unwillingness to act; or a written resignation from the Agent. Third parties shall be entitled to rely on the original power of attorney instrument with any such document attached.

NOTE: A physician's letter stating that the agent is incapable of managing his or her own affairs will be difficult to obtain without a HIPAA-compliant written authorization signed by the agent. See §8.38 for a sample drafted attorney-in-fact authorization. See also §4.12, which discusses the difficulties associated with obtaining a physician's statement.

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§4.56 10. Different Agents for Different Tasks

One solution to multiple-agent problems is for the principal to authorize the multiple agents to perform different tasks rather than requiring them to work jointly on the same tasks. For example, the principal may nominate his or her spouse or domestic partner to sell, lease, and otherwise manage the principal's interest in the family home, and nominate an adult child or business associate to manage his or her business, liquid assets, and investments. When drafting these types of provisions, it is important to grant a residual general power to one of the agents to avoid a situation in which none of the agents is authorized to engage in a certain type of transaction that might be necessary.

NOTE: If inconsistent authority is granted to more than one agent, the authority granted last controls to the extent of the inconsistency. Prob C §4130.

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§4.57 11. Successor Agents

If the primary agent is unable to serve, successor agents may be nominated. Prob C §4203. A physician's certificate or other proof of the primary agent's incapacity (see generally §§4.15-4.16) may be required. In harmonious situations, the instrument can provide that a successor agent's written declaration that the primary agent is unable or unwilling to serve shall be sufficient proof of succession, and third parties may rely on such a declaration. In disputed situations, however, discord may arise between the primary and secondary agent about whether the authority should be transferred.

NOTE: See Prob C §4152(a)(7), which provides that an agent's authority is terminated during periods of an agent's incapacity. See also Prob C §4541(a), which allows a petition by specified persons (see §11.48) to determine whether a power of attorney is in effect or has terminated.

NOTE: Some practitioners recommend that every DPOA include a nomination of a successor agent, a method to appoint a successor agent, or the name of a third party to appoint a successor agent, in order to avoid a complex or cumbersome process for the appointment of the successor if the first named agent dies or becomes incapacitated. This is particularly important in the event the principal lacks capacity at the same time the agent lacks capacity to appoint a successor. Other attorneys, however, disfavor naming successor agents because, as a practical matter, any complex scheme for appointment of a successor may be too cumbersome, and broad estate planning powers that are given to the primary agent, such as a spouse or domestic partner, may not be appropriate for a secondary agent, such as a child. Other practitioners recommend that at the time a successor is needed, a competent principal should immediately execute a new DPOA and revoke the prior instrument. But this may not be possible if the principal lacks capacity at the time a successor is needed. Some attorneys further recommend having every named agent and successor agent sign an authorization to release his or her health information to avoid problems if the agent in turn becomes incapacitated. See form in §8.37.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.58 a. Agent May Appoint Successor Agent

§4.58 a. Agent May Appoint Successor Agent

The DPOA can authorize the agent to appoint his or her own successor, for example, from a class of persons named by the principal in the instrument. See §4.60 for form. Alternatively, the DPOA can authorize a third party to appoint a successor, again perhaps from a designated class.

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§4.59 b. Exculpating Clause

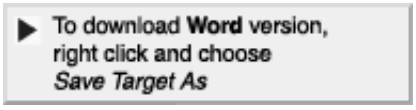
When successor agents are named, a clause exculpating the successor from liability for the previous agent's acts may be included in the DPOA. See §4.61 for form.

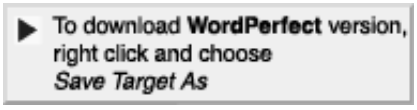
For a sample petition to remove the primary agent and to compel recognition of the successor agent, see form in §11.56.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.60 c. Form: Appointment of Successor Agent

§4.60 c. Form: Appointment of Successor Agent





4.60-1 Appointment of successor agent

[*Add one of the following alternatives*]

[*Alternative 1: Appointment of successor by original agent*]

If for any reason the Agent under this durable power of attorney is unwilling or unable to continue to serve, the Agent shall select a successor Agent from the class composed of the Principal's adult children. A dated and signed affidavit of the original Agent regarding the selection of the successor Agent shall be attached to the original instrument and shall be delivered to the successor Agent. A copy shall be delivered to the Principal. Third parties who deal with the successor Agent shall be entitled to rely on the original power of attorney instrument with the affidavit attached.

[*Alternative 2: Appointment of successor by principal*]

If for any reason the original Agent under this durable power of attorney is unwilling or unable to continue to serve, _ _[*name*]_ _, whose current address is _ _ _ _ _ _, shall instead serve as successor Agent. In such case, one of the following documents shall be attached to this _ _[*springing*]_ _ durable power of attorney: a resignation or declination to serve signed by the original Agent, or an affidavit by the successor Agent that states that the original Agent is not available or is incapable of acting. The affidavit may (but need not) be supported by a death certificate of the original Agent, a certificate showing that a guardian or conservator has been appointed for the original Agent, a letter from a physician stating that the original Agent is incapable of managing his or her own affairs, or a letter from the original Agent stating his or her unwillingness to act or delegating his power to the successor Agent. Third parties who deal with the successor Agent shall be entitled to rely on the original power of attorney instrument with any such document attached.

[*Alternative 3: Appointment of successor by third party*]

If no one is serving as my attorney-in-fact under this power of attorney, _ _[*name and address of third party*]_ _ may appoint a successor attorney-in-fact by written instrument acknowledged before a notary public and attached to this power of attorney.

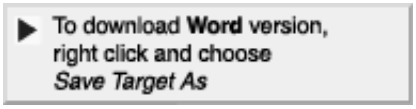
Comment: Regarding Alternative 1, counsel should be mindful that it would not be useful in the event the agent dies before selecting a successor.

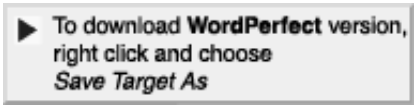
In Alternatives 1 and 2, if the DPOA includes a provision allowing the use of photocopies, the final sentence regarding reliance by third parties on the original document should be drafted to include reliance by third parties on photocopies.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.61 d. Form: Successor Agent's Liability for Prior Agent's Acts

§4.61 d. Form: Successor Agent's Liability for Prior Agent's Acts





4.61-1 Successor agent's liability for prior agent's acts

No successor Agent shall be liable for any act, omission, or default of a prior Agent. Unless requested in writing within _ _[*e.g., 60*]_ _ days after appointment by the Principal or an adult beneficiary of the Principal, no successor Agent shall have any duty to investigate or review any action of a prior Agent. The successor Agent may accept the prior Agent's accounting records showing assets on hand without further investigation and without incurring any liability to any person claiming or having an interest in the Principal's assets.

Comment: The second sentence of this form, regarding the successor's duty to investigate, is optional; counsel should be mindful that its inclusion may discourage the successor agent from consenting to act.

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C. Duty and Standard of Care; Authority to Act

§4.62 1. Educating and Protecting Agent

Agents often have concerns regarding their duties and liabilities under a DPOA. These concerns are usually about the nature and extent of the agent's duties, what actions must be taken on the principal's death, and whether the agent will be protected from the principal's heirs and successors for acts taken. The agent sometimes will express concern that he or she does not want to become responsible for the principal's actions or liabilities and does not want to put his or her own personal assets at risk by consenting to act.

In representing a DPOA agent, it is prudent for the attorney to meet with the agent to review the DPOA's agent's authority as outlined in the document. An attorney may also wish to prepare a handbook in plain English that summarizes the agent's duties and responsibilities. This can include a summary of the relevant fiduciary duties, common problems that can arise, events that terminate an agent's authority, and ministerial acts that need to be performed, *e.g.,* signing the agent's name in the correct form. In presenting this handbook, the attorney should make sure the agent is aware it is not a substitute for legal advice.

The principal's attorney represents the principal and should not also represent the agent, because of potential conflicts of interest. Both the principal and the agent should understand that the DPOA was drafted for the principal's benefit and that the attorney represents the principal and not the agent. In protecting the principal's interests, it is prudent for the attorney to answer the agent's initial questions, but any such discussion should always be done in the principal's presence. The attorney may also consider taking the extra precaution of having the agent sign an acknowledgment that the attorney represents only the principal and that the agent has been advised to seek independent legal counsel as needed. For a discussion of additional ethical responsibilities of the attorney, see chap 3.

PRACTICE TIP: The practitioner may wish to add to the DPOA, below the signature lines of the DPOA document, the admonition found in §4.66.

PRACTICE TIP: With a springing DPOA, particularly when the client is not elderly or ill, it is sometimes better to avoid any discussions with the agent, in order to best protect the principal's interests. The client may later change the designation of the agent, or the "springing" event may never occur.

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2. Agent's Authority

§4.63 a. Standard of Care

A designated agent under the Power of Attorney Law (Prob C §§4000-4545) is held to a prudent person's standard of care in dealing with the property of another. Prob C §4231(a). An agent's duty of care is also derived from general agency law. See CC §§2295-2357. For example, an agent is subject to a trustee's duties of loyalty, avoiding conflicts of interest, avoiding adverse interests, and segregating and identifying trust property. CC §2322(c).

See §4.67 for a list of agent's duties.

If an agent is not compensated, the agent is not liable for loss to the principal's property unless the loss arose from the agent's bad faith, intentional wrongdoing, or gross negligence. Prob C §4231(b). An agent with special skills or expertise or one who was designated as an agent on the basis of representations of special skills or expertise must observe the standard of care observed by others with similar skills or expertise. Prob C §4231(c). Agents who have special skills have the duty to apply the full extent of those skills. Prob C §4237.

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§4.64 b. Duty to Act

If the agent expressly agrees in writing to act for the principal, he or she has a duty to act pursuant to the terms of the agreement. The agreement is enforceable against the agent as a fiduciary, regardless of whether there is any contractual consideration in the agreement. Prob C §4230(c). If an agent does not agree in writing to act, he or she is generally free to act or not to act and may refuse to act in future transactions. Prob C §4230. This is true even if the principal becomes incapacitated, is missing, or is otherwise unable to act. See Prob C §§4230(a), 4266. Acting for the principal in one or more transactions does not obligate an agent to act for the principal in any subsequent transaction. However, if the agent commenced a transaction, he or she has a duty to complete the transaction. Prob C §4230(b).

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§4.65 c. Right to Resign

Even if the agent has agreed in writing to act for the principal, an agent may resign by giving notice to the principal (if the principal is competent), by giving notice to the principal's conservator (if one has been appointed), on the written agreement of a successor agent, or under a court order. Prob C §4207. The agent's right to resign may not be limited by the DPOA's terms. Prob C §4207(b).

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§4.66 3. Form: Warning to Agent

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4.66-1 Warning to agent

Warning to Agent: You have no duty to undertake actions under this power of attorney, but if you do undertake an action, you have the duties and obligations of a fiduciary regarding that action. You are advised to seek the counsel of a California attorney.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.67 4. Explicit Duties of Agent

§4.67 4. Explicit Duties of Agent

The Power of Attorney Law (Prob C §§4000-4545) covers an agent's basic duties under a DPOA and is drawn from existing agency law, from the Trust Law, and from relevant statutes in other states. See discussion in 24 Cal L Rev'n Comm'n Reports 345 (1994). The following are some of the explicit duties provided in the Power of Attorney Law:

- **A duty of care and skill.** An agent must observe the standard of care that a prudent person dealing with the property of another would observe. Prob C §§4231, 4237. See §4.63.
- **A duty of loyalty.** An agent has a duty of loyalty to the principal. If an agent undertakes a transaction, the agent must act solely in the principal's interest and avoid conflicts of interest. Prob C §4232. This duty of loyalty is not violated solely because the agent also benefits from acting for the principal; has conflicting interests in relation to the property, care, or affairs of the principal; or acts in an inconsistent manner regarding the respective interests of the principal and the agent. Prob C §4232(b). See also Prob C §16002; CC §2322.
- **A duty to keep the principal's property separated and identified.** An agent has a duty to keep the principal's property separated and identified. An agent holding the principal's property is in compliance with this duty to keep the principal's assets separate if the property is held in the principal's name or in the agent's name as attorney-in-fact for the principal. Prob C §4233(b).
- **A duty to keep the principal informed and follow the principal's instructions.** An agent has a duty to keep the principal informed and to follow the principal's instructions. Prob C §4234(a). See Prob C §16001; CC §2020.

NOTE: The agent may disobey the principal's instructions if the agent is granted court approval to do so. Prob C §4234(b). The agent may also disobey if it is clearly for the interest of the principal and there is no time to communicate with the principal. CC §2320. It can be argued that Prob C §4234 requires an agent, absent a court order, to follow the principal's instructions even if he or she is impaired. If an agent feels conflicted by directions given by an impaired principal and the agent's fiduciary duty to the principal, counsel should advise the agent to petition the court to review his or her actions and seek authority to disobey the principal's instructions under Prob C §4541(b). See chap 11, discussing court review. The agent may also consult with others if the principal is incapacitated. Prob C §4235.

- **A duty to keep records of transactions on behalf of the principal.** An agent has a duty to keep records of all transactions entered into on behalf of the principal. Prob C §4236. However, an agent has no duty to make an account of transactions except (1) at any time requested by the principal, (2) under an express provision in the power of attorney requiring the agent to account, (3) on request by the conservator of the estate of the principal while the principal is living, (4) on request by the principal's personal representative or successor in interest after the principal's death, or (5) pursuant to a court order. See Prob C §4541(c). For discussion and forms, see §§11.50, 11.57-11.58. This provision may not be limited in a power of attorney. Prob C §4236(d). There is no limit on the number of times that an accounting can be demanded.
- **A duty to use special skills.** An agent with special skills must fully apply those special skills. Prob C §4237. See §4.63.
- **A duty to deliver property to appropriate persons on termination of the agent's authority.** Upon termination of the agent's authority, an agent has a duty to deliver the principal's property to the appropriate parties. Prob C §4238.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.68 5. Specific Prohibitions for Agents

§4.68 5. Specific Prohibitions for Agents

There are both statutory and general agency laws that prohibit certain acts by an agent.

Under the Power of Attorney Law (Prob C §§4000-4545), an agent's actions are restricted in the following way:

- **An agent may not make, publish, declare, amend, or revoke the principal's will.** See Prob C §4265. Counsel should note that if the DPOA expressly provides, an agent may create, modify, or revoke a trust. Prob C §4264. Other acts listed in Prob C §4264 may be performed only if they are expressly authorized in the power of attorney. For a list of these acts, see §§4.72-4.75, and for a form and discussion, see §§6.12-6.13, 6.18.

Under general agency law, the following prohibitions apply:

- **The agent may not define the scope of the agency.** See CC §2322(b). See also CC §2019; Prob C §§4261-4262, 16000.
- **The agent may never perform an act that is a fraud on the principal.** An agent is prohibited from performing acts, known or suspected, that commit fraud on the principal. CC §2306. Fraudulent acts include, among other things, taking funds under false pretenses, converting the principal's funds or property to the agent's purposes, refusing to account for funds, withholding information from the principal, or secretly making a profit. *Kinert v Wright* (1947) 81 CA2d 919, 185 P2d 364.
- **The agent may not perform acts that require the principal's personal attention.** See CC §2304. Examples are assuming fiduciary responsibilities of the principal and painting a portrait that the principal agreed by contract to paint. In addition to artistic performance, an agent may not undertake matters of highly personal judgment such as entering into a marriage contract, adopting a child (see limited exception for absent military personnel discussed in §§5.46-5.47), or consenting to sterilization.
- **The agent may not perform acts that the principal is not allowed by law or contract to delegate.** This prohibition includes acting as a director of a corporation; as a trustee, executor, guardian, conservator, or custodian under the California Uniform Transfers to Minors Act (CUTMA) (Prob C §§3900-3925); or as a partner or an agent when a partnership or other agreement specifically forbids a delegation of authority. See Prob C §4261.
- **The agent may not perform acts that violate public policy.** An agent is prohibited from performing any act that would violate public policy if the principal had performed it. See, *e.g.,* CC §1667. Moreover, a principal is restricted from delegating acts that, for reasons of public policy, must be performed only by the principal. For example, the principal may not delegate his or her vote in a public election to an agent.
- **The agent may not accept a second agency that puts the agent in a position that is adverse to the interests of the principal of the first agency.** See Prob C §4232.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.69 6. Duty to Third Persons

§4.69 6. Duty to Third Persons

In general, an agent's primary duty and standard of care is to the principal. Under certain limited circumstances, an agent also has a duty to third parties in the following circumstances (CC §2343):

- When, with the agent's consent, credit is given to the agent personally in a transaction;
- When the agent enters into a written contract in the name of the principal without believing, in good faith, that the agent has authority to do so; or
- When the agent's acts are wrongful in nature.

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7. Practical Considerations Related to Agent's Standard of Conduct

§4.70 a. Limiting Agent's Liability

A principal may seek to protect the agent and limit the agent's liability. In this case, counsel should draft the DPOA to provide that the agent will not be liable to the principal or successor agents for acts he or she takes in good faith, except in cases of willful misconduct or gross negligence. Sometimes hindsight shows that an agent might have acted differently to conserve or enhance the principal's assets. Provisions limiting the agent's liability may help to discourage lawsuits by third parties for an alleged failure to act prudently. The DPOA may also be drafted to limit the power of certain persons to challenge the agent's actions. Prob C §4503. See §§5.54-5.56.

For a sample form limiting a successor agent's liability for actions taken by the previous agent, see §4.61.

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§4.71 b. Specific Provisions Clarifying Agent's Duties

The principal may choose to describe in greater detail the necessary standard of care in some or all of the following areas:

- **Record-keeping.** The agent is required to keep records of the financial transactions made on the principal's behalf. Prob C §4236(a). See §4.67. The DPOA may be drafted to protect the agent with language stating that the agent is required to keep only those financial records the agent considers advisable.

PRACTICE TIP: If the agent is authorized to prepare and file the principal's income tax returns, the DPOA should include language requiring the agent to keep adequate ledgers and records for purposes of income tax audits. The principal may want to describe the specific types of records to be kept. The drafting attorney should be sensitive to the needs or wishes expressed by the principal in the area of bookkeeping and record-keeping.

- **Accounting.** If the principal is required to provide annual financial statements to third parties regarding a business, he or she should reaffirm or describe this duty in the DPOA. Or the principal may want to check on the agent or satisfy other family members by requiring the agent to provide periodic reports to third parties. Conversely, if the principal does not want information provided to specific family members, this direction should be included in the DPOA. If the principal wants to require any specific reporting under certain circumstances, the attorney should describe the requirement fully in the instrument. See §5.57 for form requiring preparation of an annual financial report and §5.59 for form requiring periodic reports to third parties. See Prob C §4236(b) (not requiring accountings without request, except as required by power of attorney or court orders). For further discussion, see §4.67.

PRACTICE TIP: If the agent is required to provide accountings to third parties, one way to prevent the agent from undue harassment by interested parties is to include a clause in the DPOA providing for compensation for the agent's preparation of the accountings. A clause should also be included providing that the compensation for any unnecessary accountings will be charged against the requesting party. To prevent further harassment, it would be prudent to define in the DPOA what is considered an "unnecessary accounting." On agent compensation, see §§4.79-4.85.

NOTE: If a court accounting or report is required, either by the terms of the DPOA or by court order, the accounting or report is governed by Prob C §§1060-1064. See California Trust Administration, chap 7 (2d ed Cal CEB 2001). An account submitted on a court order resulting from a Prob C §4541(c) petition to compel the agent to submit the agent's account or report must be presented as required by Prob C §§1060-1064. On petition to compel accounting and for sample forms, see §§11.50, 11.57-11.58.

- **Guidelines for matters on which the principal feels strongly.** The principal may express to the attorney a concern that the agent could use the DPOA to "put me away in a rest home and sell my house." To allay such fears, the attorney can include strong language in the instrument, expressing the principal's desire to continue to remain in his or her own home as long as possible, authorizing the agent to commit the principal's resources to providing at-home care even if the cost depletes the principal's estate, and directing the agent not to sell the family home as long as the principal's continued residence remains possible. See §5.65 for a form expressing a principal's desire to remain at home. Alternatively, the principal can forbid a specific act, such as selling the family residence, farm, or business. See §5.66 for a form prohibiting sale of the home before all other assets are depleted and §5.67 for a form prohibiting sale of the principal's residence without prior court approval.

PRACTICE TIP: It is strongly recommended that any authority given to the agent in the DPOA concerning the principal's personal care be consistent with any authority given to an agent in the AHCD, so as not to create a conflict of authority between the agents.

PRACTICE TIP: An unequivocal prohibition against sale of an asset is not recommended, because time and

circumstances could render any such prohibition obsolete and not in the principal's best interest.

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8. Authorizing Specific Acts

§4.72 a. Acts That Must Be Expressly Authorized

Under Prob C §4264, an agent can perform any of the following acts *only* if they are expressly authorized in the power of attorney:

- Create, modify, or revoke a trust;
- Fund with the principal's property a trust not created by the principal or a person authorized to create a trust on behalf of the principal;
- Make or revoke a gift of the principal's property in trust or otherwise;
- Exercise the right to make a disclaimer on behalf of the principal (this does not limit the agent's authority to disclaim a detrimental transfer to the principal with the approval of the court);
- Create or change survivorship interests in the principal's property or in property in which the principal may have an interest;
- Designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death; and
- Make a loan to the agent.

For a discussion of using a DPOA for all forms of estate and tax planning, see chap 6. For forms and discussion authorizing the agent to take acts listed in Prob C §4264, see §§6.18, 6.21. For possible problems regarding an agent's making gifts to himself or herself, even if expressly authorized to do so in the power of attorney, see §§4.74 and 6.24-6.26. On self-dealing and commingling, see §§4.73-4.75 and 5.13-5.17.

PRACTICE TIP: For purposes of Medi-Cal planning, the agent may need the power to create, amend, or revoke a trust. If this power is granted, the principal may wish to specify that the principal's dispositive plan at death is not to be modified.

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§4.73 b. Acts That Should Be Expressly Authorized

The principal may want to specifically authorize the agent to do certain acts. For example, by making gifts within the annual gift tax exclusion, the principal's estate may gain certain tax advantages. This is one way to use the principal's funds in ways that help the principal's family and reduce the principal's taxable estate. Another way to do this is to use the principal's funds to pay tuition and medical expenses for family members directly to the providers of such services. IRC §2503(e). See §6.62 for form and §6.61 for discussion. The principal may be supporting an adult child with a disability or a child in college. If the principal wishes to continue such support, particularly after incapacity, the agent must have specific direction and authority in the DPOA instrument.

PRACTICE TIP: Many persons with disabilities receive governmental assistance that has stringent income and resource tests, such as Supplemental Security Income (SSI) or Medi-Cal. The drafter must be careful not to inadvertently commit the principal's resources to support such persons, thus disqualifying them from receiving needed public benefits. Probate Code §4235 provides a means for an agent to obtain information about the principal's affairs from third persons under certain limited circumstances. See §4.76. The principal may want to provide the agent with broader authority to obtain information. See §10.15 for form authorizing release of information and waiving privileges.

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§4.74 (1) Self-Dealing

If the principal's agent is his or her child, who is also managing the family business in which the principal holds an ownership interest, self-dealing may be absolutely necessary for the agent to manage the principal's property. Or the principal may want the family member/agent to have a right of first refusal to purchase the principal's vacation home at fair market value if it must be sold to pay the principal's medical bills after incapacity. Another example is a principal's wish to continue a long-standing practice of paying an accountant/agent to prepare the principal's income tax returns. Similarly, the agent may be a stockbroker whom the principal wants to receive commissions when the DPOA becomes effective.

PRACTICE TIP: To limit potential self-dealing abuses, a clause could be added to the DPOA requiring the agent to provide full and accurate accountings to specific individuals. See Prob C §4236(b)(2). Another option is the designation of a special attorney-in-fact whose only responsibility would be to make gifts pursuant to the principal's wishes. Using this approach could avoid any issues concerning self-dealing or the problem of transfers to disqualified persons under Prob C §21350 (see §§4.46-4.48) and could prevent the IRS from asserting that the agent possesses a general power of appointment over the principal's property. IRC §2041. On problems relating to the authority of an agent to make gifts to himself or herself and certain others, see §§5.13-5.17 and 6.24-6.26.

Probate Code §4232(b) protects the agent by providing that the agent's duty to act solely in the interest of the principal and to avoid conflicts of interest is not violated solely because the agent also benefits from acting for the principal; has conflicting interests in relation to the property, care, or affairs of the principal; or acts in an inconsistent manner regarding the respective interests of the principal and agent. Still, it might be helpful to define more explicitly in the power of attorney the agent's ability to perform acts that might otherwise be prohibited as self-dealing. See the form in §5.14, which authorizes general self-dealing, and the form in §5.15, which allows limited self-dealing.

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§4.75 (2) Commingling

The principal and agent, in particular in the case of an agent who is also the principal's spouse, may have commingled their funds for a long time, may hold joint accounts, and may own property together that requires joint management. Under these circumstances, the principal may wish to authorize commingling either in general or in a particular situation. For forms that authorize general and limited commingling of assets, see §§5.16-5.17.

Without such an express provision, Prob C §4233(a) requires the agent to keep the principal's property separate and distinct from other property in a manner adequate to identify the property clearly as belonging to the principal. If commingling is authorized, the DPOA should make it clear that the agent is still required to keep separate accounting records for the principal's assets.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.76 9. Authority to Obtain Confidential Information

§4.76 9. Authority to Obtain Confidential Information

If the principal becomes wholly or partially incapacitated, or if the principal's capacity to give instructions to and supervise the agent is in any doubt, the agent may consult with someone previously designated by the principal to obtain information or guidance necessary to carry out any purpose on behalf of the principal. The agent may also consult with, and obtain information needed to carry out the agent's duties from, the principal's spouse or domestic partner, physician, attorney, accountant, family member, or other person, business entity, or government agency on matters to be undertaken on the principal's behalf and affecting the principal's personal affairs, welfare, family, property, or business interests. A person from whom information is requested must disclose relevant information to the agent. Disclosure under this provision is not a waiver of any privilege that may apply to the information disclosed. Prob C §4235.

NOTE: Probate Code §4235 seems to imply that the agent can waive the principal's attorney-client privilege. This could place the attorney in a difficult position if, for example, the attorney drafts a DPOA for the client, a widower, in which the client names a son as the agent. In this hypothetical example, in the course of the related estate planning activity, the client confides the existence of an unacknowledged child to whom the client periodically sends money. The client's acknowledged children, including the named agent, do not know of this child. After the client suffers a stroke, the agent, in reviewing the client's financial records, discovers payments made to someone whose name he does not recognize. Unable to obtain this information elsewhere, he asks his father's lawyer to identify the payee. The lawyer refuses, and the agent then waives the attorney-client privilege on his father's behalf. Must the lawyer disclose the information about the unacknowledged child? There does not appear to be a concrete answer to this situation and it would likely depend on a case-by-case analysis dependent on the particular circumstances.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.77 10. Civil Actions for Financial Abuse of Elderly: Remedies Under Elder Abuse and Dependent Adult Civil Protection Act (EADACPA)

§4.77 10. Civil Actions for Financial Abuse of Elderly: Remedies Under Elder Abuse and Dependent Adult Civil Protection Act (EADACPA)

The Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) (Welf & I C §§15600-15660) includes provisions for recovery in civil actions for abuse of elderly or dependent adults. Damages are available under EADACPA for financial abuse. See Welf & I C §15657. The definition of "financial abuse" in Welf & I C §15610.30 is as follows:

> (a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:
> (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
> (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
> (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 1575 of the Civil Code.

An action seeking damages under the EADACPA should be considered when financial abuse has been committed by anyone in a fiduciary relationship to the elder under a DPOA. The remedies are broad and are spelled out in the Act. On proof by clear and convincing evidence that the defendant is liable for abuse as defined in Welf & I C §15610(f) and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, the enhanced remedies provided under the EADACPA include compensatory and punitive damages, postmortem recovery for pain and suffering, and attorney fees and costs. See Welf & I C §§15657-15657.3.

On the EADACPA, see California Elder Law Litigation: An Advocate's Guide, chaps 2, 6 (Cal CEB 2003). See also §11.9.

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§4.78 11. Reporting Financial Abuse of Elderly Under EADACPA

The Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) (Welf & I C §§15600-15660) also contains provisions for reporting financial abuse or suspected financial abuse of an elder or dependent adult. The individual required to report financial abuse or suspected financial abuse of an elder or dependent adult is called a mandated reporter. Welfare and Institutions Code §15630(a) defines "mandated reporter" as

> [a]ny person who has assumed full or intermittent responsibility for the care or custody of an elder or dependent adult, whether or not he or she receives compensation, including administrators, supervisors, and any licensed staff of a public or private facility that provides care or services for elder or dependent adults, or any elder or dependent adult care custodian, health practitioner, clergy member, or employee of a county adult protective services agency or a local law enforcement agency….

Additionally, Welf & I C §15630 outlines the duties of a mandated reporter, the method of reporting the abuse, and the punishment. A violation of the reporting requirement by a mandated reporter is a misdemeanor and is punishable by fine, jail time, or both. Welf & I C §15630(h).

The Financial Elder Abuse Reporting Act of 2005 (Welf & I C §§15630.1, 15633, 15634, 15640, 15655.5), which is operative from January 1, 2007, to January 1, 2013, inclusive, imposes certain reporting obligations on employees of banks, savings and loan associations, and credit unions to report suspected financial abuse. Welf & I C §15630.1. The Act requires reporting to be done immediately to either the local adult protective services agency or law enforcement agency and applies up to a $5000 civil penalty for failure to report. Welf & I C §15630.1. It also extends immunity from civil liability for making such reports to all mandated reporters of suspected financial abuse, including employees of financial institutions such as bank tellers. Welf & I C §15634.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.79 D. Bond

§4.79 D. Bond

A DPOA instrument rarely contains a provision requiring that the agent be bonded, because the principal usually trusts the agent and does not want the added expense of a bond. However, there is no prohibition against requiring a bond when warranted or requested by the principal. See §4.80 for a form requiring an agent to post bond. The attorney should also discuss with the client the issue of keeping the bond current. Unfortunately, requiring the agent to post a bond and keep it current introduces another element that an agent must prove to third parties to induce them to accept a DPOA.

PRACTICE TIP: A principal who feels the need to require that the agent be bonded should consider using an alternative to a DPOA or should select another agent who can be trusted to act without a bond. As a practical matter, the person named as agent may not be bondable, resulting in the agent's inability to act.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.80 E. Form: Requirement That Agent Post Bond

§4.80 E. Form: Requirement That Agent Post Bond

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4.80-1 Requirement that agent post bond

The Agent's authority under this instrument shall become effective only on posting a $_ _[*amount*]_ _ bond for faithful performance of the Agent's duties.

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§4.81 F. Reasonable Compensation

Under Prob C §4204, an agent is entitled to reasonable compensation for services rendered to the principal as agent and to reimbursement for reasonable expenses incurred as a result of acting as agent. In addition to this general provision, Prob C §4450(i) provides that, by executing a statutory form DPOA, the principal gives the agent the power to reimburse himself or herself for expenditures properly made by the agent in exercising the powers granted. In practice, an agent rarely receives compensation, probably because family members and close family friends are usually appointed. However, unless the document specifically prohibits compensation, the agent will have the authority to use the principal's assets for payment of reasonable compensation. See §§4.82-4.85 for forms specifying how compensation of the agent shall be determined.

NOTE: Receiving compensation increases the standard of care to which the agent will be held. Prob C §4231(b). See §4.63.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.82 1. Form: Compensation of Agent--Reasonable Compensation

§4.82 1. Form: Compensation of Agent—Reasonable Compensation

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4.82-1 Compensation of agent—reasonable compensation

The Agent shall be entitled to fair and reasonable compensation for services rendered as Agent under this instrument. In determining what constitutes "fair and reasonable" compensation, the following factors may be considered: (1) the time spent by the Agent in administering the Principal's affairs, (2) the Principal's net worth, (3) the nature of the assets subject to the Agent's control, and (4) the fees charged by professional fiduciaries acting in the same or similar capacities under similar circumstances. In addition to compensation for services, the Agent shall be entitled to reimbursement for all out-of-pocket expenses incurred in administering the Principal's affairs, including, without limitation, reasonable travel expenses, which include land and air transportation, lodging, and meals.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.83 2. Form: Compensation of Agent--Hourly Rate

§4.83 2. Form: Compensation of Agent—Hourly Rate

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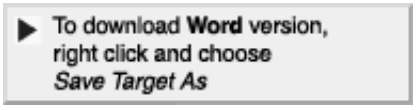
4.83-1 Compensation of agent—hourly rate

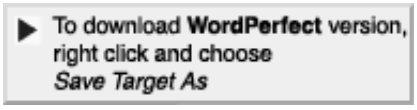
The Agent under this instrument is authorized to compensate _ _[*himself/herself*]**_ _ at the rate of $_ _**[*amount*]**_ _ per hour up to a total of $_ _**[*amount*]**_ _ per calendar year for services as Agent.**

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.84 3. Form: Compensation of Agent--Percentage of Net Assets

§4.84 3. Form: Compensation of Agent—Percentage of Net Assets





4.84-1 Compensation of agent—percentage of net assets

The Agent under this instrument is authorized to compensate _ _[*himself/herself*]**_ _ at the annual rate of _ _**[*specify*]**_ _ percent of the _ _**[*net assets/net income of assets*]**_ _ that are subject to the authority granted by this durable power of attorney.**

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.85 4. Form: Compensation of Agent--Joint Agents Serving

§4.85 4. Form: Compensation of Agent—Joint Agents Serving

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4.85-1 Compensation of agent—joint agents serving

Unless otherwise agreed between or among joint Agents, compensation for the joint Agents serving as my attorneys-in-fact shall be apportioned between or among the Agents according to the services rendered by them.

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VI. TERMINATION OF DPOA

A. Methods of Termination

§4.86 1. Revocation by Principal

Under the Power of Attorney Law (Prob C §§4000-4545), a power of attorney is revocable by the principal in accordance with the terms of the power of attorney or by a writing. Prob C §4151(a)(1)-(2). For sample forms, see §§4.87, 5.51. The ability of the principal to revoke a power of attorney by a writing is not subject to limitation in the power of attorney. Prob C §4151(a)(2).

The authority of the agent may be revoked either orally or in writing and is not subject to any limitation in a DPOA. Prob C §4153(a)(2). The principal may also inform an agent about when and under what circumstances the agent's authority is revoked, and this provision is also not subject to limitation in the power of attorney. Prob C §4153(a)(2).

NOTE: Probate Code §4153 is poorly worded; it starts out describing the situations under which the agent's authority is revoked by using "where." Then it switches within subsection (a)(2) to "when" and describes a second situation in which the authority is revoked. But the second situation is odd because it says the authority is revoked even when the principal only *mentions* under what circumstances it could be revoked. This seems to mean that in a situation in which the principal only talks about when the agent's authority can be revoked, it then becomes revoked in fact —a strange result in circumstances that would be very difficult to prove.

Many powers of attorney declare by their terms that the power will terminate on appointment of a conservator of the estate. See the termination language in the form in §5.69. See also §2.13 on the relationship between powers of attorney and conservatorships.

PRACTICE TIP: A power of attorney may contain provisions other than those granting powers to an agent, such as a provision nominating a conservator. Therefore, revocation of the entire instrument may have more far-reaching consequences than a revocation of the agent's authority under Prob C §4153. See Comment to Prob C §4151 (24 Cal L Rev'n Comm'n Reports 323, 390 (1994)).

PRACTICE TIP: The authors recommend that the instrument include a statement about the DPOA's revocability. This statement will avoid any misunderstanding on the part of the principal and call this issue to the principal's attention at the time the agency is created. When a subsequent DPOA is executed, it should contain a provision revoking all prior DPOAs. See sample form in §5.51 and form in §5.69, which includes a statement about revocability in the warnings at the beginning of the form. A DPOA is revocable as long as the principal has legal capacity. See CC §2356(a)(3). See discussion of capacity in §§3.30-3.40.

WARNING: If the DPOA contains a provision that all prior DPOAs executed by the principal are revoked, the provision should expressly *exclude* from revocation any powers of attorney for health care or any limited powers of attorney. If the principal intends that the agent continue to have access to the safe deposit box and accounts at the principal's financial institution, the exclusion provision should also expressly exclude any powers granting access to a safe deposit box and the powers specified by the principal on the financial institution's forms granting the right to write checks on, deposit funds to, and withdraw funds from accounts to which the principal is a signatory. See form in §5.69 for a copy of this type of revocation.

CAUTION: A third person or an agent who does not have notice of a revocation (Prob C §4151(b)) or of an event that terminates or revokes the authority of the agent (Prob C §§4152(b), 4153(b)) is protected from liability. Prob C §§4151(b), 4152(b), 4153(b).

When the principal plans to revoke a DPOA that grants authority over real property or when the principal believes that adverse consequences could follow from the continued agency, the attorney should recommend all of the following:

(1) a written, acknowledged revocation, (2) recordation of the revocation, and (3) delivery of the revocation with proof of delivery to the agent and to affected third parties such as banks and brokerages.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.87 2. Form: Revocation of DPOA

§4.87 2. Form: Revocation of DPOA

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4.87-1 Revocation of DPOA

RECORDING REQUESTED BY)
)
)
AND WHEN RECORDED)
MAIL TO)
_____)

Space above this line for recorder's use

NOTICE OF REVOCATION OF DURABLE POWER OF ATTORNEY

I, _ _[*name*]_ _, presently of _ _ _ _ _ _ County, California, give notice of revocation and hereby revoke that power of attorney dated _ _[*date*]_ _, which appointed _ _[*name*]_ _ as my Agent and empowered such Agent to act as my attorney-in-fact. The above power of attorney was recorded on _ _[*date*]_ _, in Book _ _ _ _ _ _ at page _ _ _ of the Official Records of _ _ _ _ _ _ County, California.

All power and authority granted under the above power of attorney is hereby revoked and withdrawn, effective immediately.

Date: _ _ _ _ _ _ __[*Signature of principal*]__

State of California)
)
County of _ _[*name of county*]_ _)
)
)
_____)

On _ _[*date*]_ _ before me, _ _[*name and title of officer*]_ _, personally appeared _ _[*name(s)*]_ _, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal:

__[*Signature of officer*]__ [*Officer's seal*]

Comment: If the client has previously executed a DPOA, the new DPOA should include a revocation clause. See form in §5.51.

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§4.88 3. Expiration of Agent's Term or Extinction of Subject of Instrument

The DPOA can provide for its own termination, such as on the expiration of a term certain, on the accomplishment of a task, or on the occurrence of an event or set of events. See Prob C §§4150-4152(a)(2). Unless the power of attorney states a time of termination, the agent's authority is exercisable no matter how much time has elapsed since its execution. Prob C §4127. Any attorney whose advice is sought on termination of a DPOA should begin by reviewing the instrument to see if such termination is covered.

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§4.89 4. Agent's Death

An agent's authority under a DPOA is terminated by the death of the agent. Prob C §4152(a)(9). However, the agent's personal representative may enforce contracts entered into by the agent before his or her death, such as a sale of real property when escrow has not closed before the agent's death. Further, if there is a successor agent, the agency does not terminate, because the successor agent assumes responsibility under the DPOA.

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§4.90 5. Agent's Resignation

The agent serves at will and can resign. See Prob C §§4152, 4207. See §4.65. If the principal is competent, the agent wishing to resign should submit a written resignation to the principal and to all interested third parties. Any property under the agent's control should be returned immediately to the principal, the principal's successors in interest, or the successor agent if the instrument so provides.

PRACTICE TIP: An agent's resignation is rarely needed because the agent has no duty to act unless the agent agreed in writing to act. However, the successor agent may need to provide the resignation to third parties in order to establish his or her authority under the DPOA. See §4.64.

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§4.91 6. Agent's Incapacity to Act

An agent's incapacity or inability to act as agent terminates the authority of the agent during the period of the incapacity. Prob C §4152(a)(7). For a form appointing a successor agent on the prior agent's disability, resignation, or death, see §4.60.

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§4.92 7. Dissolution or Annulment; Effect of Legal Separation or Termination of Domestic Partnership

Probate Code §4154(a) provides that if, after executing a power of attorney, the principal's marriage to the agent is dissolved or annulled, the principal's designation of the former spouse as agent is revoked. If the revocation is made solely under Prob C §4154(a), the agent's authority is revived by the principal's remarriage to the agent. Prob C §4154(b). Section 4154 is subject to limitation by the power of attorney. Comment to §4154 (24 Cal L Rev'n Comm'n Reports 323, 393 (1994)). For special rules applicable to a federal "absentee" as defined in Prob C §1403, see Prob C §3722 (authority of agent spouse is revoked if the spouse who is the agent commences a proceeding for dissolution, annulment, or legal separation or if a legal separation is ordered).

There is no reference in Prob C §4154 to revocation based on legal separation of the spouses or to revocation of the designation of a domestic partner as agent if the registered domestic partnership is terminated or dissolved. However, Fam C §297.5 affords the same rights and duties under the law to registered domestic partners as are granted to and imposed on spouses. See also Prob C §6122.1 (provision in will naming domestic partner as agent revoked after termination of domestic partnership).

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§4.93 8. Principal's Incapacity to Contract Terminates Nondurable Power of Attorney

A power of attorney that is not by its terms durable terminates on the principal's incapacity. CC §2356(a)(3). (On the language required to create a DPOA that survives the principal's incapacity, see §4.2.) See also Prob C §4304(b), which provides:

> The incapacity of a principal who has previously executed a nondurable power of attorney does not revoke or terminate the agency as to the attorney-in-fact or a third person who, without actual knowledge of the incapacity of the principal, acts in good faith under the power of attorney. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

NOTE: The attorney rarely encounters the issue of termination because of the principal's incapacity inasmuch as third parties are unwilling to accept old powers of attorney executed before 1982, and most powers of attorney executed since January 1, 1982, are durable.

CAUTION: The attorney should always review the instrument when an agent intends to act on behalf of an incapacitated principal. The attorney should not assume that a power of attorney is durable and still in effect.

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§4.94 9. Restoration to Capacity and the Springing DPOA

The springing power of attorney comes into effect only on the occurrence of a stated event, which is usually the incapacity of the principal. By extension, the springing DPOA should be terminated on the principal's restoration to capacity. The instrument should provide a mechanism for proving restoration to capacity, presumably one comparable to the mechanism for proving incapacity, such as a written declaration under penalty of perjury or a physician's certificate. See §5.69 for form terminating the agent's authority on the principal's restoration to capacity, see §§4.16-4.17.

A principal who has not included in the DPOA a provision similar to that in §4.16 and who has been restored to capacity should immediately take steps to revoke the power of attorney and serve notice of revocation on the agent and on affected third parties. On revocation, see §§4.86-4.87.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.95 10. Principal's Death

§4.95 10. Principal's Death

The death of the principal terminates the agent's authority under a power of attorney, except for specific authority permitted by statute to be exercised after the principal's death. Prob C §4152(a)(4). An agent without notice of the principal's death is protected from liability. Prob C §4152(b).

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§4.96 11. Revocation by Court Order

A DPOA may be revoked by a court order. See chap 11 for court procedures for review and revocation of powers of attorney under Prob C §4541. In addition to the procedures under §4541, the agent's authority under a DPOA may be revoked when the principal's legal representative, with court approval as provided in Prob C §4206, informs the agent in writing that the agent's authority is revoked. Prob C §4153(a)(3). This includes the principal's right to establish when and under what circumstances the agent's authority is revoked. Prob C §4153(a)(3). However, see the Note in §4.86 concerning how this poorly worded statute may result in revocation of the agent's authority by the principal's oral statement. Section 4206 allows a conservator of the principal's estate to revoke or amend the principal's DPOA in accord with a court order.

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B. Practical Problems Related to Termination of DPOA

§4.97 1. Capacity to Revoke

An agent's authority under a DPOA is not affected by incapacity of the principal. By definition, an incapacitated principal has no authority to revoke the DPOA. But, practically speaking, a problem arises when the principal attempts to revoke the agent's authority and the agent believes the principal to be incapacitated. The agent is a fiduciary and has a duty to act in the principal's best interest, so the agent may not simply acquiesce if the agent believes that the principal would not terminate the DPOA if he or she still had capacity. But the agent must also serve the principal and follow the principal's orders. The solution to the agent's problem turns on the language in the DPOA and the procedure the instrument defines for determining incapacity. As a last resort, the agent may petition the court of appropriate jurisdiction for instructions or for appointment of a conservator. On court enforcement provisions, see chap 11.

A principal who seeks to revoke a DPOA and finds the revocation not accepted by the agent, who claims that the principal is incapacitated, will need to seek legal counsel. The principal's attorney should try to assess the principal's legal capacity. If the attorney believes that the principal has the requisite capacity to contract, he or she will want to help the principal take immediate steps to revoke the DPOA. The principal should also demand an immediate accounting (see Prob C §4236) from the agent and return of all the principal's assets (see Prob C §4238). The attorney should consider the possibility of the agent's abuse or dishonesty, which could make the agent unwilling to relinquish authority and return records to the principal. A court proceeding against the agent may then be appropriate. See chap 11.

For assistance in assessing the principal's capacity, see §§3.29-3.40 and Capacity and Undue Influence: Assessing, Challenging, and Defending (Cal CEB Action Guide February 2008).

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§4.98 2. Loss of Instrument

The loss of the instrument has been held to not terminate an agent's authority under a California DPOA. If the instrument is lost, the court will permit secondary evidence, such as the testimony of witnesses, to establish the content of the instrument and the nature and the scope of the power. *Posten v Rassette* (1855) 5 C 467, 469; *Culver v Newhart* (1912) 18 CA 614, 624, 123 P 975, 980. See generally *Stenseth v Wells Fargo Bank* (1995) 41 CA4th 457, 463, 48 CR2d 192. For practical purposes, even if a court establishes that there was a DPOA, such a determination is relatively worthless for future acts because it will be extremely difficult to get a third party to accept the agent's authority. The primary purpose of such a court proceeding is to determine the validity of the agent's authority for past acts.

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§4.99 3. Duties of Terminated Agent

An agent whose authority is terminated by whatever method and for whatever reason should immediately render an accounting and must promptly deliver possession or control of the principal's property to the principal or to such person or place as the principal directs. Prob C §4238(a)(1). If the principal is incapacitated, delivery must be made (1) to a qualified successor agent; (2) regarding any community property, to the principal's spouse or registered domestic partner (Fam C §297.5); and (3) to the principal's conservator of the estate, if any. Prob C §4238(a)(2). If the principal is deceased, delivery must be made to the principal's personal representative or successors in interest. Prob C §4238(a)(3).

The successor of a deceased principal may be tempted to ask the agent to remove funds before the death becomes widely known, in order to have funds available for immediate postdeath needs. The attorney should point out to the agent that this is not only illegal but risky. If the agent were requested to do so by the principal's successor in interest, the successor could later change his or her mind, forget, become incapacitated, die, or not be the actual successor in interest. The attorney should inform the agent that a successor's posttermination inconvenience is never worth the risk involved in the agent's attempting to reach funds for any reason after the agent knows that the DPOA has been terminated.

The agent must also deliver copies of any records regarding transactions undertaken on the principal's behalf that are requested by the person to whom possession or control of the property is delivered. Prob C §4238(b). The agent has the powers reasonably necessary under the circumstances to perform the duties provided in Prob C §4238. Prob C §4238(d).

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§4.100 4. Protection of Agent Who Acts in Good Faith Reliance on Terminated DPOA

Probate Code §§4151(b), 4152(b), 4153(b), 4155(b), and 4305 attempt both to protect the agent who acts under a terminated DPOA without knowledge of the termination and to bind the principal and the principal's successors. But what does the agent do when faced with having sold the principal's property not knowing that the principal died the previous day? Probate Code §4305 provides as follows for an affidavit by the agent:

> (a) As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney-in-fact under a power of attorney, whether durable or nondurable, 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 is conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for record is likewise recordable.
>
> (b) This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity.

The affidavit should be recorded in order to authenticate a deed when real property was sold without knowledge of the principal's death. The affidavit can be used for the purpose of obtaining action and acceptance by third parties. For a sample form, see §10.12.

NOTE: An agent who takes action under a DPOA with knowledge of the principal's death does so at great risk. A close reading of Prob C §4304(a) indicates that an action taken by an agent who has actual knowledge of the principal's death will not bind the successors in interest and thus can be voided by them. The agent's lack of knowledge of the law is apparently not a defense. A warning can be included on the front of the power of attorney, advising the agent that his or her legal authority under the document terminates on the principal's death. This may help reduce the incidence of actions by agents after the principal's death because they are simply unaware of the law.

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VII. USE OF DPOA

§4.101 A. Availability of Documents

A DPOA that is not delivered to the agent or to which the agent does not have access when needed is of little benefit. The attorney should advise the principal to keep a record of where the original DPOA will be kept and who will have copies. The principal does not have to give an agent a copy of the document, in particular under a springing power of attorney; however, the agent should be informed of where the DPOA will be kept and the triggering events that necessitate action by the agent.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.102 B. Use of Photocopies

§4.102 B. Use of Photocopies

A copy of a durable power of attorney certified in accordance with Prob C §4307 has the same force and effect as the original. Under Prob C §4307(b), such a copy may be certified by any of the following:

- An attorney authorized to practice law in California;
- A notary public in California; or
- An official of the state or of a political subdivision who is authorized to make certifications.

The certification must state that the certifying person has examined the original power of attorney and the copy and that the copy is a true and correct copy of the original power of attorney. Prob C §4307(c). See Govt C §8205(a)(2), (4) (specifying that notary's duties include certification of powers of attorney). See §§5.52-5.53 for a sample form for certification.

The DPOA instrument can contain specific language authorizing the acceptance of unverified photocopies instead of an original. See §4.103 for sample form. Despite such language, photocopies will be rejected by the county recorder's office if the principal or agent wishes to record the document. The agent should have access to and be able to provide third parties with the original DPOA.

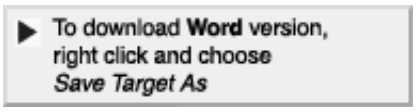
If photocopies are specifically declared to be sufficient and the DPOA was recorded, a revocation of the DPOA should also be recorded because destruction of the original DPOA will not be sufficient. Although recording a revocation is a good idea, it may be preferable that the instrument remain silent about photocopies.

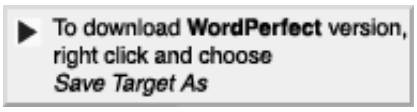
NOTE: A power of attorney for health care is different because it is designed to be used in emergencies. Agents and third parties have routinely relied on a specific provision in a health care power of attorney authorizing use of photocopies. A copy of a power of attorney for health care automatically has the same effect as the original (Prob C §4660), and there is no provision that the copy must be certified. There should be relatively few emergencies, however, for an agent under a DPOA.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/4 Durable Powers of Attorney for Financial Management: The Fundamentals/§4.103 C. Form: Authorization to Use Photocopies

§4.103 C. Form: Authorization to Use Photocopies





4.103-1 Authorization to use photocopies

Only one original of this instrument has been executed. The Agent is authorized to make photocopies of this instrument and any attached documents (such as certificates of incapacity) as frequently and in such quantities as the Agent deems appropriate. Each photocopy shall have the same force and effect as the original, and all parties dealing with the Agent are authorized to rely fully on any such photocopy showing the Principal's signature thereon.

Comment: See discussion in §4.102 on use of this form.

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§4.104 D. Timely Recording of DPOA

An immediately effective DPOA that affects real property should be recorded soon after execution because third parties, usually title companies, are reluctant to accept a stale DPOA. Recording a DPOA serves as notice of the agent's authority. This authority is then protected until a revocation is also recorded. See CC §1216. For a form for recording a revocation, see §4.87. Many third parties are more willing to accept an older recorded DPOA than an older unrecorded DPOA. An agent who anticipates future sale of a principal's residence if the principal becomes incapacitated and must be moved to a facility, or to the agent's home, should consider recording the DPOA immediately after execution even if not expecting to use it for a number of years.

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§4.105 E. Multistate Considerations

A DPOA is governed by the laws of the state of its execution. An agent who attempts to use a California DPOA to deal with property in another state or to do business in another state may encounter both legal and practical problems.

In theory, a valid DPOA executed in California should be accepted in other jurisdictions under the well-established legal principle that the form of jurisdictional acts is governed by the law of the place of execution. Many states now have laws similar to Prob C §4053, which provides that a DPOA validly executed in another state or jurisdiction is valid and enforceable in California regardless of whether the principal is a domiciliary of California. The Power of Attorney Law (Prob C §§4000-4545) also sets out conditions under which a DPOA will be governed by the Power of Attorney Law regarding acts and transactions of the agent in or outside California. Prob C §4052.

In practice, however, a DPOA may not be accepted in another jurisdiction, particularly if its form would not be valid if executed in that jurisdiction. Even if the power of attorney is accepted as a valid document in another jurisdiction, local laws governing the general agency relationship cannot be ignored. The Restatement (Second) of Conflict of Laws §291 (1971) provides that the rights and duties of principal and agent toward each other are determined by the local law of the state that has the most significant relationship to the parties and to the transaction. Under this principle, even though an agent could vote stock in another state where the power of attorney was executed, before 1985 an agent could not vote the stock of a California corporation, because California had the greatest interest in the transaction and had determined that as a matter of policy an agent under a power of attorney should not be able to vote such stock. Corporations Code §702(e) currently allows an agent to vote such shares in person or by proxy. But see Corp C §705 on expiration of proxies.

In view of potential conflicts of laws, an attorney should avoid drafting a DPOA for use in another state. Further, if a client informs the attorney that he or she intends to move to another state, the attorney should advise the client to have an attorney in the new state of residence review the documents to make sure that it will be valid in that state. If the attorney is going to draft a DPOA under another state's law—which may be considered the unauthorized practice of law in a state in which the attorney is not licensed—the attorney should take great care in drafting to ensure that the instrument complies with the current Power of Attorney Law for the other state.

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5

Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms

W. Vito Lanuti
Susan A. Katzen

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§5.1 I. INTRODUCTION

A durable power of attorney for financial management (DPOA) can be tailored to a myriad of different uses and circumstances. This chapter contains the following:

- Discussion and forms of clauses tailored for specific assets or financial management concerns (see §§5.12-5.48);
- Discussion and forms of provisions on administrative issues (see §§5.49-5.61);
- Discussion and forms for a power of attorney for personal care decisions, either as a separate document or as part of a DPOA (see §§5.62-5.68);
- Sample complete DPOA forms (see §§5.69-5.71); and
- Sample cover letter addressed to the principal, which can be used to accompany a draft of the DPOA (see §5.72).

For clients considering tax or estate planning powers in a DPOA, see chap 6. On the legal requirements for a DPOA, see chap 4.

NOTE: Unless otherwise explicitly stated, all references in this chapter to Probate Code sections regarding durable powers of attorney refer only to DPOAs and durable powers of attorney for personal care and do not refer to powers of attorney for health care (PAHC) or advance health care directives (AHCD). See chaps 7-8 on PAHCs and AHCDs.

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II. DRAFTING CLAUSES FOR SPECIFIC ASSETS AND ISSUES

A. Real Property

§5.2 1. Discussion

A DPOA that confers powers to deal with real property should specify the address of currently owned real property and include the assessor's parcel number for further identification if it is anticipated that a transaction concerning the real property will occur in the near future. A full legal description of the property may be included either in the body of the document or as an attachment.

CAVEAT: The danger in including the address and full legal description of real property in the DPOA is that if the principal subsequently sells the specifically identified property and acquires another parcel, the DPOA may not cover the new property. A well-drafted DPOA does not need a legal description of the property.

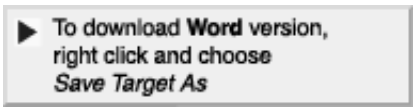
For sample form granting broad powers, see §5.3. The form includes a clause for refinancing property that may be held in the principal's trust. The form also allows the agent to remove the property from the trust and place the property in the principal's name if the principal is incapacitated when refinancing is needed. Many lenders require that property be taken out of the name of the trustee of a revocable trust and placed solely in the individual borrower's name before they will refinance existing mortgages. The reason for this practice appears to be that most of the loans sold on the secondary market are then packaged and sold as mortgage-backed securities. This practice will likely change because the failure of many of these mortgages is expected to bring about modifications to regulations on the law in this area.

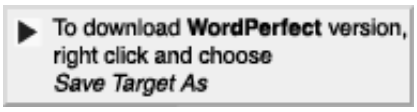
NOTE: Probate Code §15401(c) requires an express provision in the trust regarding modification or revocation of the trust. To the extent that removal of the residence from the trust is a modification, the practitioner will also need a coordinating provision in the trust.

For form granting the agent powers to deal with possible environmental hazards, see §5.4. See §5.3 for discussion and form for a limited power of attorney granting the agent powers limited to a particular parcel of real property or limited in time. Management of jointly owned real property can be facilitated by authorizing one owner to act as an agent for the other owner(s) for some purposes. For sample forms restricting the sale of the principal's residence, see §§5.66-5.67.

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§5.3 2. Form: Authority Regarding Real Property





5.3-1 Authority regarding real property

The Agent is authorized to do the following acts relating to real property:

1. To manage, control, lease, sublease, and otherwise act concerning the Principal's interest in the real property more fully described in Exhibit A attached to this instrument; to collect and receive rents or income from that property; to pay taxes, charges, and assessments on it; to repair, maintain, protect, preserve, alter, and improve it; to commit the Principal's resources and contract on the Principal's behalf regarding the property; and to do all things necessary or expedient to be done in the Agent's judgment in connection with the property.

2. To grant, sell, transfer, mortgage, deed in trust, convey, pledge, and otherwise encumber and deal in the real property described in this instrument and to execute such instruments as the Agent considers proper, specifically including but not limited to the power to do the following:

(a) Represent the Principal in negotiations for the sale of the real property described in this instrument, including but not limited to entering into listing agreements with brokers or other Agents regarding such sale; and

(b) Execute, acknowledge, and deliver contracts of sale, escrow instructions, deeds, covenants, agreements, assignments of agreements, and all other documents needed with respect to the sale of the real property described in this instrument.

3. To purchase real property on the Principal's behalf; to mortgage, pledge, or otherwise encumber such newly acquired property; to commit the resources of the Principal with respect to its purchase; to do all acts and execute all documents necessary for its purchase; and otherwise generally deal in all respects and have all powers described in this power of attorney with respect to such property.

4. To refinance real property described in this instrument and in connection with refinancing to do any of the following:

(a) To sign deeds and other instruments to take title out of the name of _ _[*trustee's name*]_ _ of the _ _[*name*]_ _ Trust and to place it in the Principal's name.

(b) To negotiate loans.

(c) To sign promissory notes and security instruments.

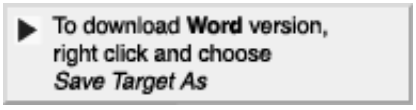
(d) To sign for lines of credits and to access lines of credit.

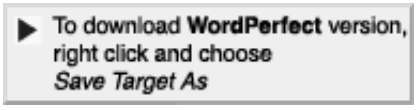
(e) To sign deeds and other instruments to place title in the Principal's name or in the name of _ _[*trustee's name*]_ _ of the _ _[*name*]_ _ Trust.

Comment: A full legal description of real property owned at the time the DPOA is executed, as well as the address and assessor's parcel number, can be attached to the DPOA as Exhibit A. But see Caveat in §5.2.

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§5.4 3. Form: Authority Regarding Real Property That May Have Environmental Hazards





5.4-1 Authority regarding real property that may have environmental hazards

The Agent is authorized to perform all environmental inspections of the Principal's property deemed advisable by the Agent at the Principal's expense, either before or after accepting the appointment to serve as Agent. The Agent shall have the right to decline to serve as Agent on the basis of the results of any such inspections. The Agent shall have the power and authority to undertake any remedial measures with respect to any of the Principal's property that the Agent deems necessary or advisable in order to comply with all environmental laws, regulations, and orders, and to compromise environmental liability claims on terms deemed advisable by the Agent. The Agent shall have the power and authority to regularly inspect and monitor the Principal's property for environmental compliance at the Principal's expense. The Agent shall have no personal liability for violation of environmental laws, regulations, and orders, except for the Agent's bad faith, willful misconduct, or gross negligence.

Comment: If the principal has an interest in commercial property or other real property that may contain environmental hazards, inclusion of this form may provide some protection to the agent. Although the liability of an "innocent fiduciary" is generally limited to the value of assets held in a fiduciary capacity, operation or management of contaminated property may expose fiduciaries who hold the property to liability, resulting in civil and criminal penalties and substantial cleanup costs. 42 USC §§6991b(h)(9), 9607(n). See *Canadyne-Georgia Corp. v NationsBank* (11th Cir 1999) 183 F3d 1269. Therefore, a party who is considering whether to act as an agent would be well advised to carefully assess in advance the condition of real property subject to the power of the agent. An agent must also be careful when purchasing real property on the principal's behalf, making appropriate inquiries regarding contamination before acquiring the property.

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B. Investments

§5.5 1. Authority to Invest and Reinvest

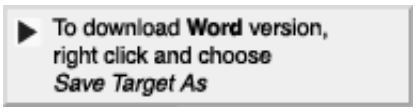
In dealing with the principal's property, the agent must observe the standard of care that would be observed by a prudent person dealing with the property of another. This authority is not limited by any other statute restricting investments by fiduciaries. Prob C §4231(a). However, an agent who has special skills or expertise or who was designated because he or she claimed to have special skills or expertise must observe the standard of care that would be observed by others with similar skills or expertise. Prob C §4231(c).

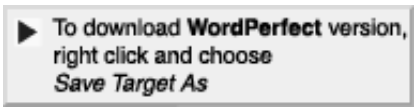
A form provision for the authority to invest and reinvest the principal's funds is set forth in §5.6. The attorney should review each part of this provision with the client and eliminate or add specific kinds of investments according to the client's directions. For example, the principal may wish to add further instructions on acceptable investments, limitations on investments, directions regarding the principal's investment objectives, and other particulars such as whether the agent may retain unproductive assets and whether diversification is required.

PRACTICE TIP: If a client has a significant investment portfolio, it is strongly advised that the attorney discuss with the client's financial advisor what authority the company will accept to have an agent manage the principal's portfolio. Investment authority through a DPOA is often ignored by investment advisers, stock brokers, broker-dealers, or other financial institutions. These individuals and entities may require the completion of a form prepared by in-house counsel. Many of these forms include boxes that must be checked if the principal wants the agent to have aggressive investment powers. Further, these brokerage firms may require the same level of specificity in an attorney-drafted or statutory form DPOA before allowing the agent to use these investment strategies. Some brokerage account power of attorney forms also limit the agent's authority to make withdrawals from the principal's account.

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§5.6 2. Form: Authority to Invest and Reinvest





5.6-1 Authority to invest and reinvest

The Agent is authorized to invest and reinvest the Principal's funds in every kind of property—real, personal, or mixed—and every kind of investment, specifically including corporate obligations of every kind; preferred or common stocks; shares of investment trusts, investment companies, and mutual funds; and mortgage participations. The Agent is authorized to buy, sell, and trade, on margin or otherwise, in stocks, bonds, options, and any other securities or contracts relating to the same.

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C. Accounts, Safe Deposit Boxes, and Credit Cards

§5.7 1. Authority to Make Transactions Regarding Accounts, Safe Deposit Boxes, and Credit Cards

A principal in a DPOA may grant an agent extensive powers over the principal's account activities, safe deposit boxes, and credit cards. For sample forms, see §§5.8, 5.10-5.11.

In addition, Prob C §5204, which is not a part of the Power of Attorney Law, provides for the creation of a special power of attorney for accounts at a financial institution, or for contracts with a financial institution concerning safe deposit services. Accounts include checking accounts, savings accounts, certificates of deposit, savings certificates, and any other depository relationship with a financial institution. Prob C §5204(a). The statutory provision allows the depositor or safe deposit box holder to appoint "agents" rather than joint owners when it is actually an agency relationship that is intended (as when elderly or very ill persons want a relative to have access to their bank accounts in order to pay their bills). Under the special power of attorney for bank accounts, the agent must keep books or records that will permit an accounting and is liable for any disbursements that were not to or for the benefit of the grantor, unless the grantor authorized the disbursement in writing. Prob C §5204(i)-(j).

If the special power of attorney is intended to be durable, it must contain substantially the following language (Prob C §5204(d)): "These powers of attorney shall continue even if you later become disabled or incapacitated."

The power endures until it is revoked by the grantor, the account is terminated, or the grantor dies, or, in the case of a nondurable power of attorney, appointment of a conservator of the estate of the grantor of the power occurs, whichever is earliest. Prob C §5204(e). Nothing in Prob C §5204 limits the use or effect of any other form of power of attorney for transactions with a financial institution or creates an implication that a financial institution is liable for acting in reliance on a power of attorney that does not meet the requirements of §5204. Prob C §5204(k). For sample provision, see §5.8. An agent may also be designated as a P.O.D. (payable on death) payee. Prob C §5204(*l*).

Probate Code §5204(c) sets out the warning language *that must be contained* in the special power of attorney. For form of a special durable power of attorney under Prob C §5204, including the warning, see §5.9.

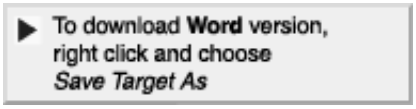
The special power of attorney is not governed by the Power of Attorney Law except that Prob C §4130 (regarding inconsistent authority; see §1.9) and §§4500-4545 (regarding judicial proceedings) apply. Prob C §5204(m).

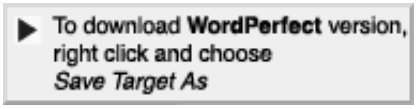
NOTE: Probate Code §5204(m) refers to former Prob C §§4900-4947, repealed and replaced by Prob C §§4500-4545.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.8 2. Form: Authority to Transact Business Regarding Accounts

§5.8 2. Form: Authority to Transact Business Regarding Accounts





5.8-1 Authority to transact business regarding accounts

The Agent is authorized to deposit in and draw on any checking, savings, agency, or other accounts that the Principal may have in any banks, credit unions, or other financial institutions, and any accounts with securities brokers or other commercial institutions, and to establish and terminate all such accounts.

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§5.9 3. Form: Authority to Transact Business Regarding Accounts (Prob C §5204)

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5.9-1 Authority to transact business regarding accounts (Prob C §5204)

Durable Power of Attorney for Bank Accounts and Certificate of Deposit (Probate Code §5204)

WARNING TO PERSON EXECUTING THIS DOCUMENT: This is an important legal document. It creates a power of attorney that provides the person you designate as your attorney-in-fact with the broad powers it sets forth. You have the right to terminate this power of attorney. If there is anything about this form that you do not understand, you should ask a lawyer to explain it to you.

These powers of attorney shall continue even if you later become disabled or incapacitated.

I, _ _[*Principal's name and address*]**_ _, am the owner of the following account(s) _ _**[*and/or*]**_ _ _ _**[*certificates of deposit*]**_ _ held at _ _**[*name and address of financial institution*]**_ _:**

[*List each account and certificate to which agency applies, e.g.:*

Savings Account No. 56789
Checking Account No. 12345
Certificate of Deposit 112233]

I hereby appoint _ _[*name and address of each person appointed*]**_ _ as the Agent(s) with regard to these account(s) _ _**[*and/or*]**_ _ _ _**[*certificate(s) of deposit*]**_ _.**

Transactions regarding these bank account(s) _ _[*and/or*]**_ _ _ _**[*certificate(s) of deposit*]**_ _ may be made by the named Agent(s). This agency is governed by California Probate Code §5204, under which the Agent (1) has no present or future ownership or right of survivorship in this account, (2) must keep a record of the transactions and disbursements under the agency, and (3) may make disbursements from this account only to or for the benefit of the account owner unless the account owner has authorized the disbursement in writing.**

In addition, under Probate Code §5204 the power of attorney hereby granted endures until the earliest of the following occurs: (1) revocation by the grantor of the power, (2) termination of the account, (3) death of the grantor of the power, or (4) appointment of a guardian or conservator of the estate of the grantor of the power.

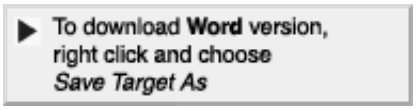
Date: _ _ _ _ _ _ **__**[*Signature of principal*]**__**

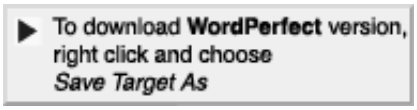
Comment: The special power of attorney under Prob C §5204 must be in writing, be signed by the person giving the power of attorney, and explicitly identify the attorney-in-fact, the financial institution, and the accounts or contracts subject to the power. Prob C §5204(b). It must also contain, as in this form, the warning language and statement on durability, which are set forth in Prob C §5204(c)-(d). There is no requirement that the power of attorney be witnessed or notarized. However, some financial institutions may require that the special power of attorney either be notarized or signed before a bank officer. This form may be modified to create a power of attorney for safe deposit boxes or other forms of accounts. Banks frequently have their own power of attorney form for bank accounts. At least one major California bank has a power of attorney form that appears to be a special power of attorney under Prob C §5204. However, the bank form differs from the statute in one important respect: It contains an indemnification clause.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.10 4. Form: Authorization to Maintain, Have Access to, and Remove Property From Safe Deposit Boxes

§5.10 4. Form: Authorization to Maintain, Have Access to, and Remove Property From Safe Deposit Boxes



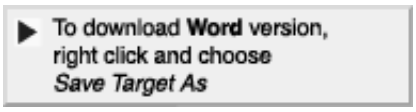


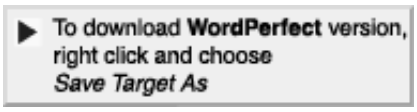
5.10-1 Authority to maintain, have access to, and remove property from safe deposit boxes

The Agent is authorized to have access to all safe deposit boxes in the Principal's name or to which the Principal is an authorized signatory; to contract with financial institutions for the maintenance and continuation of safe deposit boxes in the Principal's name; to add to and remove the contents of all such safe deposit boxes; and to terminate contracts for all such safe deposit boxes.

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§5.11 5. Form: Authority to Use and Cancel Credit Cards





5.11-1 Authority to use and cancel credit cards

The Agent is authorized to use any credit cards in the Principal's name, to make purchases, to sign charge slips on behalf of the Principal as may be required to use such credit cards, and to close the Principal's charge accounts and terminate the Principal's credit cards when the Agent considers such acts to be in the Principal's best interest.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/ D. Specific Agent Issues/§5.12 1. Property Previously Belonging to Agent

D. Specific Agent Issues

§5.12 1. Property Previously Belonging to Agent

An agent should generally not be given a DPOA over property that the agent previously transferred to the principal. An inadvertent grant of authority over previously owned property could trigger a tax boomerang. Internal Revenue Code §2036 addresses transfers with a retained life estate. Internal Revenue Code §2038 addresses previously transferred property for which the power to alter, amend, revoke, or terminate the transfer is retained or later reacquired. Both sections draw previously transferred property back into a decedent's taxable estate, and both sections can apply to agents under a DPOA, particularly if the authority to make gifts is included in the instrument.

PRACTICE TIP: As a precaution, a DPOA can include a specific provision forbidding the agent to exercise any trustee powers under an irrevocable trust of which the agent is a settlor and the principal is a trustee. See form in §5.37, which includes this provision. If the agent previously transferred property to a trust for the principal's benefit and if the principal was given a power to replace a trustee or a power to appoint trust assets, care should also be taken to prevent these trust-related powers from returning to a donor-agent and triggering IRC §2038.

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§5.13 2. Self-Dealing and Commingling

In certain situations, it may be advisable to allow the agent to self-deal and commingle assets. See §§4.73-4.75. However, even with this express authority, the agent will still be held to the duty of loyalty (see Prob C §4232), will need to keep records (see Prob C §4236), and must keep the property identified as the principal's (see Prob C §4233).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.14 a. Form: General Self-Dealing Authorized

§5.14 a. Form: General Self-Dealing Authorized

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5.14-1 General self-dealing authorized

The Agent is authorized to purchase any of the Principal's assets at fair market value and to engage in any transactions the Agent considers in the Principal's best interest, regardless of any concurrent interest or benefit to the Agent personally.

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§5.15 b. Form: Limited Self-Dealing Authorized

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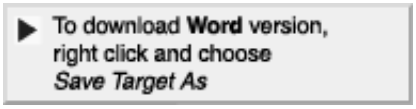
5.15-1 Limited self-dealing authorized

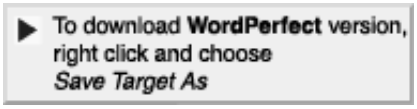
The Agent is specifically authorized to purchase the Principal's _ _[*identify asset(s)*]_ _ at fair market value if the Agent determines that such asset(s) must be liquidated in order to pay for the Principal's care, support, and maintenance or to meet the Principal's financial obligations. Fair market value of such property shall be determined by independent written appraisal by a licensed professional person or organization qualified to appraise the property. The Agent is authorized to select the appraiser and to pay for the appraisal from the Principal's assets over which the Agent holds management authority.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.16 c. Form: General Commingling of Principal's and Agent's Assets Authorized

§5.16 c. Form: General Commingling of Principal's and Agent's Assets Authorized





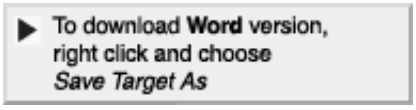
5.16-1 General commingling of principal and agent's assets authorized

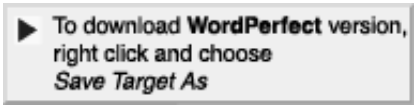
The Agent may commingle any of the Principal's and the Agent's funds. The Agent is not required to maintain separate accounts but must keep separate accounting records with respect to the Principal's funds.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.17 d. Form: Commingling of Specific Bank Account of Principal and Agent Authorized

§5.17 d. Form: Commingling of Specific Bank Account of Principal and Agent Authorized





5.17-1 Commingling of specific bank account of principal and agent authorized

The Principal and the Agent presently jointly own that real property commonly known as _ _[*street address*]_ _. For purposes of ownership and maintenance of this property, the Principal and the Agent hold a joint checking account, No. _ _[*account number*]_ _, at _ _[*name of bank*]_ _. The Principal and the Agent each contribute to and commingle their funds in this account. The Agent is authorized to continue to deposit into this account _ _[_ _[*number*]_ _ *percent of the net monthly income received from rental of the above-referenced property*]_ _ and to commingle such deposit with the Agent's personal deposits to the same account.

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E. Litigation Authority

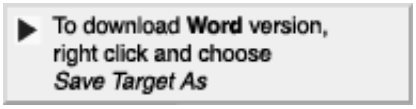
§5.18 1. Authority to Assert Attorney-Client Privilege

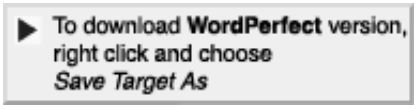
A client holds the privilege of refusing to disclose, and preventing another from disclosing, confidential communications between the client and his or her attorney. Evid C §954. This privilege may be claimed by the client or anyone authorized to claim the privilege by the client. Accordingly, depending on the client's circumstances, it may be appropriate to include in the DPOA a provision authorizing the agent to assert the principal's lawyer-client privilege. See §5.19 for form.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.19 2. Form: Authority to Assert Attorney-Client Privilege

§5.19 2. Form: Authority to Assert Attorney-Client Privilege





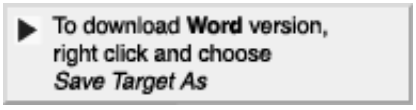
5.19-1 Authority to assert attorney-client privilege

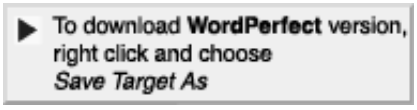
The Agent is authorized to assert any privilege that the Principal holds, including the attorney-client privilege, the doctor-patient privilege, or any privilege recognized under any relevant authority.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.20 3. Form: Authority to Collect Assets, Compromise Claims, and Litigate

§5.20 3. Form: Authority to Collect Assets, Compromise Claims, and Litigate





5.20-1 Authority to collect assets, compromise claims, and litigate

[*Add one of the following alternatives*]

[*Alternative 1: General authority*]

The Agent is authorized to collect and deposit for the benefit of the Principal all debts, interest, dividends, or other assets that may be due or belong to the Principal and to execute and deliver receipts and other discharges therefor; to demand, arbitrate, and pursue litigation on the Principal's behalf concerning all rights and benefits to which the Principal may be entitled; and to compromise, settle, and discharge all such matters as the Agent considers appropriate under the circumstances.

The Agent is further authorized to pay any sums of money that may at any time be or become owing from the Principal to settle, adjust, and compromise any claims that may be made against the Principal as the Agent considers appropriate under the circumstances.

[*Alternative 2: Specific authority*]

The Agent is authorized to demand, sue for, and collect all sums of money, debts, accounts, legacies, bequests, interest, dividends, annuities, and demands that are now, or may later become, due or payable to the Principal, including any benefits payable by any governmental body or agency (such as Supplemental Social Security (SSI), Medi-Cal, Medicare, and Social Security Disability Insurance (SSDI) (for purposes of receiving Social Security benefits, the Agent is hereby appointed as the Principal's Representative Payee)), and to take all lawful means to recover such assets and to compromise claims for such assets and grant discharges for such assets in the Principal's name.

The Agent is also authorized to prosecute or defend actions, claims, or proceedings for the protection of the Principal's property, including the power to renew, extend, compromise, arbitrate, adjust, and settle or lease (with or without consideration) any claim, debt, or obligation held by or asserted against the Principal or the Principal's property or which affects such property; to foreclose, extend the time of payment for, assign, partially release, or discharge mortgages, deeds of trust, security interests, and other liens; and with respect to deeds of trust, to execute subordinations, acreage or lot releases, and requests for partial or full reconveyance.

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F. Government Benefits

§5.21 1. Qualification for Public Medical Benefits

Medi-Cal eligibility is dependent on a financial means test. The potential recipient must not have more than the allowable amount of nonexempt assets and must have income under specific stated levels. In certain circumstances, a principal's home is exempt. Most nursing home costs are paid by Medi-Cal, not Medicare. Elderly people may wish to shift their financial resources from nonexempt assets to exempt assets in order to qualify for Medi-Cal benefits.

Medi-Cal rules for eligibility and for state recovery of benefits are extremely complex and rapidly changing. For current rules, see California Elder Law Resources, Benefits, and Planning: An Advocate's Guide, chap 12 (Cal CEB 2003). Exhaustive resource planning strategies are discussed in Elder Law Resources, chap 11. Fact sheets regarding Medi-Cal benefits for nursing home care can usually be obtained from legal services programs for the elderly, located in most California counties.

NOTE: Public benefits for persons with disabilities should also include the provision authorizing establishment of a special needs trust. See form in §§6.33-6.34.

For Medi-Cal planning purposes, if the agent's authority is to include the power to change beneficiary designations, the DPOA must specifically state this power. See *Schubert v Reynolds* (2002) 95 CA4th 100, 115 CR2d 285, discussed in §6.13, requiring express authority in the DPOA to name beneficiaries different from those designated by intestate succession or inconsistent with the principal's existing estate plan.

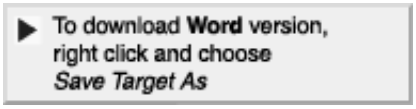
Regarding a principal's intent to return home if institutionalized, see sample form in §5.65.

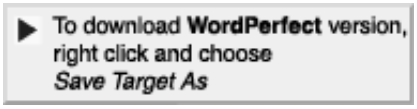
PRACTICE TIP: If an agent has the authority to deal with Medi-Cal benefits, careful review of the most current law will be necessary before the agent takes any action on the principal's behalf. It is advisable for the agent to consult an attorney who has specialized knowledge of Medi-Cal law to assure that the principal is afforded all planning strategies. The attorney members of the California Advocates for Nursing Home Reform (CANHR) at http://www.canhr.org or the National Academy of Elder Law Attorneys (NAELA) at http://www.naela.org/ are specialists in this area of law.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.22 2. Form: Authority Regarding Government Benefits (Short Form)

§5.22 2. Form: Authority Regarding Government Benefits (Short Form)



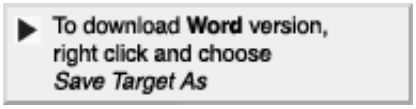


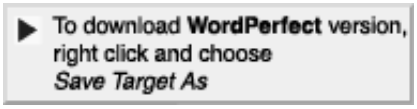
5.22-1 Authority regarding government benefits (short form)

The Agent is authorized to apply for and make any elections required for receipt of governmental benefits to which the Principal may be entitled, to take possession of all such benefits, and to distribute such benefits to or for the Principal's benefit.

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§5.23 3. Form: Authority Regarding Public Benefits (Long Form)





5.23-1 Authority regarding public benefits (long form)

A. General Authority. The Agent is authorized to apply for and to make any elections required to maximize and maintain any and all public benefits, governmental programs, insurance benefits, and retirement benefits to which the Principal may be entitled or may in the future become entitled. Such public benefits shall expressly include, but not be limited to, veteran's benefits, Social Security (SSA), Social Security Disability Insurance (SSDI), Medicare, Medi-Cal or Medicaid, In-Home Supportive Services (IHSS), and Supplemental Security Income (SSI). The Agent is authorized to take any of the following actions, which are illustrative and not exhaustive:

1. Modify or revoke, in whole or in part, any trust established by the Principal;

2. Create a revocable or irrevocable trust,

[*Add one of the following alternatives*]

[*Alternative 1: If principal is unmarried*]

as long as any such trust does not substantially modify the Principal's current estate plan;

[*Alternative 2: If principal is married*]

even if to do so substantially modifies the Principal's current estate plan, even to the point of treating beneficiaries unequally, naming beneficiaries different from, or in proportions different from, the principal's existing estate plan, or disinheriting certain beneficiaries;

[*Continue*]

3. Effect a transfer of the Principal's residence, or interest therein, to the Principal's spouse or to other permissible transferees under applicable laws and regulations then in effect, including agreeing to a transmutation of such residence to the separate property of the Principal's spouse;

4. Execute an occupancy agreement on the Principal's behalf concurrently with making a gift of any real property or interest therein;

5. Enter into and execute a voluntary postdeath lien against any of the Principal's real property to secure the unpaid portion of an estate claim under 22 Cal Code Regs §50961 until the claim is paid in full;

6. Make gifts of the Principal's property, even to the extent such gifts may be in excess of the annual gift tax exclusion amount, to the Principal's spouse and to other permissible transferees;

7. Change the character of the Principal's property from community property to shares of separate property;

8. Consent on the Principal's behalf to support orders sought and obtained by the Principal's spouse for the spouse's proper support and to avoid the spouse's impoverishment;

9. Transfer and transmute ownership in any of the Principal's assets to the Principal's spouse, as the spouse's separate property, in order to, among and including other reasons, fund the Community Spouse Resource Allowance (CSRA) fully;

10. Consent to a change in beneficiary designations or, when appropriate, to a change in ownership on the

Principal's behalf regarding all insurance policies, annuity policies, retirement plans, pension plans, and the like; and

11. Take any other action that the Agent in his or her best judgment considers necessary to accomplish the goals set forth herein regarding the qualification for and continuation of public benefits for the Principal.

B. Defense of Actions Related to Public Benefits Planning. Should it become necessary, the Agent is hereby authorized to defend actions taken under these public benefits planning provisions, including but not limited to retaining legal counsel, hiring other professionals, and paying for such legal and professional services from the Principal's assets and income.

C. Authorization of Self-Dealing for Public Benefits Planning. For the purposes of public benefits planning, the Agent is authorized to (1) purchase any of the Principal's assets at fair market value, (2) transfer any of the Principal's assets, and (3) engage in any transactions that the Agent considers to be in the Principal's best interest and in furtherance of the public benefits planning goals, irrespective of any concurrent interest or benefit that the Agent may receive personally.

D. Removal of Assets From Trust for Public Benefits Planning. If any of the Principal's assets are held in a revocable trust, the Agent is authorized to remove those assets from such trust to the extent that it is necessary to effect any of the above-described transfers of assets or for general eligibility purposes.

E. Appointment of Special Attorney-in-Fact for Public Benefits Planning. In the event that the Agent is the Principal's spouse, or in the event that the Agent is or may be the possible recipient of the Principal's assets, _ _[*name*]_ _ shall be appointed as Special Agent for the purpose of executing all necessary documents to effect any of the public benefits planning actions, including the transfer of any real property, as authorized herein. In the event _ _[*name*]_ _ is unable or unwilling to serve, _ _[*name*]_ _ shall be appointed as Special Agent.

F. Receipt of Benefits by Agent. The Agent is authorized to take possession of all such benefits and to distribute such benefits to or for the Principal's benefit.

Comment: Any trust over which the agent has withdrawal authority such as specified in Paragraph D should authorize the agent to exercise this power.

WARNING: This form should be reviewed carefully with the principal (and agent if possible) because several of the techniques described in the form may be disallowed under the Deficit Reduction Act of 2005 (DRA) (Pub L 109-171, 120 Stat 4). The DRA repealed and replaced many of the transfer-of-assets provisions in both the Medicare Catastrophic Coverage Act of 1988 (MCCA) (Pub L 100-360, 102 Stat 683) and the Omnibus Budget Reconciliation Act of 1993 (OBRA 1993) (Pub L 103-66, 107 Stat 312). However, although the DRA became effective on February 8, 2006, when President Bush signed it, it is uncertain when California will enact legislation and issue regulations to implement it. Practitioners should be alert for the latest news on its implementation; one source of news is the website of the California Advocates for Nursing Home Reform (CANHR), located at http://www.canhr.org. See generally California Elder Law Resources, Benefits, and Planning: An Advocate's Guide (Cal CEB 2003) for in-depth coverage of the DRA.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/ G. Employee and Retirement Benefits/§5.24 1. Authority to Deal With Employee, Retirement, and Other Benefits

G. Employee and Retirement Benefits

§5.24 1. Authority to Deal With Employee, Retirement, and Other Benefits

A DPOA is especially valuable for handling retirement accounts because such accounts cannot be held and managed in a revocable living trust. The principal's asset management and estate plan may benefit, *e.g.,* from continuing to fund tax-exempt employee benefit plans after incapacity, if possible. Decisions may also need to be made with respect to benefit elections and "rollovers." The DPOA is the only means, other than by court action, for the agent to manage retirement accounts of an incapacitated principal.

For many individuals of retirement age, retirement accounts such as individual retirement accounts (IRAs) and 401(k) plans are significant assets of their estate. Their estate planning is incomplete unless they plan for the management of these accounts in the event of incapacity.

The wording of the DPOA requires special attention. For example, if the agent is authorized to name beneficiaries, including himself or herself, and then dies before the principal does, the entire value of the retirement account will be included in the agent's estate for estate tax purposes. See IRC §§2014, 2514. On power of appointment, see §§6.39-6.40. Both the principal and the agent should be aware of this fact, and for the attorney's protection, both should agree by separate writing to inclusion of this power.

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§5.25 2. Effective Use of Power

Institutions are more willing to accept the DPOA and acknowledge the agent's authority to act if

- the DPOA includes a specific paragraph identifying the retirement accounts and the location and number of each; and
- the principal delivers to each retirement account's administrator a copy of the DPOA and a written request for acknowledgment of receipt and acceptance of the DPOA.

See §5.26 for sample letter. The power must be durable in order to be valid when needed, *i.e.,* when the principal becomes incapacitated.

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§5.26 3. Form: Sample Request for Acknowledgment of Receipt and Acceptance of DPOA by Benefit Administrator

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5.26-1 Sample request for acknowledgment of receipt and acceptance of DPOA by benefit administrator

I am writing to you about decisions regarding my _ _[*identify retirement account or plan*]_ _.

Currently I have capacity and am able to make my own decisions.

[*Add one of the following alternatives*]

[*Alternative 1: If immediately effective DPOA*]

However, on _ _[*date*]_ _, I created an immediately effective Durable Power of Attorney for Financial Management (DPOA), a copy of which is enclosed. The provisions of paragraph _ _[*number*]_ _ allow the Agent to manage my retirement accounts and to make withdrawals on my behalf. Either of us has the power to act alone.

[*Alternative 2: If springing DPOA*]

However, the time may come when I am unable to act because of incapacity. The provisions of paragraph _ _[*number*]_ _ of my DPOA, dated _ _[*date*]_ _, a copy of which is enclosed, specifically authorize the Agent to manage my retirement accounts and to make withdrawals on my behalf. The DPOA takes effect only in the event of my incapacity.

[*Continue*]

Paragraphs _ _[*numbers*]_ _ explain your company's responsibilities and the limitations of your company's liability.

I request that you acknowledge receipt of my DPOA and agree in writing to honor it unless and until you receive my revocation of this DPOA in writing, delivered either in person, by messenger, or by certified mail, return receipt requested.

Sincerely,
_ _[*Name*]_ _
_ _[*Address*]_ _

Enclosures: DPOA, Receipt/Acceptance for signature by authorized Agent

PRACTICE TIP: If the principal is already incapacitated and the institution hesitates to accept the DPOA, and if the retirement account is already in pay status, consider requesting automatic transfer of income from the retirement account into the checking account at the same or at another company. Often an individual has authorized someone else to have access to his or her checking account, either as trustee or as a joint tenant.

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§5.27 4. Institution-Provided DPOA

Each bank, savings and loan, and brokerage firm will provide one or more in-house power of attorney forms by which the principal may name the agent. All are effective immediately. The appropriate form for retirement accounts is the one that is durable and allows the attorney to withdraw as well as to manage the account. If none of the company forms includes these provisions and the company will not accept a form drafted by the principal's attorney, the principal may consider moving the account to another company that accepts and honors such powers. See also §§10.7-10.9.

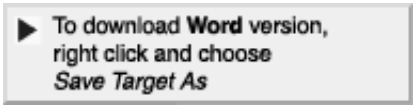
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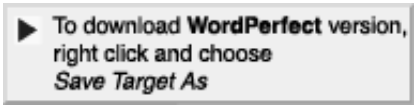
§5.28 5. Cautions in Using Statutory Form Power of Attorney

There is one provision in the Statutory Form Power of Attorney regarding retirement plan transactions that could potentially cause problems for the agent. Simple additions to the statutory form as special instructions can be drafted to address these issues. Probate Code §4462(b) defines the scope of the Statutory Form Power of Attorney language granting power with respect to retirement plan transactions and gives the agent the power to "[d]esignate beneficiaries under those plans and change existing designations." This power creates a general power of appointment in the agent, who can appoint all the retirement benefits to himself or herself. See §§6.24-6.26. This power can be limited by special drafting as allowed in Prob C §4401.

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§5.29 6. Form: Authority to Deal With Employee, Retirement, and Other Benefits





5.29-1 Authority to deal with employee, retirement, and other benefits

The Agent is authorized to establish one or more Individual Retirement Accounts (IRAs) and employee benefits plans (including a plan for a self-employed individual) on the Principal's behalf; to contribute to any IRA or plan held in the Principal's name; to roll over or direct transfers of plan benefits into other retirement plans or IRA accounts at the same company or at another company; to manage the accounts; to withdraw from any account _ _[*without limitations/such minimum distributions as may be required by law/amounts that may be necessary for the health, maintenance, and support of the Principal*]**_ _; to select or change payment options; to apply for and make any elections under any IRA or employee benefit plan in which the Principal is a participant, including elections required for payment of any and all types of employee benefits to which the Principal may be entitled; to take possession of all such benefits; and to distribute such benefits to or for the Principal's benefit. The Agent _ _**[*shall have/shall not have*]**_ _ the power to designate and change beneficiaries.**

[*If applicable, add one or more of the following options*]

[*Option 1: Agent may not be beneficiary*]

The Agent, however, may not designate _ _[*himself/herself*]**_ _ as a beneficiary on any employee benefit plan.**

[*Option 2: Beneficiaries can only be members of a class*]

The Agent, in exercising the power to designate and change beneficiaries, may designate as beneficiaries only a member or members of a class of persons consisting of _ _[*names*]**_ _.**

[*Continue*]

The employee benefits plans and Individual Retirement Accounts _ _[*and annuities*]**_ _ now held by the Principal are as follows:**

[*Identify institution and account number for each*]

If an account or a plan is rolled over or transferred to a new company, the Principal requests that the new company also honor this power.

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H. Business, Partnership, and Stock Interests

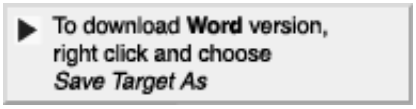
§5.30 1. Operation of Principal's Business

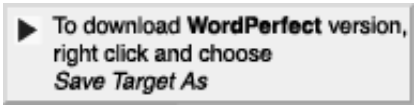
The sole proprietor faces a special problem with the business when temporarily absent or incapacitated. Who will pay bills, meet payroll, hire and fire personnel, and contract with third parties? Employees, no matter how competent, do not have the legal authority to handle most of the above matters. But under appropriate circumstances, a limited DPOA granting a trusted employee or other third person the authority to keep the business going during the principal's absence or incapacity can prove extremely useful. The attorney will want to discuss with the principal the employee-agent's conflict of interest and any opportunities for abuse of authority. The authority to manage a business may also, in appropriate circumstances, be included in a general DPOA. See §5.31 for form. The form in §5.32 is a more detailed long form authorizing the agent to deal with different types of business interests in which the principal may have an interest.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.31 2. Form: Authority Regarding Principal's Business (Short Form)

§5.31 2. Form: Authority Regarding Principal's Business (Short Form)





5.31-1 Authority regarding principal's business (short form)

The Agent is authorized to manage, control, and take charge of the Principal's _ _[*e.g., dry cleaning*]_ _ business, currently located at _ _[*address*]_ _, and to do everything necessary to carry on and continue such business, including hiring and discharging employees; paying employees; providing employee benefits; purchasing goods, services, and materials; accepting orders; accepting payments; executing and accepting title documents; issuing checks, notes, and title documents; retaining legal, accounting, financial, and other advisers; executing and filing tax returns and other government forms required of the business; and selling, liquidating, or otherwise terminating the business at such time and on such terms as the Agent considers appropriate under the circumstances.

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§5.32 3. Form: Authority Regarding Principal's Business (Long Form)

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5.32-1 Authority regarding principal's business (long form)

The Agent is authorized to continue the operation of any business owned by the Principal for such time and in such manner as the Agent shall deem advisable, including paying the Principal's employees; providing employee benefits; paying all business-related expenses; selling or liquidating the business at such time and on such terms as the Agent shall deem advisable; and representing the Principal in establishing the value of any business under any buy-sell agreement to which the Principal may be a party.

The Agent may also from time to time hold stock or other interests in; participate in the operation of; or acquire, sell, invest in, liquidate, or dissolve any closely held corporation, partnership (general or limited), sole proprietorship, joint venture, or other business entity in which the Principal holds an interest. The Agent may retain such stock or other business interests as long as the Agent considers it desirable to do so. Any such operation, sale, acquisition, liquidation, or dissolution made in good faith shall be at the risk of the Principal's estate and without liability on the part of the Agent for any resulting losses or tax liabilities.

The Agent is further authorized to incorporate any business or any interest in a business that is, or at any time thereafter becomes, an asset of the Principal; to enter into partnerships (general or limited); to enter into agreements of merger or other reorganization with respect to such business interests; to hold, sell, or grant options with respect to any such stock or partnership interests; and to take any other steps the Agent deems advisable to effect the organization, reorganization, or dissolution of any business entity.

The Agent is further authorized to borrow money for any purpose related to the holding, operating, sale, purchase, acquisition, investment in, liquidation, or dissolution of any business and to employ officers, managers, directors, employees, or Agents in the management and operation of such business, including elected directors and officers. In the course of dealing with such business interests, the Agent may have occasion to deal with stock, securities, and other business interests in which the Agent may have an interest in an individual capacity as stockholder, officer, director, or otherwise.

The Agent may also have occasion to employ or retain investment counsel or attorneys or other professional services from a firm of which the Agent may be a partner, stockholder, officer, director, or otherwise. The fact of such interest shall not disqualify the Agent from retaining such investment advisers and shall not impair the right of the interested Agent to act with respect thereto or to obtain such professional services as fully as if such interest did not exist. The fact of such interest shall also not preclude any interested Agent from voting any stock in favor of the Agent as director (or as director, voting for the Agent as officer), from employing the firm in which the Agent has an interest, or from taking any other action that might be or might be construed to constitute self-dealing or a conflict of interest.

The Agent shall incur no liability for misconduct, mismanagement, or negligence on the part of any employee of such business, any employee or partner of a partnership, or any employee, officer, or director of a corporation who is not an officer or employee of the Agent.

In the absence of actual notice to the contrary, the Agent may accept as correct and rely on financial or other statements rendered by any accountant for any business or by any partnership or corporation.

The services rendered by the Agent under these provisions relating to holding, operation of, sale, purchase, acquisition, investment or reinvestment in, liquidation, or dissolution of any business or interest in a business, or otherwise in connection with the management or continuation of any business, shall be deemed extraordinary services for which the Agent shall be entitled to extra compensation.

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§5.33 4. Authority to Represent Partner

A partner can delegate no greater rights than he or she possesses. Frequently, the partnership agreement prohibits delegation of authority. But when delegation is not prohibited, authority to represent a partner may be important either with regard to other partners or on behalf of the partnership with respect to third parties. However, the attorney should be aware that an agency could cause problems in a general partnership because any general partner is already able to act on behalf of all other partners and the agency could cause friction between the agent and the other partners.

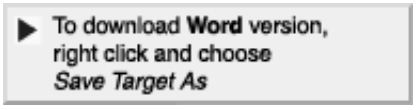
The DPOA can be very useful with respect to limited partnerships. General partners often, however, require specific language in the instrument referring to limited partnerships. See §5.34 for form authorizing the agent to deal with partnerships.

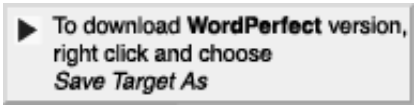
CAUTION: Review partnership documents before drafting a DPOA to cover a general or a limited partnership.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.34 5. Form: Authority to Deal With Partnership Interests

§5.34 5. Form: Authority to Deal With Partnership Interests





5.34-1 Authority to deal with partnership interests

The Agent is authorized to manage and control all partnership interests owned by the Principal and to make all decisions the Principal could make as a general partner, limited partner, or both, and to execute all documents required of the Principal as such partner, all to the extent that the Agent's designation for such purposes is allowed by law and is not in contravention of any partnership or other agreement.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.35 6. Form: Authority to Exercise Stock Options

§5.35 6. Form: Authority to Exercise Stock Options

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5.35-1 Authority to exercise stock options

The Agent is authorized to exercise any and all qualified and nonqualified stock options issued to the Principal, specifically including but not limited to incentive stock options, and to purchase the shares on exercise of any such options with any form of payment acceptable to the issuer.

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I. Insurance and Annuities

§5.36 1. Life Insurance Policies

A DPOA should generally prohibit the agent from exercising any power to take any action on insurance policies owned by the principal on the agent's life. Internal Revenue Code §2042 includes in a decedent's taxable estate any life insurance on the decedent's life over which the decedent held any "incidents of ownership" at death. Arguably, an agent's authority under a DPOA does not constitute such incidents of ownership. This issue was litigated several times in the 1970s. In *Estate of Harry Bloch, Jr.* (1982) 78 TC 850, the government partially gave up the fight and conceded that (78 TC at 857)

> powers possessed by decedent in a fiduciary capacity do not constitute incidents of ownership for the purposes of section 2042(2) where they have devolved on the decedent after the decedent has divested himself of all interest in the policies and where the decedent cannot exercise the powers for the decedent's own personal benefit.

Even under *Bloch,* however, policies on an agent's life could still be included in the agent's estate under retained powers or beneficial-powers theories. See form in §5.37, which includes a clause specifically providing that the agent has no authority over any insurance policies owned by the principal on the agent's life.

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§5.37 2. Form: Powers Specifically Not Granted

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5.37-1 Powers specifically not granted

Regardless of any other possible language to the contrary in this document, the Agent is specifically NOT granted the following powers:

(1) To use the Principal's assets for the Agent's own legal obligations, including but not limited to support of the Agent's dependents;

(2) To exercise any trustee powers under an irrevocable trust of which the Agent is a settlor and the Principal is a trustee; or

(3) To exercise incidents of ownership over any life insurance policies that the Principal owns on the Agent's life.

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§5.38 3. Other Types of Insurance

The principal's estate plan may benefit from including the following provisions on insurance in a DPOA:

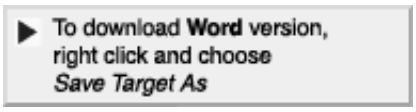
- Authority to make and settle claims;
- Authority to purchase additional life insurance if no additional insurability need be proved;
- Authority to borrow against policies;
- Authority to repay policy loans;
- Authority to continue to pay premiums on policies; and
- Authority to borrow money to purchase additional insurance and to pay ongoing premiums.

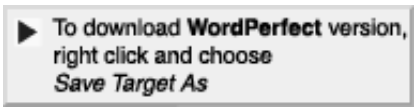
Giving the agent the additional authority to change beneficiary designation or to assign an ongoing policy is a more controversial matter and is not recommended by the authors. However, if a principal wants the agent to have the authority to change beneficiary designations, the agent must be expressly authorized to do so in the DPOA. Prob C §4264(f). See *Schubert v Reynolds* (2002) 95 CA4th 100, 106, 115 CR2d 285, discussed in §6.13. For form authorizing the agent to deal with insurance, see §5.39.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.39 4. Form: Authority Over Insurance

§5.39 4. Form: Authority Over Insurance





5.39-1 Authority over insurance

The Agent may purchase and maintain insurance on the Principal's life and property or the life and property of any third person when the Principal has an insurable interest; may pay all insurance premiums from the Principal's assets; and may borrow money on the Principal's behalf in order to pay for insurance. The Agent may pursue insurance claims on the Principal's behalf and may decrease or increase coverage under any insurance policy or cancel any policy and receive on the Principal's behalf any cash proceeds on termination. The Agent may also borrow against policies on the Principal's life and repay loans against such policies as the Agent considers in the Principal's best interest.

The Agent is authorized to apply for and make any elections required for payment of insurance benefits to which the Principal may be entitled, to take possession of all such benefits, and to distribute such benefits to or for the Principal's benefit.

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§5.40 5. Annuities

The agent may wish to have authority over a principal's annuity, either to purchase, modify, or sell. An annuity is defined as "a right to receive fixed, periodic payments, either for life or for a term of years." Black's Law Dictionary (8th ed 2004). There are many different kinds of annuities. On annuities, see California Estate Planning, chap 20 (Cal CEB 2002).

An agent under a DPOA has access to the principal's annuity to the same extent as the principal except for altering the annuity's beneficiary. An agent under a DPOA may have authority to change or alter the annuity's beneficiary; however, it must be expressly stated in the DPOA. See *Schubert v Reynolds* (2002) 95 CA4th 100, 115 CR2d 285 (requiring express authority in DPOA to name beneficiaries different from those designated by intestate succession or inconsistent with principal's existing estate plan).

For authority of an agent to act under a statutory DPOA, see Prob C §4457. For form concerning the agent's authority over an annuity, see §5.41.

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§5.41 6. Form: Authority Over Annuity Contracts

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5.41-1 Authority over annuity contracts

The Agent is authorized to purchase, maintain, surrender, collect, withdraw funds from, incur penalties and surrender charges from, cancel, modify, rescind, release, terminate, or exchange any annuity contract procured by the Principal or the Agent.

The Agent is also authorized to do the following:

(1) Collect, sell, assign, hypothecate, borrow on, or pledge the Principal's interest in an annuity contract.

(2) Procure new, different, and additional contracts of annuities for the Principal and the Principal's spouse, children, and other dependents, and select the amount and type of annuity and mode of payment.

(3) Continue, modify, rescind, release, or terminate a contract procured by the Principal or on the Principal's behalf that provides an annuity to either _ _[*him/her*]_ _ or another person, whether or not the Principal is the beneficiary under the contract.

(4) Pay from proceeds or otherwise compromise or contest and apply for refunds in connection with a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

[*If appropriate, add one of the following alternatives*]

[*Alternative 1: Agent may change beneficiary to anyone but agent*]

(5) Change the beneficiary of an annuity contract. However, the Agent may not designate _ _[*himself/herself*]_ _ as beneficiary. However, the Agent may continue to be a beneficiary as long as _ _[*he/she*]_ _ is already named as a beneficiary under a contract procured by me while having legal capacity to do so and in the same proportion as previously designated.

[*Alternative 2: Agent may change beneficiary to anyone*]

(5) Change the beneficiary of an annuity contract and name new beneficiaries without limitation, including any person, entity, or charity. The Agent may designate _ _[*himself/herself*]_ _ to the full contract amount, to the exclusion of all other beneficiaries previously named by me or the Agent and to the exclusion of the Principal's spouse, children, grandchildren, beneficiaries of the Principal's will or trust, and heirs at law.

Comment: Alternative 2 to paragraph number 5 should not be included unless, after discussion with a principal, he or she understands the effect of including this power. See §§6.24-6.26 concerning the possible inclusion of an annuity in an agent's estate.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/ J. Support for Persons Dependent on Principal/§5.42 1. Providing Support for Others

J. Support for Persons Dependent on Principal

§5.42 1. Providing Support for Others

A principal may be legally or morally responsible for the support of another, whether it be a child, person with a disability, elder, or other adult. In order to maintain payments to such persons, the DPOA can include a provision authorizing that these payments continue. The attorney should make sure that the principal understands that these payments may interfere with the long-term care of the principal if third persons are authorized equal access to funds and such funds exceed the principal's assets.

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§5.43 2. Form: Providing Support for Others

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5.43-1 Providing support for others

The Agent is authorized to support or continue to support any person whom the Principal has agreed to support or to whom the Principal owes a duty of support. Payments shall be made in the same manner and in accordance with the same standard of living as the Principal may have provided in the past (adjusted if necessary by circumstances and inflation). Payments cover the person's food; clothing; shelter; medical, dental, or psychiatric care; vacations; education (including room, board, tuition, books, and incidental charges for education at vocational and trade schools; training in music, stage, arts, and sports; special training provided at institutions for persons with disabilities; and undergraduate or graduate study in any field at public or private universities, colleges, or other institutions of higher learning); and a reasonable amount of spending cash.

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K. Nomination of Conservator of Person or Estate

§5.44 1. Nominating Conservator of Person and Estate

The nomination of a conservator may be included in the DPOA, in a written advance health care directive (AHCD), or in a separate writing. Prob C §1810. The nominated individual is given priority over all other individuals for appointment as conservator of the person of the principal. For form nominating a conservator of the person and estate, see §5.45.

The statutory AHCD form in §8.3 contains a nomination of conservator of the person. However, the nomination should be placed in only one document, preferably either the DPOA or a separate document rather than in the AHCD. The risk of placing the nomination in an AHCD is that the AHCD may be replaced, with no conservator nominated in the new document. For example, before receiving major medical treatment or moving to a residential care or retirement facility, the principal often executes, by arrangement of the institution involved, a new AHCD, regardless of whether the individual had a preexisting document. The institutional forms often do not provide for nomination of a conservator.

If the nominated conservator of the person is not the same as the nominated conservator of the estate, the form should be modified.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.45 2. Form: Nomination of Conservator of Person and Estate

§5.45 2. Form: Nomination of Conservator of Person and Estate

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5.45-1 Nomination of conservator of person and estate

If a conservatorship of the Principal's person or estate or both is deemed necessary, the Principal hereby nominates _ _[*name*]_ _ as conservator of the Principal's person and estate. If _ _[*name*]_ _ is unwilling or unable to serve for any reason, the Principal hereby nominates _ _[*name*]_ _ as such conservator.

[*Optional*]

On the appointment of a conservator of the Principal's estate, this power of attorney shall terminate and the Agent shall deliver the assets of the Principal under the Agent's control as directed by the conservator of the Principal's estate.

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L. Appearance for Military, Charitable, or Religious Person in Adoption Proceedings

§5.46 1. Discussion

A person desiring to adopt a child must appear before the court unless (Fam C §§8913, 8613)

(1) the person is in the military service of the United States or any of its allies, is in the American Red Cross, or is engaged in service on behalf of any U.S. governmental entity or any other recognized charitable or religious organization; and

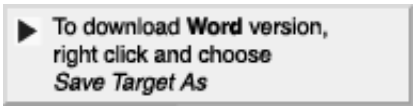
(2) personal appearance is impracticable because of absence from the state or otherwise.

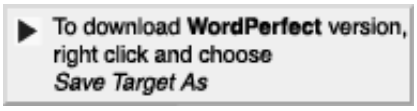
In such circumstances, appearance may be made by an agent holding a special power of attorney for this purpose. The spouse residing with the adopting parent may also appear through such a power of attorney. See §5.47 for form. The power of attorney is not required to be acknowledged (Fam C §8613(b)), but acknowledgment is recommended. The special form of acknowledgment prescribed by CC §1183.5 for military officers should be used when appropriate. Enlisted personnel and Red Cross members should use the acknowledgment provided in CC §1183 for use outside the United States before a U.S. consular agent or foreign notary.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.47 2. Form: Authority to Appear for Military, Charitable, or Religious Person or Spouse in Adoption Proceeding

§5.47 2. Form: Authority to Appear for Military, Charitable, or Religious Person or Spouse in Adoption Proceeding





5.47-1 Authority to appear for military, charitable, or religious person or spouse in adoption proceeding

_ _[*Principal's name*]_ _ **appoints** _ _[*Agent's name*]_ _ **to appear for the Principal under California Family Code §§8913 and 8613 in proceedings for the adoption of** _ _[*name*]_ _**, presently pending under proceeding No.** _ _[*number*]_ _ **of the Superior Court of** _ _ _ _ _ _ **County, California.**

The _ _[*Principal/Principal's spouse*]_ _ **is** _ _[*enlisted in the military service of the United States as* _ _[*position*]_ _*/with the* _ _[*American Red Cross or other organization*]_ _ *as a* _ _[*position*]_ _]_ _**. It is impracticable for the Principal to appear in court in California because the** _ _[*Principal/Principal's spouse's*]_ _ **tour of duty as a member of the** _ _[*military service/American Red Cross/name of other organization*]_ _ **requires that** _ _[*he/she/they*]_ _ **be absent from California.**

Comment: Counsel should be certain to use the appropriate acknowledgment form in CC §1183 (person out of country) or §1183.5 (person serving in the armed forces; spouse of someone serving in the armed forces; or person serving with, employed by, or accompanying the armed forces), depending on the principal's circumstances.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.48 M. Representation of Creditor in Bankruptcy Proceedings

§5.48 M. Representation of Creditor in Bankruptcy Proceedings

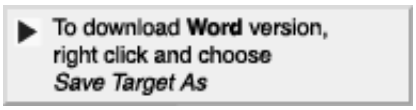
The United States Supreme Court has prescribed official forms for use in representing creditors in bankruptcy proceedings. As with the IRS power of attorney forms, use of the prescribed forms is not mandatory but is advisable. An agent, often the principal's attorney, may represent the creditor and vote the claims at a creditors' meeting, but the agent must first present a properly completed and executed power of attorney in the form prescribed by Official Form 11A (General Power of Attorney; formerly Official Form 17) or 11B (Special Power of Attorney; formerly Official Form 18).

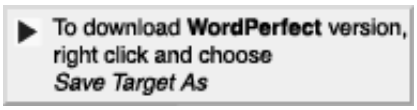
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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/ III. ADMINISTRATIVE PROVISIONS/§5.49 A. Form: General Administrative Authority

III. ADMINISTRATIVE PROVISIONS

§5.49 A. Form: General Administrative Authority





5.49-1 General administrative authority

The Agent is authorized generally to do, execute, and perform any other act, deed, matter, or thing that in the opinion of the Agent ought to be done, executed, or performed in conjunction with this power of attorney, of every kind and nature, as fully and effectively as the Principal could do if personally present. The enumeration of specific items, acts, rights, or powers in this instrument does not limit or restrict, and is not to be construed or interpreted as limiting or restricting, the general powers granted to the Agent except where powers are expressly restricted.

The Agent is authorized to commence enforcement proceedings, at the Principal's expense, against any bank, credit union, financial institution, or other person or entity that fails or refuses to honor this durable power of attorney.

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B. Revocation and Amendment

§5.50 1. Provision for Revocation and Amendment

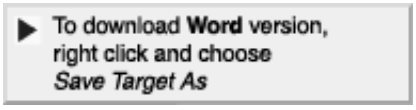
To avoid confusion, even though the statute provides that the principal has the power to revoke a DPOA (Prob C §4151), the DPOA should include a provision stating that all prior DPOAs that the principal executed are revoked. On revocation, see §4.86. This provision should expressly exclude a PAHC and possibly a DPOA for estate and tax planning.

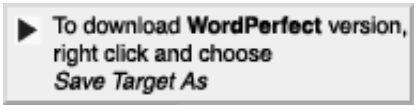
In addition, even though the statute provides that the principal has the power to amend a DPOA (Prob C §4150), there should be an express provision stating that the principal has the authority to amend the DPOA, and it should include the terms for making an amendment, *e.g.,* that it must be in writing and attached to the original DPOA. For sample form, see §5.51.

WARNING: If the DPOA contains a provision that all prior DPOAs executed by the principal are revoked, it should expressly exclude any PAHC. It should also expressly exclude any powers granting access to a safe deposit box and powers granted by the principal on forms provided by financial institutions granting the right to write checks on, deposit funds to, and withdraw funds from accounts to which the principal is a signatory if the principal intends that the agent continue to have access to the safe deposit box and accounts at the principal's financial institutions. See form in §5.69 for a copy of this type of revocation.

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§5.51 2. Form: Revocation and Amendment





5.51-1 General revocation and amendment

The Principal revokes all prior durable or general powers of attorney that the Principal may have executed (except any Power of Attorney for Health Care or Advance Health Care Directive _ _[*or Power of Attorney for Estate and Tax Planning, Power of Attorney granting access to safe deposit boxes, and Power of Attorney executed by the Principal on forms provided by financial institutions granting the right to write checks on, deposit funds to, and withdraw funds from accounts to which the Principal is a signatory*]**_ _), and the Principal retains the right to revoke or amend this instrument and to substitute other persons in the Agent's place. Amendments to this instrument shall be made in writing by the Principal personally (not by the Agent), attached to the original of this instrument, and recorded in the same county or counties as the original if the original is recorded.**

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C. Certifying Power of Attorney

§5.52 1. Certification

A certified copy of a power of attorney has the same force and effect as an original. Copies may be certified by attorneys, notaries, and officials authorized to make certifications. Prob C §4307. See also Govt C §8205(a)(2), (4) for provisions specifying that a notary's duties include certification of a power of attorney.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.53 2. Form: Certifying Power of Attorney

§5.53 2. Form: Certifying Power of Attorney

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5.53-1 Certifying power of attorney

CERTIFICATION OF POWER OF ATTORNEY

I, _ _[*name*]_ _**, am** _ _[*an attorney licensed in California/a California notary public/an official* _ _[*of the state of California/of a political subdivision*]_ _ *who is authorized to make certifications*]_ _**. I certify under Probate Code §4307 that I have examined the original power of attorney and the copy of the original power of attorney and that the copy is a true and correct copy of the original power of attorney.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

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§5.54 D. Limiting Authority to Petition Court

Probate Code §4503 provides that the authority of some persons to petition the court for any of the purposes stated in Prob C §4541 (including power to petition to challenge acts of agent, to compel agent to submit accounts or reports, and to remove agent) may be proscribed in the power of attorney if the power of attorney was executed under the advice of an attorney who provides a written certification in the terms stated in Prob C §4503(a)(2). For sample form of the required attorney's certificate, see §5.55.

The following persons may not be proscribed from filing a petition under Prob C §§4500-4545 (Prob C §4503(b)):

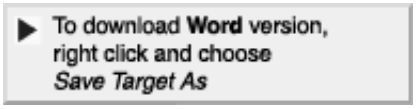
- The agent;
- The principal;
- The conservator of the person of the principal;
- The conservator of the estate of the principal; and
- The public guardian.

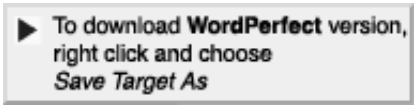
For sample forms proscribing the ability of certain persons to petition the court, see §5.56. See also chap 11.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.55 1. Form: Attorney Certificate Regarding Limitation on Authority to Petition

§5.55 1. Form: Attorney Certificate Regarding Limitation on Authority to Petition





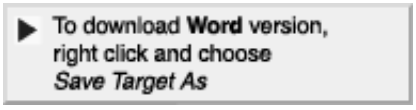
5.55-1 Attorney certificate regarding limitation on authority to petition

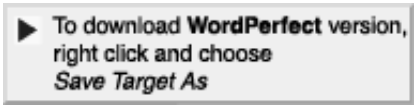
I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the Principal was my client at the time this power of attorney was executed. I have advised my client concerning _ _[*his/her*]_ _ rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney.

__[*Signature of attorney*]__
_ _[*Typed name*]_ _

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§5.56 2. Form: Limitation on Authority to Petition for Court Enforcement of Agent's Duties





5.56-1 Limitation on authority to petition for court enforcement of agent's duties

[*If applicable, add one or more of the following options*]

[*Option 1: Authority limited to persons who by statute may not be proscribed*]

No one other than the Agent, the Principal, the conservator of the Principal's estate or person, or the public guardian shall have the right to file a petition under California Probate Code §4541(b).

[*Option 2: Authority limited to specific purpose*]

No one other than the Agent, the Principal, the conservator of the Principal's estate or person, or the public guardian shall have the right to file a petition under California Probate Code §4541(b), except for the following purposes: _ _[*Identify limitations, e.g., to determine that the Principal lacks the capacity to give or to revoke a PAHC*]_ _**.**

[*Option 3: Authority limited during spouse's competency*]

As long as the Principal's spouse is competent, the Principal's children shall have no right to file a petition under California Probate Code §4541(b).

[*Option 4: Authority of specific person limited*]

_ _[*Identify specific person, e.g., the Principal's son*]_ _ **shall have no right to file a petition under California Probate Code §4541(b)** _ _[*e.g., as long as he is incarcerated under the supervision of the California Department of Corrections*]_ _**.**

Comment: See §5.54 for persons who cannot be proscribed from petitioning. It is not necessary, therefore, to include the first alternative in the DPOA unless the principal wants an express provision stating the law. Note that, if a child of the principal is the principal's conservator, the third option would not apply to that child.

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§5.57 E. Reports

The agent must keep records of transactions on behalf of the principal. Prob C §4236(a). However, the agent has no duty to account except on court order, on demand of certain persons whose right to make such a demand cannot be limited in the power of attorney, or on demand of a person specifically directed in the power of attorney. Prob C §4236(b).

The power of attorney cannot limit the ability of the following to demand an accounting (Prob C §4236(b), (d)):

- The principal;
- Persons specified in the power of attorney to receive accountings;
- Conservator of the estate of the principal;
- Personal representative of the principal or successor in interest after the death of the principal; and
- Persons entitled to because of court order.

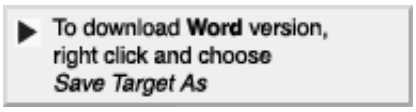
For sample form summarizing the agent's duty to prepare annual financial reports, see §5.58.

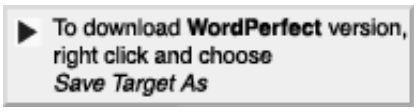
If the principal wishes a specific individual to receive an account, he or she can include a specific direction in the power of attorney that the agent account to a specific person. This is an exception to the general rule that accountings are not required. See Prob C §4236. For sample duty to report form, see §5.59.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.58 1. Form: Duty to Prepare Annual Financial Reports

§5.58 1. Form: Duty to Prepare Annual Financial Reports





5.58-1 Duty to prepare annual financial reports

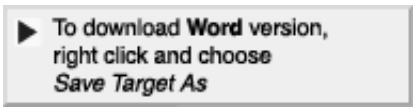
The Agent shall prepare annual financial reports, including a balance sheet of property, showing income and losses for the Principal's business known as _ _[*identify*]_ _, which the Principal has authorized the Agent to manage under this power of attorney. Such reports shall be prepared on a calendar-year basis and shall be sent on or before April 15 of each calendar year to each of the following persons at the addresses shown or at such other address as any such person may advise the Agent in writing:

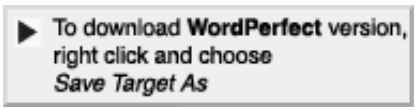
_ _[*List names and addresses*]_ _

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.59 2. Form: Duty to Report

§5.59 2. Form: Duty to Report





5.59-1 Duty to report

The Agent shall prepare quarterly reports on the Principal's assets and finances, including income received and expenses paid by the Agent. When prepared, these reports shall be mailed to the following persons at the following addresses unless the Agent is otherwise advised in writing by any such person:

_ _[*List names and addresses*]_ _

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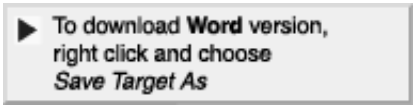
F. Hiring Professional Advisers

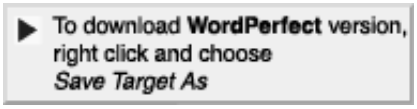
§5.60 1. Employing Professional Advisers

It is often understood that a DPOA agent may hire professional assistance in managing the principal's affairs; however, a provision may be included in the DPOA to specifically authorize the hiring and firing of professionals. Such a provision may also be necessary to include so that, *e.g.,* an attorney could continue to be retained for the principal under the DPOA without violating any conflict-of-interest rules. For form, see §5.61.

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§5.61 2. Form: Authority to Employ Professional Advisers





5.61-1 Authority to employ professional advisers

The Agent is authorized to employ and discharge any accountants, attorneys, investment counsel, real estate brokers, property managers, bookkeepers, consultants, custodians, auditors, appraisers, or any other professionals that the Agent deems reasonably necessary for the proper management and protection of the Principal's affairs, for the maintenance of proper accounts and records, and for advice in carrying out the Agent's duties and responsibilities under this instrument. The Agent is authorized to employ investment managers, investment agents, or other investment specialists as the Agent deems necessary or desirable. Specifically, the Agent is authorized to appoint an investment manager to manage all or any part of the Principal's assets and to delegate to such manager investment discretion that is not inconsistent with the Agent's duties under this instrument or applicable law. Such appointment may include the power to acquire and dispose of assets without first obtaining the Agent's consent. The Agent may pay reasonable compensation to any such professionals hired by the Agent from the Principal's assets. Any compensation paid to such professionals may be taken into consideration in determining the reasonableness of any compensation taken or requested by the Agent. The foregoing provisions are not intended to relieve the Agent of the duty to exercise reasonable care and prudence in selecting, employing, and supervising any such professionals.

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IV. PROVISIONS REGARDING PRINCIPAL'S PERSONAL CARE AND RESIDENCE

§5.62 A. Personal Care Decisions and Durable Powers of Attorney

An agent under a durable power of attorney may be authorized to make personal care decisions for an incapacitated principal. Prob C §§4123(a), (c), 4671(b). The provisions may be included in a PAHC, in a DPOA (see §5.64), or in a separate document (see §5.63). The agent authorized to make personal care decisions need not be the same person as the one named in the principal's PAHC or DPOA. If the provisions are included in a PAHC, Prob C §4671(b) of the Health Care Decisions Law (Prob C §§4600-4805) governs. See chaps 7-8. If the provisions are in a DPOA or a separate durable power of attorney for personal care, the provisions of the Power of Attorney Law, discussed in this chapter, apply.

Whether personal care decisions are authorized in a DPOA, a PAHC, or in a separate document, the other documents should contain references to the personal care provisions and direct that the agent(s) under the other documents cooperate with the agent holding the personal care powers. If the personal care provisions are not contained in the DPOA, the potential for conflict may arise, *e.g.,* if the personal care agent determines that the principal should reside at a certain facility but the agent under the DPOA concludes that the cost of that facility is excessive given the principal's assets. To avoid such a conflict, specific provisions setting out whose decision is final should be included in all of the relevant documents.

PRACTICE TIP: Because many of the provisions in a durable power of attorney for personal care involve making arrangements for things that incur costs, adopting one of the following courses of action is recommended: (1) the person named as personal care agent is the same person named as agent in the DPOA; (2) the DPOA contains a provision specifically directing the agent to pay any costs incurred by the agent under the personal care power of attorney for services or items for the benefit of the principal; or (3) the personal care provisions are included in the DPOA.

PRACTICE TIP: Because the agent under a personal care power of attorney may need confidential medical information from health care providers, it is strongly recommended that the principal execute a separate HIPAA and CMIA release form to forestall problems from medical staff. See §§8.35-8.38 for a variety of forms.

NOTE: Some nursing homes have taken the position that the agent under a PAHC alone has the power to make placement decisions. Frequently, however, the PAHC does not address placement issues. By specifically stating in the DPOA or in the separate personal care durable power of attorney that the agent has the power to determine the principal's residence, a principal may avoid having a nursing home take the position that in the absence of a specific grant of authority a conservatorship is required before the facility will accept the principal. Note, however, that if such authority is provided, nursing homes may be able to assert an arbitration clause in the event of elder abuse. See §11.12.

If personal care decisions are included in the DPOA (see §5.64), it is recommended that the title of the document include a reference to the personal care powers, *e.g.,* "Durable Power of Attorney for Financial Management and Personal Care Decisions," and that, if a reference is made to the authorizing provision in the Probate Code for the financial management power of attorney, a reference also be included to Prob C §4123(c).

Most commonly, personal care powers are incorporated into either the DPOA or the PAHC, but the form in §5.63 is an example of a stand-alone personal care power of attorney.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.63 B. Form: Springing Durable Power of Attorney for Personal Care (Separate Document)

§5.63 B. Form: Springing Durable Power of Attorney for Personal Care (Separate Document)

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5.63-1 Springing durable power of attorney for personal care (separate document)

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AND WHEN RECORDED MAIL TO)
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_ _[*Principal's name*]_ _, **(herein "Principal") to** _ _[*Agent's name*]_ _**, (herein "Agent"):**

SPRINGING DURABLE POWER OF ATTORNEY FOR PERSONAL CARE DECISIONS

NOTICE TO PERSON EXECUTING THIS DOCUMENT:

THIS IS AN IMPORTANT LEGAL DOCUMENT. IT CREATES A DURABLE POWER OF ATTORNEY. BEFORE EXECUTING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

1. THIS DOCUMENT MAY PROVIDE THE PERSON YOU DESIGNATE AS YOUR ATTORNEY-IN-FACT (AGENT) WITH BROAD POWERS TO MAKE PERSONAL CARE DECISIONS FOR YOU, INCLUDING DECIDING WHERE YOU LIVE AND PROVIDING FOR YOUR DAILY PERSONAL CARE NEEDS.

2. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH CARE DECISIONS FOR YOU.

3. THIS POWER OF ATTORNEY WILL BECOME EFFECTIVE ONLY IF YOU BECOME INCAPACITATED AND IT WILL REMAIN IN EFFECT ONLY AS LONG AS YOU ARE INCAPACITATED.

4. YOU HAVE THE RIGHT TO REVOKE OR TERMINATE THIS DURABLE POWER OF ATTORNEY AT ANY TIME.

5. YOUR AGENT HAS NO DUTY TO ACT UNLESS YOU AND YOUR AGENT AGREE OTHERWISE IN WRITING.

POWER OF ATTORNEY TO BECOME EFFECTIVE ONLY ON INCAPACITY OF PRINCIPAL

This durable power of attorney shall become effective only on the incapacity of the undersigned Principal. The Principal grants the following persons the power to determine conclusively that the Principal has become incapacitated and therefore that this power of attorney has become effective:

(a) The Principal's treating physician;

(b) _ _[*Name, address, and relationship to Principal*]_ _**;**

(c) _ _[*Name, address, and relationship to Principal*]_ _**;**

(d) _ _[*Name, address, and relationship to Principal*]_ _**.**

This springing durable power of attorney shall become effective when any three of the persons designated above execute written declarations under penalty of perjury that the Principal does not have sufficient understanding or ability to make or communicate decisions about the Principal's personal care needs. Attachment A to this document has a sample of a declaration that may be used for this purpose.

The Agent shall promptly attach the three declarations to this instrument. Any person may act in reliance on this instrument with three declarations attached without liability to the Principal or to any other person regardless of whether the Principal is later determined to have or not have capacity.

No licensed physician designated above who executes a medical opinion of the Principal's incapacity shall be subject to liability because of such execution. The Principal hereby waives any privilege that may apply to release of information included in such medical opinion.

This power of attorney shall continue after the Principal's incapacity in accordance with its terms.

TO WHOM IT MAY CONCERN:

I, _ _[*name*]_ _ (the "Principal"), presently a resident of _ _ _ _ _ _ County, California, hereby appoint _ _[*name*]_ _ (the "Agent"), presently a resident of _ _ _ _ _ _ County, California, as my true and lawful Agent.

Regardless of whether I have executed, or will execute, a Power of Attorney for Health Care or a Durable Power of Attorney for Financial Management, if I become incapacitated, I hereby grant to the Agent named in this document the authority to provide for my personal needs, other than health care decisions.

I expect the Agent to consult with the person who is managing my finances before committing my resources for my personal care needs. I further expect the Agent to be paid a reasonable fee for my personal care services, and I authorize the person who is managing my finances to pay those fees in a timely manner.

My Agent is authorized to do all things and enter into all transactions necessary to provide for my personal care and to maintain my customary standard of living. The authority shall specifically include the authority to do the following:

1. Determine where I live and make necessary arrangements, including entering into contracts on my behalf with residential facilities, hospitals, hospices, nursing homes, convalescent homes, and similar organizations;

2. Provide for my meals and snacks, or arrange to have someone else provide them;

3. Screen, choose, hire, and discharge household, nursing, and other employees as the Agent considers advisable for my well-being;

4. Provide for transportation, recreation, travel, and entertainment for me;

5. Receive, open, and read my mail;

6. Choose, purchase, and maintain my clothing;

7. Obtain and provide my medicine, including prescription medications, and personal care products and items, such as toothpaste and shampoo, and provide for my personal care and hygiene needs, such as bathing and hair care;

8. Arrange for the care and veterinary treatment of my pets;

9. Arrange for my spiritual and religious needs to be met;

10. Make and pay for advance funeral, cremation, or burial arrangements for me as directed by the Agent under my advance health care directive, for which payments the Agent is hereby released from any and all liability, if I have not already completed that process, in accordance with my expressed wishes, if known, or in my best interest if my wishes are not known; and

11. Purchase, maintain, and repair my household contents, disposing of items that cannot be properly cleaned or repaired and storing or selling items no longer needed or used by me. Other personal care items that I wish to include are as follows: _ _[*Specify additional items*]_ _.

The Principal shall be deemed to have been restored to capacity when any three of the following persons shall execute written declarations under penalty of perjury that in his or her opinion the Principal has sufficient understanding or ability to make or communicate decisions about the Principal's personal care decisions and when such declarations have been delivered to the Agent:

1. The Principal's treating physician;

2. The Agent named in this document;

3. _ _[*Name, address, and relationship to Principal*]_ _;

4. _ _[*Name, address, and relationship to Principal*]_ _.

No licensed physician designated above who executes a medical opinion of the Principal's capacity shall be subject to liability because of such execution. The Principal hereby waives any privilege that may apply to the release of information included in such medical opinion.

TO MY AGENT: I have, on this date or at some other time, executed a

__ Power of Attorney for Health Care

__ HIPAA/CMIA Medical Release

__ Durable Power of Attorney for Financial Management.

You should be aware of those documents and of the powers granted by them to the Agent(s) named in them. These documents are available on request of the Agent from my attorney, _ _[*name*]_ _, at _ _[*address*]_ _.

IN WITNESS WHEREOF, the Principal has signed this springing durable power of attorney for personal care decisions on _ _[*date*]_ _, at _ _[*city and state*]_ _.

__[*Signature*]__
_ _[*Typed name*]_ _

State of California)
)
County of _ _[*name of county*]_ _)
)
)
)
_____)

On _ _[*date*]_ _ before me, _ _[*name and title of officer*]_ _, personally appeared _ _[*name(s)*]_ _, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal:

__[*Signature of officer*]__ [*Officer's seal*]

Attachment A

[*If applicable, add one or more of the following options*]

[*Option 1: Physician's Determination of Capacity*]

I, _ _[*physician's name*]_ _, declare the following:

I am a physician licensed to practice medicine in the State of California. I am one of _ _[*Principal's name*]_ _'s attending physicians. I have examined _ _[*Principal's name*]_ _. I declare under penalty of perjury that it is my professional opinion and conclusion that _ _[*Principal's name*]_ _ is incapacitated, is unable to manage _ _[*his/her*]_ _ own financial affairs, and requires the services of another person to manage _ _[*his/her*]_ _ financial affairs for _ _[*him/her*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

[*Option 2: Incapacity panel member's determination of incapacity*]

I, _ _[*panel member's name*]_ _, declare the following:

I am _ _[*principal's name*]_ _'s _ _[*describe relationship, e.g., friend, brother, parent*]_ _, and I am named in this Power of Attorney as a person who may determine whether _ _[*Principal's name*]_ _ is incapacitated. I declare under penalty of perjury that it is my opinion and conclusion that _ _[*Principal's name*]_ _ is incapacitated, is unable to manage _ _[*his/her*]_ _ own financial affairs, and requires the services of another person to manage _ _[*his/her*]_ _ financial affairs for _ _[*him/her*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Comment: The form in this section anticipates that it will be recorded. Each item listed above should be reviewed with the client and tailored to meet the client's needs and desires before inclusion in the durable power of attorney document. See §§5.65 and 5.68 for samples of additional provisions that can be included in this form. See discussion and form in §§4.13, 4.15 for determination of incapacity by an incapacity panel.

The provisions in §§5.66-5.67 can be included in a DPOA to restrict sale of the principal's residence. They should not to be used in a separate personal care power of attorney.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/ C. Individual Personal Care Provisions/§5.64 1. Form: Personal Care Provisions as Part of DPOA

C. Individual Personal Care Provisions

§5.64 1. Form: Personal Care Provisions as Part of DPOA

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

5.64-1 Personal care provisions as part of DPOA

The Agent is authorized to do all things and enter into all transactions necessary to provide for the Principal's personal care, to maintain the Principal's customary standard of living, to provide suitable living quarters for the Principal, and to hire, compensate, and discharge household, nursing, and other employees as the Agent considers advisable for the Principal's well-being. The above shall specifically include but not be limited to the authority to procure and pay for clothing, transportation, recreation, travel, medicine, medical care, food, and other needs and to make arrangements and enter into contracts on behalf of the Principal with hospitals, hospices, nursing homes, convalescent homes, and similar organizations.

The Agent is authorized to employ and discharge physicians, dentists, nurses, therapists, and other professionals as the Agent may deem necessary for the Principal's physical, mental, and emotional well-being and to pay them reasonable compensation. The Agent may also employ and discharge barbers, beauticians, housekeepers, secretaries, and others who are not health care professionals and pay them reasonable compensation.

The Agent is authorized to arrange for the care and, as needed, veterinary treatment and disposition of the Principal's pets.

The Agent is authorized to make arrangements for meeting the Principal's spiritual and religious needs.

The Agent is authorized to make and pay for advance funeral, cremation, or burial arrangements for the Principal as directed by the Agent under the Principal's advance health care directive, for which payments the Principal's Agent is hereby released from any and all liability, if the Principal has not already completed that process, in accordance with the Principal's expressed wishes, if known, or in the Principal's best interest if _ _[*his/her*]_ _ wishes are not known.

The Agent is authorized to purchase, maintain, and repair the Principal's clothing, household furniture, furnishings, and other tangible personal effects. This includes the authority to dispose of worthless items that cannot be properly cleaned or repaired and to store items no longer needed or used by the Principal while in a hospital, nursing home, or other residential facility.

Comment: To give the reader a sample of alternative styles in drafting language, the language in this form, even when referring to the same activity as that described in the form in §5.63, differs slightly from that form. Be sure that any authority given to the agent to employ doctors and other health care professionals in the DPOA, such as that given in the second paragraph of the form, does not conflict with the authority given to the agent under the PAHC or in a separate durable power of attorney regarding personal care.

When personal care decisions are included in the DPOA, it is recommended that the title of the document include a reference to the personal care powers, *e.g.,* "Durable Power of Attorney for Financial Management and Personal Care Decisions," and that, if a reference is made to the authorizing provision in the Probate Code for the financial management power of attorney, a reference also be included to Prob C §4123(c).

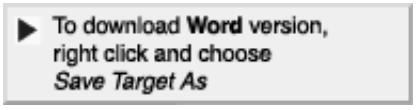
NOTE: With respect to making funeral, burial, or cremation arrangements, if the agent under the Advance Health Care Directive (AHCD) is not the same person as the agent for personal care decisions, it may be best to omit this provision. Under Prob C §4683(b) and Health & S C §§7100(a), 7100.1, the agent under the AHCD takes priority

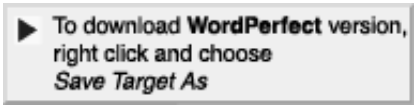
over all other individuals in making decisions regarding the disposition of the principal's remains. If the agents are different individuals, the documents may create confusion or a conflict of authority.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.65 2. Form: Principal's Intention to Remain in Own Home

§5.65 2. Form: Principal's Intention to Remain in Own Home





5.65-1 Principal's intention to remain in own home

The Principal presently lives in _ _[*his/her*]_ _ own home, located at _ _[*street address*]_ _, and owns the property _ _[*free of encumbrances/with a mortgage in the amount of $*_ _[*amount*]_ _]_ _. It is the Principal's desire to continue to live there as long as _ _[*he/she*]_ _ is physically able, despite the possibility that alternative housing may be recommended by the Agent or third parties for financial or other reasons. The Principal authorizes _ _[*and directs*]_ _ the Agent to take such steps as are necessary to honor the Principal's above-expressed desire, including but not limited to modifying the premises, hiring home care providers, or taking such other measures as the Agent considers advisable under the circumstances.

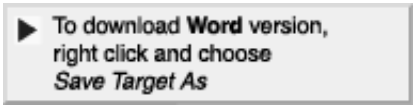
[*Optional: Principal's intention to return home if institutionalized*]

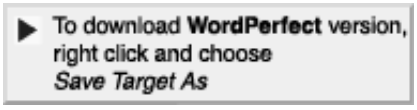
For purposes of establishing the exempt status of _ _[*his/her*]_ _ residence located at _ _[*address*]_ _ for Medi-Cal qualification, it is the Principal's intention to return home if institutionalized. The Agent is directed to take such steps as are necessary to express the Principal's intent on an application for Medi-Cal Long-Term Care.

Comment: This provision can be included as an additional provision in the personal care durable power of attorney or in the DPOA.

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§5.66 3. Form: Restriction on Sale of Home Until All Other Assets Are Depleted





5.66-1 Restriction on sale of home until all other assets are depleted

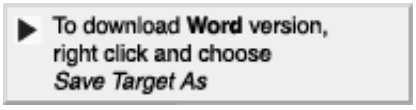
The Agent shall have no authority to sell the Principal's home, commonly known as _ _[*street address*]_ _, assessor's parcel number _ _[*number*]_ _, unless all of the Principal's other assets (exclusive of tangible personal property) have been depleted or are insufficient to pay the ongoing costs of the Principal's health, support, and maintenance. _ _[*Name*]_ _ shall have the authority to certify that these conditions have been met, and the Principal authorizes title and escrow companies and all other persons and entities to rely on _ _[*name's*]_ _ certification.

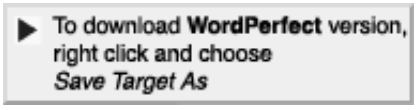
Comment: This provision can be included in a DPOA but should not be in a stand-alone personal care power of attorney. While no statutory or case law restricts using the provision in a personal care power of attorney, it is not recommended because of the potential for conflict between an agent of a DPOA and an agent of a personal care power of attorney. For example, if the personal care power contains the provision in form §5.65 and if the form in §5.66 is included in the DPOA and the agents are different, the interrelationship of these provisions can cause conflicts between the two agents in attempting to coordinate the principal's desires concerning his or her real estate.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.67 4. Form: Restriction on Sale or Encumbrance of Principal's Residence

§5.67 4. Form: Restriction on Sale or Encumbrance of Principal's Residence





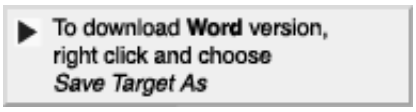
5.67-1 Restriction on sale or encumbrance of principal's residence

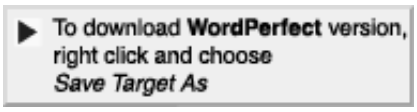
The Agent shall not sell, convey, transfer, lease, sublease, exchange, or encumber the Principal's residence commonly known as _ _[*street address*]_ _, assessor's parcel number _ _[*number*]_ _, without prior court approval.

Comment: See Comment to form §5.66. This clause, which requires a notice and court petition, should be used sparingly.

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§5.68 5. Form: Authority to Dispose of Personal Effects





5.68-1 Authority to dispose of personal effects

If in the Agent's judgment the Principal will never be able to return to the Principal's residence from a hospital, hospice, nursing home, or similar facility, the Agent is authorized to store, transfer to appropriate beneficiaries who would take under the Principal's will or trust agreement, or sell for such price and on such terms as the Agent considers appropriate any items of the Principal's tangible personal property remaining in the Principal's residence that the Agent believes the Principal will not need again.

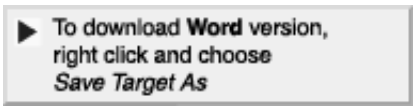
Comment: This clause may not always be appropriate and should be carefully reviewed before use. Problems could develop if property is distributed to beneficiaries currently named in a will or trust and the principal (who has capacity) later amends or revokes the instrument regardless of whether the principal returns to his or her residence. Attorneys may wish to limit this provision to items of relatively moderate value by stating a specific dollar amount limit. This specific limitation could also prevent possible gift tax consequences.

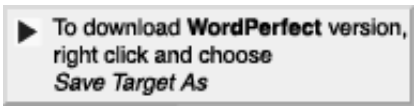
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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/ V. SAMPLES OF COMPLETE FORMS/§5.69 A. Form: General and Immediately Effective Durable Power of Attorney

V. SAMPLES OF COMPLETE FORMS

§5.69 A. Form: General and Immediately Effective Durable Power of Attorney





5.69-1 General and immediately effective durable power of attorney

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)
)
)
AND WHEN RECORDED MAIL TO)
)
)

Space above this line for recorder's use
_ _ _ _ _ _, Principal, to _ _ _ _ _ _, Agent:

DURABLE POWER OF ATTORNEY

NOTICE TO PERSON EXECUTING THIS DOCUMENT:

THIS IS AN IMPORTANT LEGAL DOCUMENT. IT CREATES A DURABLE POWER OF ATTORNEY. BEFORE EXECUTING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS.

1. THIS DOCUMENT MAY PROVIDE THE PERSON YOU DESIGNATE AS YOUR ATTORNEY-IN-FACT (AGENT) WITH BROAD POWERS TO MANAGE YOUR FINANCIAL AFFAIRS, INCLUDING THE AUTHORITY TO MANAGE, DISPOSE OF, SELL, CONVEY, AND ENCUMBER YOUR REAL AND PERSONAL PROPERTY; TO USE YOUR PROPERTY AS SECURITY IF YOUR AGENT BORROWS MONEY ON YOUR BEHALF; AND TO TAKE ACTIONS TO CARRY OUT YOUR ESTATE PLAN.

2. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH CARE DECISIONS FOR YOU.

3. THIS DOCUMENT DOES NOT GIVE YOUR AGENT THE POWER TO ACCEPT OR RECEIVE ANY OF YOUR PROPERTY, IN TRUST OR OTHERWISE, AS A GIFT, UNLESS YOU SPECIFICALLY AUTHORIZE THE AGENT TO ACCEPT OR RECEIVE A GIFT.

4. THESE POWERS WILL EXIST FOR AN INDEFINITE PERIOD OF TIME UNLESS YOU LIMIT THEIR DURATION IN THIS DOCUMENT. THESE POWERS WILL CONTINUE TO EXIST NOTWITHSTANDING YOUR SUBSEQUENT INCAPACITY.

5. YOU HAVE THE RIGHT TO REVOKE OR TERMINATE THIS DURABLE POWER OF ATTORNEY AT ANY TIME.

6. YOUR AGENT HAS NO DUTY TO ACT UNLESS YOU AND YOUR AGENT AGREE OTHERWISE IN WRITING.

TO WHOM IT MAY CONCERN:

_ _[*Name*]_ _ (the Principal), who currently resides at _ _[*address*]_ _, _ _ _ _ _ _ County, California, hereby appoints _ _[*name*]_ _, who currently resides at _ _[*address*]_ _, _ _ _ _ _ _ County, California, as the Principal's true and lawful attorney-in-fact (Agent) for the Principal. If for any reason the original Agent under this durable power of attorney is unwilling or unable to continue to serve, _ _[*name*]_ _, whose current address

is _ _[*address*]_ _, shall instead serve as successor Agent. In such case, one of the following documents shall be attached to this durable power of attorney: a resignation or declination to serve signed by the original Agent; a written and signed opinion (or declaration under penalty of perjury) from a licensed physician that the original Agent is physically or mentally incapable of serving; a certified court order as to the incapacity or inability of the original Agent to serve; or a certified death certificate of the original Agent. Third parties who deal with the successor Agent shall be entitled to rely on the original power of attorney instrument, or a photocopy thereof, with any such document attached.

REVOCATION AND AMENDMENT OF POWER OF ATTORNEY

The Principal revokes all prior durable or general powers of attorney that the Principal may have executed (except any Power of Attorney for Health Care or Power of Attorney for Estate and Tax Planning), and the Principal retains the right to revoke or amend this instrument and to substitute other persons in the Agent's place. Amendments to this instrument shall be made in writing by the Principal personally (not by the Agent), attached to the original of this instrument and recorded in the same county or counties as the original if the original is recorded.

The Agent is authorized to take the following actions for the Principal and in the Principal's name, place, and stead:

AUTHORITY OVER REAL PROPERTY

1. To manage, control, lease, sublease, and otherwise act concerning the Principal's interest in the real property more fully described in Exhibit A attached to this instrument; to collect and receive rents or income therefrom; to pay taxes, charges, and assessments on the same; to repair, maintain, protect, preserve, alter, and improve the same; to commit the Principal's resources and contract on the Principal's behalf regarding the same; and to do all things necessary or expedient to be done in the Agent's judgment in connection with the property.

2. To grant, sell, transfer, mortgage, deed in trust, convey, pledge, and otherwise encumber and deal in the real property described in this instrument and to execute such instruments as the Agent considers proper, specifically including but not limited to the power to do the following:

(a) Represent the Principal in negotiations for the sale of the real property described in this instrument, including but not limited to entering into listing agreements with brokers or other Agents regarding such sale.

(b) Execute, acknowledge, and deliver contracts of sale, escrow instructions, deeds, covenants, agreements, assignments of agreements, and all other documents needed with respect to the sale of the real property described in this instrument.

3. To purchase real property on the Principal's behalf; to mortgage, pledge, or otherwise encumber such newly acquired property; to commit the resources of the Principal with respect to purchase of such property; to do all acts and execute all documents necessary for the purchase of such property; and to otherwise generally deal in all respects and have all powers described in this power of attorney with respect to such property.

AUTHORITY OVER ACCOUNTS AND SAFE DEPOSIT BOXES

4. To deposit in and draw on any checking, savings, agency, or other accounts that the Principal may have in any banks, credit unions, or other financial institutions, and any accounts with securities brokers or other commercial institutions, and to establish and terminate all such accounts.

5. To have access to all safe deposit boxes in the Principal's name or to which the Principal is an authorized signatory; to contract with financial institutions for the maintenance and continuation of safe deposit boxes in the Principal's name; to add to and remove the contents of all such safe deposit boxes; and to terminate contracts for all such safe deposit boxes.

AUTHORITY OVER CREDIT CARDS

6. To use any credit cards in the Principal's name, to make purchases, to sign charge slips on behalf of the

Principal as may be required to use such credit cards, and to close the Principal's charge accounts and terminate the Principal's credit cards when the Agent considers such acts to be in the Principal's best interest.

INVESTMENT AUTHORITY

7. To invest and reinvest the Principal's funds in every kind of property, real, personal, or mixed, and every kind of investment, specifically including but not limited to corporate obligations of every kind; preferred or common stocks; shares of investment trusts, investment companies, and mutual funds; and mortgage participations.

AUTHORITY OVER PARTNERSHIP INTERESTS

8. To manage and control all partnership interests owned by the Principal; to make all decisions the Principal could make as a general partner, limited partner, or both; and to execute all documents required of the Principal as such partner, all to the extent that the Agent's designation for such purposes is allowed by law and is not in contravention of any partnership or other agreement.

AUTHORITY TO COLLECT ASSETS, COMPROMISE CLAIMS, AND LITIGATE

9. To demand, sue for, and collect all sums of money, debts, accounts, legacies, bequests, interest, dividends, annuities, and demands that are now, or may later become, due or payable to the Principal, including any benefits payable by any governmental body or agency (such as Supplemental Social Security (SSI), Medi-Cal, Medicare, and Social Security Disability Insurance (SSDI) (for purposes of receiving Social Security benefits, the Agent is hereby appointed as the Principal's Representative Payee)), and to take all lawful means to recover such assets and to compromise claims for such assets and grant discharges for such assets in the Principal's name.

10. To prosecute or defend actions, claims, or proceedings for the protection of the Principal's property, including the power to renew, extend, compromise, arbitrate, adjust, and settle or lease (with or without consideration) any claim, debt, or obligation that is held by or asserted against the Principal or the Principal's property or that affects such property; to foreclose, extend the time of payment for, assign, partially release, or discharge mortgages, deeds of trust, security interests, and other liens; and with respect to deeds of trust, to execute subordinations, acreage or lot releases, and requests for partial or full reconveyance.

AUTHORITY OVER GOVERNMENT BENEFITS

11. To apply for and make any elections required for payment of governmental benefits to which the Principal may be entitled, to take possession of all such benefits, and to distribute such benefits to or for the Principal's benefit.

AUTHORITY OVER INSURANCE

12. To purchase and maintain insurance on the Principal's life and property or the life and property of any third person when the Principal has an insurable interest. The Agent may pay all insurance premiums from the Principal's assets and may borrow money on the Principal's behalf in order to pay for insurance. The Agent may pursue insurance claims on the Principal's behalf and may decrease or increase coverage under any insurance policy or cancel any policy and receive on the Principal's behalf any cash proceeds on termination. The Agent may also borrow against policies on the Principal's life and repay loans against such policies as the Agent considers in the Principal's best interest.

The Agent is authorized to apply for and make any elections required for payment of insurance benefits to which the Principal may be entitled, to take possession of all such benefits, and to distribute such benefits to or for the Principal's benefit.

AUTHORITY OVER ANNUITIES

13. To purchase, maintain, surrender, collect, withdraw funds from, incur penalties and surrender charges from, cancel, modify, rescind, release, terminate, or exchange any annuity contract procured by the Principal or the Agent.

The Agent may also do the following:

(1) Collect, sell, assign, hypothecate, borrow on, or pledge the Principal's interest in an annuity contract.

(2) Procure new, different, and additional contracts of annuities for the Principal and the Principal's spouse, children, and other dependents and select the amount, type of annuity, and mode of payment.

(3) Continue, modify, rescind, release, or terminate a contract procured by the Principal or on the Principal's behalf that provides an annuity to either the Principal or another person, whether or not _ _[*he/she*]_ _ is a beneficiary under the contract.

(4) Pay from proceeds or otherwise compromise or contest and apply for refunds in connection with a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

(5) Change the beneficiary of an annuity contract, although the Agent may not be designated a beneficiary. The Agent may continue to be a beneficiary as long as _ _[*he/she*]_ _ is already named as a beneficiary under a contract procured by the Principal while having legal capacity to do so.

AUTHORITY OVER RETIREMENT ACCOUNTS

14. To establish one or more Individual Retirement Accounts (IRAs) and employee benefits plans (including a plan for a self-employed individual) on the Principal's behalf; to contribute to any IRA or plan held in the Principal's name; to roll over or direct transfers of plan benefits into other retirement plans or IRA accounts at the same company or at another company; to manage the accounts; to withdraw from any account without limitation; to select or change payment options; to apply for and make any elections under any IRA or employee benefit plan in which the Principal is a participant, including elections required for payment of any and all types of employee benefits to which the Principal may be entitled; to take possession of all such benefits; and to distribute such benefits to or for the Principal's benefit. The Agent _ _[*shall/shall not*]_ _ have the power to designate and change beneficiaries.

[*Optional additions if power granted*]

The Agent, however, may not designate _ _[*himself/herself*]_ _ as a beneficiary on any employee benefit plan.

The Agent, in exercising the power to designate and change beneficiaries, may designate as beneficiaries only a member or members of a class of persons consisting of _ _[*names*]_ _.

[*Continue*]

The employee benefits plans and Individual Retirement Accounts _ _[*and annuities*]_ _ now held by the Principal are as follows:

[*Identify institution and account number for each*]

If an account or plan is rolled over or transferred to a new company, the Principal requests that the new company also honor this power.

AUTHORITY OVER ESTATE AND TAX PLANNING

15. To prepay or postpone property taxes, income taxes, or other taxes. The Agent may pay or postpone deductible expenses, sell or postpone the sale of depreciated assets in order to preserve availability of tax losses, and otherwise manage the tax efficiency of the Principal's property and business transactions. The Agent may also borrow such sums as the Agent finds necessary for the proper management of the Principal's property, including but not limited to tax and estate planning matters, and to mortgage, convey by deed of trust, grant security interests in, or otherwise encumber any real or personal property now or hereafter owned by the Principal, whether acquired by the Principal or the Agent.

16. To prepare and file all income and other federal and state tax returns that the Principal is required to file; to sign the Principal's name on tax returns, including Forms _ _[*e.g., IRS 1040, FTB 540*]_ _; to hire preparers

and advisers and pay for their services; and to do whatever is necessary to protect the Principal's assets from assessments for income taxes and other taxes for the years _ _[*e.g., 20_ _ to 20_ _*]_ _. The Agent is specifically authorized to receive confidential information; to receive checks in payment of any refund of taxes, penalties, or interest; to execute waivers (including offers of waivers) of restrictions on assessment or collection of tax deficiencies and waivers of notice of disallowance of claims for credit or refund; to execute consents extending the statutory period for assessment or collection of taxes; to execute closing agreements under Internal Revenue Code §7121 or any successor statute; and to delegate authority or substitute another representative concerning all of the above matters.

17. To make gifts on the Principal's behalf to persons in a class composed of the Principal's children, any of their issue, or both to the full extent of the federal annual gift tax exclusion under Internal Revenue Code §2503(b) or any successor statute and, for such purposes, to remove the Principal's assets from any grantor revocable trust of which the Principal is a grantor.

18. To transfer assets to and remove assets from any and all revocable living trusts of which the Principal is or becomes a settlor.

19. To make direct payments to the provider for tuition and medical care for persons in the class composed of _ _[*e.g., the Principal's issue*]_ _ under Internal Revenue Code §2503(e) or any successor statute that excludes such payments from gift tax liability.

20. To execute and deliver disclaimers under Internal Revenue Code §2518 and California Probate Code §§260-295 or any successor statute.

21. To execute documents of transfer or conveyance or marital property agreements that convert the character of property in which the Principal has an interest from joint tenancy to community property with the Principal's spouse (if the Principal is married at such time) for the purpose of obtaining a step-up in basis on the entire value of such property under Internal Revenue Code §1014, as amended from time to time, if the Agent deems such transaction to be in the Principal's best interest or in the best interests of the beneficiaries of the Principal's estate.

AUTHORITY TO EMPLOY PROFESSIONAL ADVISERS

22. To employ and discharge any accountants, attorneys, investment counsel, real estate brokers, property managers, bookkeepers, consultants, custodians, auditors, appraisers, or any other professionals that the Agent deems reasonably necessary for the proper management and protection of the Principal's affairs, for the maintenance of proper accounts and records, and for advice in carrying out the Agent's duties and responsibilities under this instrument. Without limiting the foregoing, the Agent is authorized to employ investment managers, investment agents, or other investment specialists as the Agent deems necessary or desirable. Specifically, the Agent is authorized to appoint an investment manager to manage all or any part of the Principal's assets and to delegate to such manager investment discretion that is not inconsistent with the Agent's duties under this instrument or applicable law. Such appointment may include the power to acquire and dispose of assets without first obtaining the Agent's consent. The Agent may pay reasonable compensation to any such professionals hired by the Agent from the Principal's assets. Any compensation paid to such professionals may be taken into consideration in determining the reasonableness of any compensation taken or requested by the Agent. The foregoing provisions are not intended to relieve the Agent of the duty to exercise reasonable care and prudence in selecting, employing, and supervising any such professionals.

AGENT'S GENERAL ADMINISTRATIVE AND ENFORCEMENT AUTHORITY

23. To do, execute, and perform any other act, deed, matter, or thing that in the opinion of the Agent ought to be done, executed, or performed in conjunction with this power of attorney, of every kind and nature, as fully and effectively as the Principal could do if personally present. The enumeration of specific items, acts, rights, or powers in this instrument does not limit or restrict, and is not to be construed or interpreted as limiting or restricting, the general powers granted to the Agent except where powers are expressly restricted.

The Agent is authorized to commence enforcement proceedings, at the Principal's expense, against any bank, credit unions, financial institution, or other person or entity that fails or refuses to honor this durable power of attorney.

24. To seek appropriate court orders mandating acts that the Agent deems appropriate if a third party refuses to comply with actions taken by the Agent that are authorized by this instrument or enjoining acts by third parties that the Agent has not authorized. In addition, the Agent may sue a third party who fails to comply with actions the Principal has authorized the Agent to take and may demand damages, including punitive damages, on the Principal's behalf for such noncompliance.

AGENT'S COMPENSATION

25. To be entitled to fair and reasonable compensation for services rendered as Agent under this instrument. In determining what constitutes "fair and reasonable" compensation, the following factors may be considered: (1) the time spent by the Agent in administering the Principal's affairs; (2) the Principal's net worth; (3) the nature of the assets subject to the Agent's control; and (4) the fees charged by professional fiduciaries acting in the same or similar capacities under similar circumstances. In addition to compensation for services, the Agent shall be entitled to reimbursement for all out-of-pocket expenses incurred in administering the Principal's affairs, including without limitation reasonable travel expenses, including land and air transportation, lodging, and meals.

AUTHORITY NOT GRANTED TO AGENT

26. Regardless of any other possible language to the contrary in this document, the Agent is specifically NOT granted the following powers:

(a) To use the Principal's assets for the Agent's own legal obligations, including but not limited to support of the Agent's dependents;

(b) To exercise any trustee powers under an irrevocable trust of which the Agent is a settlor and the Principal is a trustee; and

(c) To exercise incidents of ownership over any life insurance policies that the Principal owns on the Agent's life.

SUCCESSOR AGENT LIMIT ON LIABILITY

27. No successor Agent shall be liable for any act, omission, or default of a prior Agent. Unless requested in writing within _ _[*e.g., 60*]_ _ days after appointment by the Principal or an adult beneficiary of the Principal, no successor Agent shall have any duty to investigate or review any action of a prior Agent. The successor Agent may accept the accounting records of the prior Agent showing assets on hand without further investigation and without incurring any liability to any person claiming or having an interest in the Principal's assets.

THIRD PARTY LIMITS ON LIABILITY

28. The Agent's signature under the authority granted in this power of attorney may be accepted by any third party or organization as having the same force and effect that the Principal's signature would have if the Principal were personally present and acting on _ _[*his/her*]_ _ own behalf. No person or organization that relies on the Agent's authority shall incur any liability to the Principal or the Principal's estate, heirs, successors, or assigns because of reliance on this instrument. The Principal's estate, heirs, successors, and assigns shall be bound by the Agent's acts under this power of attorney.

29. Any third party from whom the Agent under this power of attorney may request information, records, or other documents regarding the Principal's personal affairs may release and deliver all such information, records, or documents to the Agent without liability to the Principal or the Principal's estate, heirs, successors, or assigns for release or delivery of such information, records, or other documents to the Agent. The Principal hereby waives any privilege that may apply to release of such information, records, or other documents, but only to the extent necessary to authorize such release.

30. No person who relies on any representation the Agent may make regarding (a) the fact that the powers of the Agent are then in effect; (b) the scope of the Agent's authority under this instrument; (c) the Principal's competency at the time this instrument is executed; (d) the fact that this instrument has not been amended, terminated, or revoked; or (e) the fact that the Agent continues to serve as the Principal's Agent shall incur any

liability to the Principal, the Principal's estate, or the Principal's heirs, successors, or assigns for permitting the Agent to exercise any power granted in this instrument, nor shall any person who deals with the Agent be responsible to determine or ensure the proper application of funds or property.

POWER OF ATTORNEY NOT AFFECTED BY PRINCIPAL'S INCAPACITY

31. This power of attorney shall not be affected by the Principal's subsequent incapacity. The Principal declares that the Principal understands the importance of this durable power of attorney, recognizes that the Agent is granted broad power to hold, administer, and control the Principal's assets, and recognizes that this durable power of attorney will become effective immediately on execution and will continue indefinitely until specifically revoked or terminated by death, even if the Principal later becomes incapacitated.

NOMINATION OF CONSERVATOR OF PERSON AND ESTATE

32. If a conservatorship of the Principal's person or estate or both is deemed necessary, the Principal hereby nominates _ _[*name*]_ _ as conservator of the Principal's person and estate. If _ _[*name*]_ _ is unwilling or unable to serve for any reason, the Principal hereby nominates _ _[*name*]_ _ as such conservator.

[*Optional*]

On the appointment of a conservator of the Principal's estate, this power of attorney shall terminate and the Agent shall deliver the assets of the Principal under the Agent's control as directed by the conservator of the Principal's estate.

[*Continue*]

33. In transacting business on behalf of the Principal, the Agent shall sign documents in the following way:

_ _[*Principal's signed name*]_ _ **by** _ _[*Agent's signed name*]_ _, _ _[*his/her*]_ _ **Attorney-in-Fact under power of attorney, dated** _ _[*date*]_ _**.**

IN WITNESS WHEREOF, the principal has signed this durable power of attorney on _ _[*date*]_ _**, at** _ _[*city*]_ _**, California.**

__[*Signature*]__
_ _[*Typed name*]_ _

State of California)
)
County of _ _[*name of county*]_ _ **)**
)
)
_____)

On _ _[*date*]_ _ **before me,** _ _[*name and title of officer*]_ _**, personally appeared** _ _[*name(s)*]_ _**, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.**

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal:

__[*Signature of officer*]__ [*Officer's seal*]

The undersigned acknowledges and accepts appointment as Agent and agrees to serve as Agent under this durable power of attorney.

Date: _ _ _ _ _ _ __[*Signature of agent*]__

_ _[*Typed name*]_ _

Comment: If the principal wishes to include personal care provisions in the DPOA, the form provisions in §§5.64-5.68 may be added to the document. Note, however, that if the personal care provisions are only to be effective if the principal becomes incapacitated, separate introductory language must be used for that part of the DPOA.

In the introductory paragraph, the attorney may also want to review the more extensive warnings required by Prob C §4128 to be included in a printed form DPOA distributed in California for use by a person who does not have the advice of legal counsel. See §4.22. Any of the relevant warnings set out in §4128 that are not included in the warnings in this form may be added to the attorney-drafted warnings listed above.

This DPOA provides some (but not all) of the estate planning provisions that may be included in the document. Practitioners should carefully review chapter 6 to understand which provisions should or should not be included in his or her client's DPOA.

Practitioners have a difference of opinion about the best method of informing the principal of the scope and effect of the DPOA. Some lawyers prefer to advise their clients in a separate letter. See §5.72 for a copy of a letter to the principal. The authors recommend including the warnings at the beginning of the instrument and sending a separate letter. There is no statutory requirement that an attorney-drafted form include warnings, as there is for a printed form.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.70 B. Form: General Springing Durable Power of Attorney

§5.70 B. Form: General Springing Durable Power of Attorney

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5.70-1 General springing durable power of attorney

RECORDING REQUESTED BY)
)
)
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AND WHEN RECORDED MAIL TO)
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SPRINGING DURABLE POWER OF ATTORNEY

NOTICE TO PERSON EXECUTING THIS DOCUMENT:

THIS IS AN IMPORTANT LEGAL DOCUMENT. IT CREATES A DURABLE POWER OF ATTORNEY. BEFORE EXECUTING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS.

1. THIS DOCUMENT MAY PROVIDE THE PERSON YOU DESIGNATE AS YOUR ATTORNEY-IN-FACT (AGENT) WITH BROAD POWERS TO MANAGE YOUR FINANCIAL AFFAIRS, INCLUDING THE AUTHORITY TO MANAGE, DISPOSE OF, SELL, CONVEY, AND ENCUMBER YOUR REAL AND PERSONAL PROPERTY; TO USE YOUR PROPERTY AS SECURITY IF YOUR AGENT BORROWS MONEY ON YOUR BEHALF; AND TO TAKE ACTIONS TO CARRY OUT YOUR ESTATE PLAN.

2. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH CARE DECISIONS FOR YOU.

3. THIS DOCUMENT DOES NOT GIVE YOUR AGENT THE POWER TO ACCEPT OR RECEIVE ANY OF YOUR PROPERTY, IN TRUST OR OTHERWISE, AS A GIFT, UNLESS YOU SPECIFICALLY AUTHORIZE THE AGENT TO ACCEPT OR RECEIVE A GIFT.

4. THIS POWER OF ATTORNEY WILL BECOME EFFECTIVE ONLY IF YOU BECOME INCAPACITATED, AND IT WILL REMAIN IN EFFECT ONLY AS LONG AS YOU ARE INCAPACITATED.

5. YOU HAVE THE RIGHT TO REVOKE OR TERMINATE THIS DURABLE POWER OF ATTORNEY AT ANY TIME.

6. YOUR AGENT HAS NO DUTY TO ACT UNLESS YOU AND YOUR AGENT AGREE OTHERWISE IN WRITING.

DURABLE POWER OF ATTORNEY TO BECOME EFFECTIVE ONLY ON INCAPACITY OF PRINCIPAL

This durable power of attorney shall become effective only on the Principal's incapacity.

[*Add one of the following alternatives*]

[*Alternative 1: Disability determination by third party statement (two persons deciding)*]

The Principal shall be conclusively presumed to lack capacity when any two of the following persons execute written declarations under penalty of perjury that in their opinion the Principal does not have sufficient

understanding or ability to make or communicate decisions about the Principal's property or financial or business affairs and when such certificates have been delivered to the Agent:

(a) The Principal's treating physician;

(b) _ _[*Name, address, and relationship to Principal*]**_ _;**

(c) _ _[*Name, address, and relationship to Principal*]**_ _;**

(d) _ _[*Name, address, and relationship to Principal*]**_ _.**

The effective date of incapacity shall be the date of receipt of such declarations by the Agent. Such declarations, when received, shall be attached to the originals and copies attached to all copies of this power of attorney and shall be filed _ _[*and recorded*]**_ _ where the power of attorney was previously filed _ _**[*or recorded*]**_ _. For a sample declaration of incapacity, see Attachment A.**

With two such declarations attached, any person may act in reliance on this instrument without liability to the Principal or to any other person, regardless of whether the Principal is later determined to have had capacity.

No licensed physician designated above who executes a declaration of the Principal's incapacity shall be subject to liability because of such execution. The Principal waives any privilege that may apply to release of information included in such a declaration or to the execution of such a declaration.

[*Alternative 2: Incapacity declaration by incapacity panel*]

The Principal shall be conclusively presumed to be incapacitated, for all purposes of this power of attorney, in any one of the following circumstances:

The Principal is conclusively presumed incapacitated whenever, in the written _ _[*unanimous or majority*]**_ _ opinion of the Principal's incapacity panel, _ _**[*he/she*]**_ _ cannot effectively care for _ _**[*himself/herself*]**_ _ or manage _ _**[*his/her*]**_ _ property or financial affairs because of age, illness, use of prescription medications, drugs or other substances, or any other cause. Such written opinion, when received, shall be attached to the originals and copies attached to all copies of this power of attorney. For a sample declaration of incapacity, see Attachment A.**

The incapacity panel shall initially consist of the following individuals, who decide in consultation with the Principal's primary care physician and an appropriate specialist recommended by the Principal's primary care physician and approved by the incapacity panel:

(a) _ _[*Name, address, and relationship to Principal*]**_ _;**

(b) _ _[*Name, address, and relationship to Principal*]**_ _.**

Consultation with the Principal's doctor and any specialist means that the incapacity panel shall discuss the Principal's situation with _ _[*his/her*]**_ _ doctors to the extent that the panel members deem necessary in order to come to a conclusion regarding the Principal's ability to manage _ _**[*his/her*]**_ _ property and financial affairs. The Principal's doctor and any specialist are not members of the incapacity panel. The Principal voluntarily waives any physician-patient privilege or psychiatrist-patient privilege that may exist in _ _**[*his/her*]**_ _ favor, and the Principal authorizes physicians and psychiatrists to examine _ _**[*him/her*]**_ _ and disclose the Principal's physical or mental condition to _ _**[*his/her*]**_ _ Agent for purposes of this power of attorney.**

With the above written opinion attached, any person may act in reliance on this instrument without liability to the Principal or to any other person, regardless of whether the Principal is later determined to have had capacity.

No incapacity panel member designated above who executes an opinion of the Principal's incapacity shall be subject to liability because of such execution. The Principal hereby waives any privilege that may apply to release of information included in such an opinion or to the execution of such an opinion.

[*Continue*]

This power of attorney shall continue after the Principal's incapacity in accordance with its terms.

On the death of the Principal, this power shall terminate and the assets of the Principal shall be distributed to the duly appointed personal representative of the Principal's estate or, if no estate is being administered, to the persons who lawfully take the assets without the necessity of administration when they have supplied the Agent with satisfactory documents as provided by law.

TO WHOM IT MAY CONCERN:

_ _[*Name*]**_ _ (the Principal), who presently resides at _ _**[*address*]**_ _, _ _ _ _ _ _ County, California, hereby appoints _ _**[*name*]**_ _, (the Agent), whose current residence is _ _**[*address*]**_ _, _ _ _ _ _ _ County, California, as the Principal's true and lawful attorney-in-fact (Agent) for the Principal and in the Principal's name, place, and stead on the Principal's incapacity:**

[*For body of document, see paragraphs 1-28 in §5.69*]

29. This power of attorney shall become effective on the Principal's incapacity as set forth above.

[*Add one of the following alternatives regarding restoration of capacity*]

[*Alternative 1: Determination of restoration of capacity by third party statement (two persons deciding)*]

30. The Principal shall be conclusively deemed to have been restored to capacity when any two of the following persons shall execute written declarations under penalty of perjury that in his or her opinion the Principal has sufficient understanding or ability to make or communicate decisions about the Principal's property, finances, or business affairs and when such declarations have been delivered to the Agent:

(a) The Principal's treating physician;

(b) The Agent named in this document;

(c) _ _[*Name, address, and relationship to Principal*]**_ _;**

(d) _ _[*Name, address, and relationship to Principal*]**_ _.**

The effective date of restoration to capacity shall be the date of receipt of such declarations by the Agent. Such declarations, when received, shall be attached to the original durable power of attorney and the original declarations and all copies of this power of attorney and shall be filed _ _[*and recorded*]**_ _ where the power of attorney was previously filed _ _**[*or recorded*]**_ _.**

The Principal hereby waives any privilege that may apply to the execution of such a declaration by the Principal's physician.

[*Alternative 2: Determination of restoration of capacity by incapacity panel*]

The Principal is conclusively presumed to be restored to capacity whenever the incapacity panel provides a written _ _[*unanimous/majority*]**_ _ opinion that the Principal can effectively manage _ _**[*his/her*]**_ _ property and financial affairs.**

The effective date of restoration to capacity shall be the date of receipt of such written opinion by the Agent. Such written opinion, when received, shall be attached to the original durable power of attorney and the original opinion and copies attached to all copies of this power of attorney.

The Principal hereby waives any privilege that may apply to release of information included in such an opinion or to the execution of such an opinion.

[*Alternative 3: Determination of restoration of capacity by court*]

The Principal shall be considered to have been restored to capacity when a court of competent jurisdiction finds the Principal no longer incapacitated. The effective date of restoration to capacity in this case shall be the

earlier of the date such order is delivered to the Agent or the date it is recorded in the Principal's county of residence or the county where real property affected by the power of attorney is located.

[*Continue*]

31. In transacting business on behalf of the Principal, the Agent should not use the Principal's name alone or the Agent's name alone. Instead, the Agent shall sign documents in the following way:

_ _[*Principal's signed name*]**_ _ by _ _**[*Agent's signed name*]**_ _, _ _**[*his/her*]**_ _ Attorney-in-Fact under power of attorney, dated _ _**[*date*]**_ _.**

IN WITNESS WHEREOF, the principal has signed this springing durable power of attorney on _ _[*date*]**_ _, at _ _**[*city*]**_ _, California.**

__[*Signature*]__
_ _[*Typed name*]**_ _**

State of California)
)
County of _ _[*name of county*]**_ _)**
)
)
_____)

On _ _[*date*]**_ _ before me, _ _**[*name and title of officer*]**_ _, personally appeared _ _**[*name(s)*]**_ _, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.**

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal:

__[*Signature of officer*]__ [*Officer's seal*]

Attachment A

[*If applicable, add one or more of the following options*]

[*Option 1: Physician's determination of capacity*]

I, _ _[*Physician's name*]**_ _, declare the following:**

I am a physician licensed to practice medicine in the State of California. I am one of _ _[*Principal's name*]**_ _'s attending physicians. I have examined _ _**[*Principal's name*]**_ _, and I declare under penalty of perjury that it is my professional opinion and conclusion that _ _**[*Principal's name*]**_ _ is incapacitated, is unable to manage _ _**[*his/her*]**_ _ own financial affairs, and requires the services of another person to manage _ _**[*his/her*]**_ _ financial affairs for _ _**[*him/her*]**_ _.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]**_ _**

[*Option 2: Incapacity panel member's determination of incapacity*]

I, _ _[*Panel member's name*]**_ _, declare the following:**

I am _ _[*Principal's name*]**_ _'s _ _**[*describe relationship, e.g., friend, brother, parent*]**_ _, and I am named in this Power of Attorney as a person who may determine whether _ _**[*Principal's name*]**_ _ is incapacitated. I declare under penalty of perjury that it is my opinion and conclusion that _ _**[*Principal's name*]**_ _ is incapacitated, is unable to manage _ _**[*his/her*]**_ _ own financial affairs, and requires the services of another person to manage**

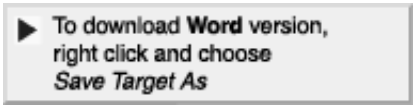
_ _[*his/her*]_ _ **financial affairs for** _ _[*him/her*]_ _**.**

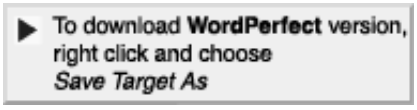
Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.71 C. Form: Uniform Statutory Form Power of Attorney (Prob C §4401)

§5.71 C. Form: Uniform Statutory Form Power of Attorney (Prob C §4401)





5.71-1 Uniform statutory form power of attorney (Prob C §4401)

UNIFORM STATUTORY FORM POWER OF ATTORNEY
(California Probate Code Section 4401)

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT (CALIFORNIA PROBATE CODE SECTIONS 4400-4465). IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I, _ _[*your name and address*]_ _**, appoint** _ _[*name and address of the person appointed, or of each person appointed if you want to designate more than one*]_ _ **as my agent (attorney-in-fact) to act for me in any lawful way with respect to the following initialed subjects:**

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS.

TO GRANT ONE OR MORE, BUT FEWER THAN ALL, OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF EACH POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF IT. YOU MAY, BUT NEED NOT, CROSS OUT EACH POWER WITHHELD.

INITIAL

__ (A) Real property transactions.

__ (B) Tangible personal property transactions.

__ (C) Stock and bond transactions.

__ (D) Commodity and option transactions.

__ (E) Banking and other financial institution transactions.

__ (F) Business operating transactions.

__ (G) Insurance and annuity transactions.

__ (H) Estate, trust, and other beneficiary transactions.

__ (I) Claims and litigation.

__ (J) Personal and family maintenance.

__ (K) Benefits from social security, medicare, medicaid, or other governmental programs, or civil or military service.

__ (L) Retirement plan transactions.

__ (M) Tax matters.

__ (N) ALL OF THE POWERS LISTED ABOVE.

YOU NEED NOT INITIAL ANY OTHER LINES IF YOU INITIAL LINE (N).

SPECIAL INSTRUCTIONS:

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

_____

_____

_____

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

This power of attorney will continue to be effective even though I become incapacitated.

STRIKE THE PRECEDING SENTENCE IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO CONTINUE IF YOU BECOME INCAPACITATED.

EXERCISE OF POWER OF ATTORNEY WHERE MORE THAN ONE AGENT DESIGNATED

If I have designated more than one agent, the agents are to act _____.

IF YOU APPOINTED MORE THAN ONE AGENT AND YOU WANT EACH AGENT TO BE ABLE TO ACT ALONE WITHOUT THE OTHER AGENT JOINING, WRITE THE WORD "SEPARATELY" IN THE BLANK SPACE ABOVE. IF YOU DO NOT INSERT ANY WORD IN THE BLANK SPACE, OR IF YOU INSERT THE WORD "JOINTLY," THEN ALL OF YOUR AGENTS MUST ACT OR SIGN TOGETHER.

I agree that any third party who receives a copy of this document may act under it. A third party may seek identification. Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

Signed this _____ day of _ _[*date*]_ _, _ _[*year*]_ _.

__[*Your signature*]__

State of _ _[*e.g., California*]_ _, County of _ _[*name of county*]_ _

BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, THE AGENT ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

State of California)
)
County of _ _[*name of county*]_ _)
)
)
_____)

On _ _[*date*]_ _ before me, _ _[*name and title of officer*]_ _, personally appeared _ _[*name(s)*]_ _, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal:

__[*Signature of officer*]__ [*Officer's seal*]

Comment: Some practitioners provide the principal, and in some cases the agent, with copies of the Probate Code sections that describe the powers identified with the terms used in the uniform DPOA form. See Prob C §§4400-4465. Although it is necessary only to initial the items your client wants, some practitioners think it prudent also to strike out portions not wanted, including any unused blank lines under "Special Instructions." See also *Torres v Torres* (2006) 135 CA4th 870, 37 CR3d 754, discussed in §4.27.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/5 Durable Powers of Attorney for Financial Management: Specific Clauses and Complete Forms/§5.72 D. Form: Cover Letter to Principal to Accompany DPOA Draft

§5.72 D. Form: Cover Letter to Principal to Accompany DPOA Draft

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

5.72-1 Cover letter to principal to accompany DPOA draft

Dear _ _ _ _ _ _:

You have asked that I provide you with a durable power of attorney as part of a plan for possible incapacity. Enclosed is a draft for your review and comments. Please be advised that because a durable power of attorney is a very powerful legal document, it could cause you much financial harm if misused.

You have indicated that you want your Agent to have the widest scope of powers available. Note, however, that such a broad set of authorities presents the most significant risk of abuse.

The following are the parts of the durable power of attorney that may present the greatest risks:

1. The power of attorney is CURRENTLY EFFECTIVE. It does not come into effect only on your incapacity but is legally effective as soon as you sign it. Once you have given the signed documents to your Agent, your Agent has virtually unlimited powers over your property and other legal affairs.

2. The power of attorney can be revoked but may be DIFFICULT TO REVOKE as a practical matter. You will have to give written notice of revocation to all third parties who have received copies and retrieve the original and all copies from your Agent.

You may also have to record a revocation with the County Recorder where you have real property or where the original document was recorded.

[*Add as applicable*]

3. This power of attorney gives the Agent authority to PAY himself or herself for carrying out your power of attorney and representing you and authority to pay others to help in implementing the power of attorney.

[*Add as applicable*]

[4.] This power of attorney gives your Agent a RELEASE FROM LIABILITY, except for willful misconduct or gross negligence, and gives GUARANTIES TO THIRD PARTIES that they can rely on your Agent's authority.

[*Add as applicable*]

[5.] This power of attorney gives the Agent almost unlimited powers to make GIFTS on your behalf. You should be aware, however, that under the law, gifts to the following persons are not valid, even if this power of attorney allows them: _ _[*Insert names or classes of individuals who are disqualified persons*]**_ _.**

[*Add as applicable*]

[6.] This power of attorney nominates as CONSERVATOR OF YOUR PERSON AND ESTATE the same person as your Agent. Although this reduces the likelihood of conflicts, it also reduces the possibility that an independent conservator would be appointed to question the actions of your Agent.

[*Continue*]

There are a few protections for you built into the language of this draft:

a. The Agent is to exercise his or her powers only in a FIDUCIARY CAPACITY.

b. COURT PROCEDURES ARE AVAILABLE for interested parties to question the actions of an Agent under a power of attorney. You have not waived these procedures or limited the people who may use them (although you have this option if you want).

[*Add as applicable*]

c. You have limited the Agent's authority to make GIFTS to himself or herself from your property or to control your life insurance. However, these limitations are included largely in an attempt to prevent your property from being taxed in the estate of your Agent if your Agent should die before you do. If this is not a concern because your Agent does not have enough property to be subject to estate tax, you may remove even these limitations if you desire.

[*Continue*]

None of the permissive provisions in this draft is required by law. You may delete or limit them as you desire.

Please contact me with any questions, comments, or concerns about these matters. It is important that the durable power of attorney you sign fits your needs and situation.

Very truly yours,

__[*Signature of attorney*]__
_ _[*Typed name*]_ _

Comment: See also form in §5.69, which contains a warning to the principal such as that stated in statutory forms. It is provided as a model for attorneys who wish to include the warning at the start of the DPOA or in a separate document.

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6

Estate and Tax Planning Using Powers of Attorney

Peter S. Myers

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I. CONSIDERATIONS IN USING DURABLE POWER OF ATTORNEY (DPOA) FOR ESTATE PLANNING

§6.1 A. Introduction

Estate planning after the principal has become incapacitated can be one of the most important uses of a durable power of attorney for financial management (DPOA), but the granting of such authority also risks the greatest potential for abuse. Under a properly drawn DPOA, an agent can make almost any income tax, gift tax, or estate tax planning decision that the principal could make. On the one hand, the agent's actions can protect the principal or the principal's heirs from a considerable amount of income or estate taxes. On the other hand, an agent's exercise of a broad power, even though well intended, may subject the agent to charges of undue influence or may create estate or tax planning consequences unintended by the principal.

To assist the attorney in accomplishing the client's tax and estate planning goals, this chapter does the following:

- Outlines various issues that the attorney should consider before including estate or tax planning powers in a DPOA, including coordination with other estate planning documents (see §§6.2-6.17);
- Reviews drafting requirements and summarizes potential problems that may arise when including estate or tax planning powers in a DPOA (see §§6.18-6.26); and
- Highlights various types of estate and tax planning provisions that may be included in a DPOA (see §§6.27-6.72).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.2 B. Need for Increased Planning Flexibility

§6.2 B. Need for Increased Planning Flexibility

Including estate and tax planning powers in a DPOA provides flexibility to modify a client's estate plan. This is an important benefit because a client might lose capacity long before death and be unable to amend estate planning documents in response to future tax law changes or significant changes in the client's estate size or family situation.

The need for flexibility is particularly important because of the present and ongoing uncertainty in current state and federal tax laws. Under current law (see §§6.3-6.7), the estate, gift, generation-skipping transfer (GST), and income tax rules are in a state of flux. The estate and GST tax are set to be "repealed" in 2010 and then brought back in 2011 because of a sunset provision in the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA-2001) (Pub L 107-16, 115 Stat 38). During the year of repeal in 2010, there will not be a federal estate tax; however, the capital gains tax rules will change, and the "step-up" in basis that has been of great benefit to real-estate-heavy estates will no longer be available. The rules are somewhat complex, but in general there will not be a full "step-up" in basis for larger estates but rather a modified carryover basis.

Many observers believe that further legislative changes to the transfer tax laws are likely to occur before the date of repeal. However, commentators have not reached a consensus on what these changes may be. Because of this uncertainty, clients with estates of even $1 million (or clients considering Medi-Cal planning) should consider including provisions in their estate planning documents and DPOAs to permit changes in their estate plans in the event of future incapacity.

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§6.3 1. Estate and Gift Tax

Knowledge of estate and gift tax law is important for preparation of estate and gift tax returns after a gift or death. It is equally important for the estate planner to understand how to optimize the tax benefits from an estate plan. To lower the overall transfer taxes, estate planners should understand deductions, credits, and exclusions that might be available. The planner can then recommend actions that would qualify an estate for the relevant tax advantages.

This task has become difficult with the enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA-2001) (Pub L 107-16, 115 Stat 38), which makes temporary changes to the law. As in the past, the estate planner must consider possible changes in the client's economic or family situation, but now a planner must also consider the effect of future changes in the law. Because of these issues, a DPOA should include estate planning powers sufficient to alter a client's estate plan to keep current with the changing legal environment.

Sections 6.4-6.7 briefly summarize the current state of the law on estate, gift, generation-skipping, and capital gain taxes. See California Estate Planning, chaps 10-12 (Cal CEB 2002).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.4 a. Estate Tax

§6.4 a. Estate Tax

Under current law, there are uncertainties about how the estate tax "repeal and sunset" law will affect estate plans. Under EGTRRA-2001, the estate tax is repealed for the estates of decedents dying after December 31, 2009. IRC §2210(a). Leading up to the repeal, the estate tax is phased out, with the applicable exclusion amount gradually increasing from $1 million to $3.5 million (IRC §2010(c)), while the maximum tax rate decreases (IRC §2001(c)).

However, EGTRRA-2001 is scheduled to sunset for all taxable years beginning after December 31, 2010. Pub L 107-16, §901, 115 Stat 38. Thus, unless there is further legislative action, all provisions of EGTRRA-2001 will cease to apply after that date, and the rates as they existed in the year 2001 will be in effect (a $1 million applicable exclusion amount, plus inflation adjustments after 2005, as provided by the law existing in 2001).

Accordingly, estate plans that are drafted while the applicable exclusion amount is $3.5 million and that do not include provisions to minimize estate tax may need to be amended if the applicable exclusion amount indeed sunsets back to $1 million. If there is no one with the ability to make changes after a client's incapacity, such as an agent under a DPOA, there could be significant estate tax consequences.

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§6.5 b. Gift Tax

Under EGTRRA-2001 §511(d), the gift tax applicable exclusion remains at $1 million and is not subject to fluctuation. Instead, the applicable exclusion amount increased to $1 million in 2002 and will stay at that level unless Congress decides to change it. IRC §2505(a). The gift tax will continue to share the estate tax rate schedule until the estate tax is repealed. Once the estate tax is repealed, the gift tax will have a flat 35-percent rate. IRC §2502(a). Preservation of the gift tax reduces opportunities for reducing income taxes by moving assets among family members (*e.g.*, by giving assets to parents in order to obtain a new basis or giving income-assets to family members with large deductions or in low tax brackets) and also reduces the temptation to make exceptionally large gifts in 2010 if the repeal of the estate tax remains temporary.

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§6.6 2. Generation-Skipping Transfer Tax

The generation-skipping transfer (GST) tax is a second transfer tax imposed in addition to the estate or gift tax on transfers benefiting "skip persons" (persons two or more generations below that of the transferor, *e.g.,* grandchildren). IRC §§2601, 2611-2613. EGTRRA-2001 slowly phases out the GST tax. Pub L 107-16, §§501-521, 115 Stat 38. During the phase-out from 2001 to 2009, the tax rate applied to GSTs drops because the maximum estate tax rate drops and the GST tax "applicable rate" is the maximum federal estate tax rate multiplied by the inclusion ratio. IRC §2641. Also, the applicable exclusion amount increases because it is equal to the estate tax applicable exclusion rate, which increases during this same period. IRC §2631(c).

As a result of the sunset provision, the tax disappears completely for calendar year 2010 and then reappears in 2011 as it was in 2001. The GST tax does not apply to generation-skipping transfers after December 31, 2009 (for a period of 1 year). IRC §2664. This repeal apparently applies with respect to taxable distributions from, and taxable terminations of, a trust occurring after that effective date, even if the trust was established earlier. This creates the possibility that a trustee could deliberately cause a taxable termination or distribution in 2010 in order to reduce the transfer-tax exposure of a GSTT trust.

The GST tax changes present some interesting planning choices through 2009. It will be possible to establish larger GST-exempt trusts, but inter vivos creation of trusts in excess of $1 million will trigger gift tax that might be avoided by waiting for complete repeal. For both inter vivos and testamentary trusts, it is also necessary to consider the possibility that the $1.3 million and $3 million increases in basis under IRC §1022, scheduled to take effect in 2010, will become permanent. See §6.7.

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§6.7 3. Income Tax Basis

The income tax basis of property acquired from a decedent is generally the fair market value of that property on the date of the decedent's death. IRC §1014(a)(1). If the alternate valuation date is selected on the federal estate tax return for the decedent's estate, the basis will be the fair market value on that date. IRC §1014(a)(2). If an election is made to apply the special use valuation for qualified real property in a farm, trade, or business under IRC §2032A, the basis of the property will be its value as determined under the provisions of that section. IRC §1014(a)(3).

When the fair market value of the property at the date of death is greater than its income tax basis in the hands of the decedent, the result will be a "stepped-up" basis. However, a fair market value less than the decedent's income tax basis causes a "step-down" in basis at the date of death.

Under EGTRRA-2001, the step-up in basis is eliminated for decedents dying after December 31, 2009. IRC §1014(f). EGTRRA-2001 provides that, except for allowable adjustments (*e.g.,* up to $1.3 million of basis adjustment for individuals other than spouses or $3 million of step-up for assets left to a spouse), property transferred at death will have a carryover basis determined in the same manner as the basis for property transferred during the decedent's lifetime under IRC §1015. Therefore, in most instances, property acquired from a decedent will have a basis equal to the lesser of the decedent's adjusted basis or the fair market value of the property at the date of death. IRC §1022(a).

The post-2009 carryover basis rules have importance even before 2010 because they can influence pre-2010 decisions regarding the design of different types of trusts, *e.g.,* QTIP trusts, bypass trusts, and inter vivos irrevocable trusts. Planners are accustomed to planning trusts in a way that keeps property out of estates, but if the estate tax is essentially replaced with the proposed carryover basis scheme, that strategy can backfire by making it impossible for the trust assets to receive new basis increase benefits that would be available to estates of persons dying after 2009.

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§6.8 C. Cost Constraints

Cost considerations may dictate that estate plans be drafted for the short term and that clients be warned that there are now greater risks associated with failing to update the plan on a regular basis. Unfortunately, the viability of this approach assumes future client capacity, except to the extent that the plan can be amended by an agent under a DPOA or by court authorization in limited circumstances.

Many, if not most, ideas for building flexibility into estate planning documents by including authority in a DPOA assume a level of client-by-client custom drafting that is not always economically feasible for clients whose net worth is between $1 million and $3.5 million. It is these clients who now pose the most complex drafting problems under EGTRRA-2001 because they face the problem that plans that are good for estate tax planning may be bad for capital-gains-tax basis planning once the client's estate has little estate tax exposure. See discussion of income tax basis in §6.7. These clients are also the least likely to accept the use of an independent professional trustee who would be in a position to mitigate the impact of tax law change through valuation planning, significant exempt or excluded gifting, or sophisticated advance income tax planning. This limits the use of planning options that depend on very broad trustee discretion.

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§6.9 D. Safety

Allowing an agent under a durable power of attorney (DPOA) to amend an estate plan may be uncomfortable for some clients. The client may have visions of Child X running off with the estate or handing it over to a religious cult. However, the practitioner's care in drafting the power will avoid the risk of misappropriation.

If the client is comfortable naming this person as trustee, perhaps this person would also be suited to serve in the role as an agent with the authority to modify an estate plan. If there is a trust and a different person is named trustee, or if a special trustee is named to handle the exercise of any trust amendment authority, there is an automatic check on the exercise of authority under a DPOA because the trustee is obligated to determine the validity of any proposed amendments. If desired, the drafter can expressly recite this obligation in the trust instrument.

NOTE: A will cannot be amended by an agent under a DPOA. See §6.12. Thus, this chapter presumes that all estate plans will be based on a revocable living trust.

Once the drafter selects an honest trustee, it becomes possible to deploy procedural protections concerning the use of the estate planning power. For example, the drafter can provide that the trustee is prohibited from acting on any amendment made by the agent until a certain number of days after notice and a copy of the amendment are provided to specified persons, *e.g.,* the existing beneficiaries and the attorney. This obstacle could, however, pose problems in end-of-life situations requiring an immediate amendment. As an alternative, use of a special trustee or trust protector to ratify the amendment would provide some protection. For use and description of special trustees or trust protectors, see California Estate Planning §§6.36-6.37 (Cal CEB 2002). In situations involving contentious beneficiaries and a high risk of litigation, the trust instrument might also authorize or require the trustee to delay acting on an amendment until the amendment's validity is determined by a court petition under either Prob C §17200 (see California Trust Administration, chap 15 (2d ed Cal CEB 2001)) or Prob C §4541 (see §§11.47-11.52).

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§6.10 E. Drafting Protections: Scope of Agent's Authority

Drafting the scope of the agent's power requires attention to several issues. The drafter will want to ensure the following:

- **That exercise of the power does not trigger a contest.** A settlor with multiple beneficiaries may wish to include language that constrains the agent to avoid, to the extent possible, disrupting the dispositive provisions of the principal's estate plan, which might thus invite a possible contest.
- **That exercise does not destroy any intended protections.** Exercise of a power under a DPOA should not disrupt any other intended protections, *e.g.,* by reducing or eliminating the trustee's fiduciary duty to current or remainder beneficiaries. If the agent were permitted to eliminate the trustee's duty of confidentiality, reasonable care, disclosure, or the duty to account, the agent could potentially exonerate the trustee from significant malfeasance—likely not the result the grantor would have endorsed.
- **That the authority is broad enough to be respected by taxing authorities.** The IRS can attack, and has attacked, exercises of a power that purportedly exceed the agent's authority. The IRS has done so in order to disregard annual exclusion gifts made by agents with insufficient authority to make gifts. Under California law, an agent has no authority to make gifts—even in continuation of existing patterns of gifting—unless expressly authorized in the power of attorney. Prob C §4264(c).
- **That the language is express enough to comply with limitations in the Probate Code.** Probate Code §4264 lists estate planning powers that cannot be exercised by an agent without specific authorization in the power of attorney. See §6.18 for the list of estate planning powers. Using §4264 as a checklist can alert the drafter to the need to confer additional powers. For example, it may be desirable to provide the agent with limited authority concerning a large retirement plan or IRA. It is often desirable to confer a power to allow the agent to execute a qualified disclaimer on behalf of the principal. A principal who lacks capacity is not a likely candidate for additional life insurance trusts, but special circumstances (*e.g.*, a life settlement transaction) may justify authorizing the creation of such trusts. In considering powers to make gifts, the drafter should remember such things as historical patterns of charitable giving, patterns of family use of property in kind *(e.g.,* the vacation home), and support. Such matters may often be best addressed in instruments other than the estate planning DPOA, but the statute is a helpful checklist with respect to the plan as a whole.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.11 F. Coordinating DPOA With Other Estate Planning Documents

§6.11 F. Coordinating DPOA With Other Estate Planning Documents

It is important to coordinate the DPOA with estate planning powers with all other estate planning documents to ensure that the documents are not in conflict with one another and to further ensure that the agent works well with a trustee of a revocable living trust, with agents under a power of attorney for health care (PAHC), or with a conservator. For purposes of estate planning using a DPOA, a trust-based plan is the only type of estate plan that can be modified by an agent under a DPOA. A will may not be affected by an agent under a power of attorney. See §6.12. Thus, for purposes of this chapter, it is presumed that the drafter is contemplating effecting an estate plan that centers on a revocable living trust.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.12 1. Will

§6.12 1. Will

A DPOA may not authorize the agent, under any circumstances, to make, publish, declare, amend, or revoke the principal's will. Prob C §4265. Thus, from a drafting perspective, it will do no good to give a DPOA agent the power to make or amend a will, and once an estate plan is completed, there is no way to modify a will for a principal who lacks capacity without a court order. One solution is to create a pour-over will with respect to unfunded assets; however, sometimes the will is not drafted correctly, does not pour over to the trust, cannot be located, or is not properly executed. Thus, it is important to address issues such as this during the initial estate planning.

NOTE: The rule in Prob C §4265 appears anomalous because Prob C §2580(a)(13) allows a conservator to make a will for a conservatee (on petition to the court), and an agent can create, modify, or revoke a trust if expressly authorized to do so in both the DPOA (Prob C §4264(a)) and the trust (Prob C §15401(c)).

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§6.13 2. Revocable Trust

In order to allow an agent to modify or revoke a living trust, the power to do so must be in both the revocable living trust and the DPOA. An agent under a power of attorney cannot modify or revoke a trust unless expressly permitted to do so by the trust instrument. Prob C §15401(c). In addition, if the principal wants the agent to have the power to create or modify a trust, *e.g.,* the power to designate or change beneficiaries so that they are different from those named in a will or existing trust or those designated under the laws of intestate succession, a specific grant of this authority must be included in the DPOA. Prob C §4264(a), (f).

For example, in *Schubert v Reynolds* (2002) 95 CA4th 100, 115 CR2d 285, the decedent's will divided his property equally among his children. However, under a power of attorney that authorized her to create a trust under Prob C §4264(a), one of the children created a trust in which she held the decedent's residence in trust for herself for life, with the remainder to the decedent's grandchildren. The court voided the trust as a violation of Prob C §4264(f) because the power of attorney did not also give the child authority to change the beneficiaries.

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3. Gifting Authority

§6.14 a. DPOA or Revocable Living Trust

If the DPOA will include authorization to make gifts and if the principal's estate plan includes a revocable living trust, the drafter and principal must decide whether the authority should be placed in the trust or in the DPOA. It is permissible to give a trustee the authority to make gifts, thereby eliminating the need to include the authority in a DPOA. See IRC §2035(e), providing that gifts made directly from a revocable trust are treated as if made directly by the decedent for purposes of the 3-year look-back period of IRC §§2035 and 2038. It is generally preferable to have the gift-giving authority included in the trust because there may be difficulties in compelling a DPOA agent to act. Further, placing all distribution provisions in one document can be less confusing for the client, particularly if the client's specific desires to provide for the support of others or to authorize the use of property in kind necessitate elaborate provisions.

Clauses authorizing gifts by agents can be found at §§6.30-6.32. These can be adapted for use in trusts.

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§6.15 b. Survivor's Trust

When deciding whether to place gift-giving authority in the trust or in the DPOA, special considerations arise in the case of a survivor's trust that remains revocable by the survivor after the death of the deceased spouse where the combined estate exceeds the applicable exclusion amount. In most cases, it is important to make sure that transfers to the survivor's trust will qualify for the IRC §2056 marital deduction. If such a trust benefits a person other than the spouse during the spouse's lifetime, a transfer from the deceased spouse to the trust ordinarily will not qualify for the marital deduction because the spouse will not continue to receive the income from any property distributed to others during the spouse's lifetime. The spouse also loses the ability to appoint the distributed property. See IRS Letter Ruling 9030001 and 9325002 (in which the IRS ruled that a savings clause was ineffective in preserving the marital deduction). A court might conclude otherwise, but it is prudent to avoid creating a test case.

There are three basic approaches for addressing this concern.

(1) Give all powers to make gifts from the survivor's trust to the agent under the DPOA and allow the agent to remove assets from the trust in order to make the gifts. Because the "removal" is a revocation of the trust in part, a separate authorization for this procedure must be included in the trust instrument. See Prob C §4264(a). This approach should work, although the author is aware of at least one case in which an estate tax examiner allegedly suggested that a gift-giving power vested in any fiduciary, even the surviving spouse/donor's own agent, might create a marital deduction problem. This suggestion appears illogical because it would mean that an agent's act would not be treated as the act of the principal.

(2) Provide for a temporary split of the survivor's trust. The first survivor's trust is funded with the survivor's own property and authorizes third party gifts. The second survivor's trust does not authorize gifts, thereby qualifying for the marital deduction, and is funded with transfers from the deceased spouse. Immediately after the death of the deceased spouse, the survivor can execute an instrument that purports to withdraw all of the assets of the marital deduction qualifying trust and transfer them to the first trust. Because it is uncertain whether an anticipatory assignment executed before the death of the deceased spouse will be valid, a durable power agent should be authorized to make the transfer if the surviving spouse is not competent.

(3) Take a third approach, which is the same as the second except that the marital deduction transfer is made outright to the spouse rather than to a marital-deduction-qualifying survivor's trust. Again, the expectation is that the spouse will transfer the marital-deduction-qualifying gift to a survivor's trust that authorizes desired gifts, and again, an agent under a durable power should be authorized to make the transfer. A disadvantage of this approach is the risk of probate if the transfer to the survivor's trust is never accomplished. The modest benefit of this approach involves an apparent glitch in EGTRRA-2001. Unless IRC §1022 is amended before 2010, a direct transfer to a survivor's trust will be ineligible for the extra $3 million of basis increases allowed for "qualified spousal property" under IRC §1022. This problem exists because survivor trust property can be appointed to someone other than the spouse during the spouse's lifetime. It is unknown whether IRC §1022 will ever take effect, but the glitch will likely be fixed if it does.

Both the second and third approaches avoid another glitch with respect to the current form of IRC §1022. Under the statute, the only property in a qualified revocable trust that receives a new basis on the death of a decedent is property transferred to the trust by the decedent. IRC §1022(d)(1)(B)(ii)-(iii).

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§6.16 4. Power of Attorney for Health Care

Whenever the agent under a DPOA for estate and tax planning is different from the agent under the power of attorney for health care (PAHC), it is important to delineate and coordinate each agent's responsibilities in the respective documents. Although the two agents share the common goal of providing for the principal's well-being, there is a strong potential for conflict. The principal should be encouraged to select individuals who will work well together.

End-of-life health care can be very expensive and can constitute a large portion of a monthly budget, especially when skilled nursing care is needed either in a facility or at home. Health care decisions and the comfort and quality of care of the principal sometimes take priority over cost-containment concerns. If the principal wants the agent under the PAHC to have primary decision-making authority about incurring health care costs, the document should be drafted with this objective in mind. Both the PAHC and the DPOA should state that the agent under the latter DPOA is instructed and directed to pay all bills incurred on the principal's behalf and submitted by the agent under the PAHC. It would be proper to exculpate the agent acting under the DPOA for any liability caused by following the payment instructions of the agent under the PAHC.

The principal may be concerned about asset preservation if the need for long-term care is anticipated, and he or she may wish to include public-benefit-planning provisions in the documents. If so, both agents should work together in implementing the principal's wishes to preserve assets. Furthermore, if the principal's primary concern is preserving assets for his or her heirs, the drafting attorney should ask the principal whether he or she wants the agent under the DPOA to have priority in all spending decisions in order to achieve the principal's goal of asset preservation. A statement of the principal's goals may be included in both powers of attorney or a standalone interpretive document.

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§6.17 5. Conservatorship

Ideally, a comprehensive plan for incapacity is created for a client using a DPOA and a trust so that a conservatorship is never needed. However, it is not uncommon for a person to have both a conservator and agent under a DPOA. When planning is ignored, having two different individuals serving in each role could create problems, which could lead to a conservator's removing an agent under a DPOA and destroying the estate and tax planning provisions of the DPOA.

There are a number of reasons why a conservatorship might be needed in addition to a DPOA. If a DPOA is limited (restricting the agent's authority to the actions, subjects, or purposes specified in the instrument creating the power; see Prob C §§4261-4262), a conservatorship may be required if the powers specified in the DPOA are insufficient to address the proposed conservatee's needs. Also, an agent under a DPOA has no power to restrain the principal. Thus, if the client is acting imprudently or is subject to undue influence, a DPOA will not divest that person from causing such problems; *e.g.,* an agent would be powerless to prevent the individual from gambling or from making gifts to people who are preying on him or her. Only a conservatorship will divest the principal of such authority.

A DPOA agent is accountable to the conservator under Prob C §4206(a) in the same manner as he or she was accountable to the principal before the creation of the conservatorship. For example, a conservator may demand that the agent submit accounts and report his or her acts to the conservator, and if no report is given within 60 days after that written demand, the conservator may petition for an order compelling the agent to submit a report. Prob C §4541(c). Further, a conservator may revoke or amend the durable power, although only after court authorization. See Prob C §4206(b). This could lead to a conservator petitioning a court for authorization to revoke or amend the DPOA. See Prob C §4541. For these reasons, it would be prudent to nominate the agent as conservator and thus eliminate any confusion about roles and accountability.

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II. ESTATE AND TAX PLANNING THROUGH USE OF DPOA

A. California Statutory Limitations for Estate Planning Powers

§6.18 1. Express Authorization

If the principal wants to grant the agent any of the following estate planning powers, they must be specifically authorized in the power of attorney (Prob C §4264):

- Creating, modifying, or revoking a trust;
- Funding with the principal's property a trust not created by the principal or by a person authorized to create a trust on behalf of the principal;
- Making or revoking a gift of the principal's property in trust or otherwise;
- Exercising the right to make a disclaimer on behalf of the principal;
- Creating or changing survivorship interests in the principal's property or in property in which the principal may have an interest;
- Designating or changing the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death; and
- Making a loan to the agent.

For form authorizing an agent to exercise all of the powers listed in Prob C §4264, see §6.21. Any power listed may be more specifically described. See, *e.g.,* §§6.30-6.32 (gifts), 6.45-6.48 (disclaimers).

PRACTICE TIP: The attorney and the principal should discuss the power to make gifts, shift assets, and otherwise modify the principal's estate plan. The problem of gifts to "disqualified" persons should be considered. See §§4.46-4.48. In addition to meeting the requirement of an express authorization to exercise estate planning powers (Prob C §4264), the provisions of the DPOA should be as specific as possible. When taking actions under the DPOA, the agent should be familiar with the principal's estate plan so that the agent's actions are as compatible with that plan as possible. For example, a decision about which of the principal's assets should be sold or encumbered should be influenced by whether a particular asset is specifically bequeathed. Similarly, before terminating employment of the principal's employees, it will be important to know whether the principal has made a gift to any employee conditioned on continued employment at the time of the principal's death.

CAVEAT: If the power to modify or revoke a trust is granted, the agent may modify or revoke the trust only if this power is expressly permitted by the trust instrument. Prob C §15401(c). See §6.13.

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§6.19 2. Using Separate DPOA for Estate and Tax Planning

Some attorneys create a separate DPOA to hold only the estate and tax planning powers. An attempt to create a single comprehensive document may add significant complexity to that one document and may increase the risk of misinterpretation. Other attorneys, however, prefer a single DPOA document, believing that two separate attorney-drafted DPOAs may create confusion between overlapping powers and add unneeded paperwork. In this book, the draft estate and tax planning provisions are included with other provisions to save space. See §5.69.

NOTE: If multiple documents are used, the drafter must address the issue of whether the holder of either power can modify or revoke the other DPOA's authority and specify which document will control in the event of a conflict.

There are a number of reasons why it can be a good idea to create a separate DPOA for estate and tax planning purposes.

- **The identities and number of the agents can differ.** Although the principal might consider using a private professional fiduciary (see §4.44) or business associate for a property management power, he or she may not wish to have such person acting alone in exercising an estate planning power. Appointing multiple agents to act unanimously to exercise an estate planning power ensures the type of "checks and balances" approach that such a power may warrant. Also, because the power may have sensitive tax-inclusion issues associated with it (see §§6.24-6.26), its exercise may be more suitable for ratification by a special independent trustee or trust protector (who may be a tax professional) than the typical property management power.
- **Privacy concerns can be addressed.** The agent may want to record the DPOA when real property is the subject of the exercise of a power. A recorded DPOA provides notice of the agent's authority over real property. See §§5.2-5.3. The principal may not, however, want to provide notice of the agent's estate planning or gifting authority in a public document.
- **Confusion of third parties can be minimized.** Property management DPOA powers are usually broadly drafted to encourage quick and inexpensive compliance by a wide array of third parties, not all of whom have knowledge of California law. As a result, drafters may be reluctant to impose procedural requirements because of the difficulty of proving compliance to such third parties. This is less of an issue with a rarely used estate planning power that will not be presented in a business transaction.
- **Different types of triggers can be used.** For example, the client may choose to use a property management power that is effective immediately but choose to use a springing power for estate planning matters.

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§6.20 3. Estate Planning Powers in DPOAs Executed Before January 1, 1995

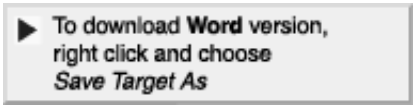
A DPOA executed before Prob C §4264 took effect is subject to the limitations of that section regarding any actions taken on or after January 1, 1995. Prob C §4054(a). Regarding actions before that date, any estate planning done under a DPOA required express authorization from the principal. At that time, the broadly drafted DPOA commonly did not include such authorization.

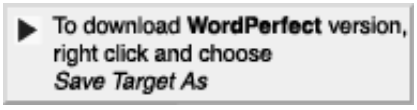
Before enactment of the Power of Attorney Law (Prob C §§4000-4545) (effective January 1, 1995), a DPOA was governed by common law and the general statutes regarding agency. See CC §§2295-2400. Two limitations on agents under pre-January 1, 1995, law commonly precluded use of the general DPOA for estate planning. The first limitation was the requirement that the agent could only use the power for the benefit of the principal. Without express authority from the principal, this precluded gifting, the establishment of trusts, or any other action that the principal might have wanted for the benefit of others. A second, narrower limitation was the proscription against the agent's using the power for the benefit of the agent. A broad statement that the agent could do anything the principal could do was not sufficient to eliminate these limitations.

Often the agent is a close family member who would be included in any estate planning done by the principal. Even if the DPOA included express authorization for typical estate planning transactions, however, the agent would be required to exclude himself or herself from the gifting unless the agent also had express authority to include the agent. For example, if the agent had been given express authority to make gifts on behalf of the principal and used this discretion to make gifts to all the principal's children, including the agent, the gifts to the other children would have been valid, but the gift to the agent would have been invalid unless the DPOA included express authorization for self-dealing.

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§6.21 4. Form: Broad Authority to Exercise Estate Planning Powers





6.21-1 Broad authority to exercise estate planning powers

I authorize my Agent to exercise all the following powers:

1. To create, modify, or revoke a trust;

2. To fund with the Principal's property a trust not created by the Principal or by a person authorized to create a trust on behalf of the Principal;

3. To make or revoke a gift of the Principal's property in trust or otherwise;

4. To exercise the right to make a disclaimer on the Principal's behalf;

5. To create or change survivorship interests in the Principal's property or in property in which the Principal may have an interest;

6. To designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the Principal's death, including the power to designate beneficiaries of the Principal's trust who differ from those designated in the Principal's will or who would inherit under the laws of intestate succession; and

7. To make a loan to the Agent.

Comment: This provision includes all the powers that cannot be exercised by an agent under a DPOA unless they are specifically authorized in the DPOA. The language is based on that of Prob C §4264. The language in the more specific forms in this chapter relating to the specific powers, *e.g.,* §§6.30-6.32 (gifts) or §§6.45-6.48 (disclaimers), may be used instead of (and, in some cases, in addition to) the statutory language used above.

WARNING: The powers listed in clause 1 and clauses 3 through 7 may give the agent a general power of appointment. See §§6.22, 6.24-6.26 for discussion of the potential adverse tax consequences to the agent resulting from the grant of a general power of appointment.

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§6.22 B. Potential Tax and Creditor Problems in Creation and Use of DPOA

The attorney drafting a DPOA must understand the instrument's potential tax consequences regarding both the principal and the actions the agent is authorized in the instrument to take. For the principal, merely creating a DPOA is not a taxable event, but the agent's actions under the DPOA may have tax consequences for the principal. For the agent, mere creation of the power may have adverse tax consequences.

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§6.23 1. Principal Liable for Capital Gains and Gift Tax

When an agent sells an appreciated capital asset of the principal, any capital gains tax arising from the transaction will be the principal's liability. Similarly, if the agent makes taxable gifts, the gift tax is a liability of the principal. See Rev Rul 67-280, 1967-2 Cum Bull 349; Rev Rul 73-612, 1973-2 Cum Bull 322.

NOTE: Gifts made by an agent not authorized to make gifts are revocable, even if only by the principal's conservator, and may be included in the principal's estate. *Estate of Casey v Commissioner* (4th Cir 1991) 948 F2d 895. See *Estate of Sylvia P. Goldman,* TC Memo 1996-29.

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2. Agent's Potential Liability

§6.24 a. Agent as Holder of General Power of Appointment

The mere creation of a power of attorney may have tax consequences for the agent if the instrument gives the agent an immediately effective general power of appointment. A general power of appointment is the power to appoint property to oneself, one's creditors, one's estate, or the creditors of one's estate, unless the power is held jointly with the creator of the power or with one whose interests are adverse to the exercise of the power or unless the exercise of the power is limited by an ascertainable standard. IRC §2041(b)(1).

It is a common misperception that a power held in a fiduciary capacity cannot be a general power of appointment when, in fact, "[t]he term 'power of appointment' includes all powers which are in substance and effect powers of appointment regardless of the nomenclature used in creating the power and regardless of local property law connotations." Treas Reg §20.2041-1(b).

An agent possessing a general power of appointment may be taxed on the income generated by the appointive property, and the estate of an agent who dies possessing a general power of appointment includes the property over which the agent had a general power. IRC §§678, 2041. An agent exercising or releasing his power may also have gift tax consequences when the power is exercised or released. These tax consequences do not affect an agent who is given a general power of appointment under a springing power of attorney, if the triggering event does not occur; if the triggering event does occur, however, the above concerns apply. Treas Reg §20.2041-3(b). For discussion of springing powers, see chap 4.

The general power of appointment might pose a concern for the agent only if it results in increased estate taxes. If there is no estate tax increase, the result of estate inclusion may be a tax benefit in the form of an increased basis under IRC §1014. The IRS's current view of the possible application of IRC §2041 in cases involving powers over another person's property is unclear, particularly now that planners in common law states are attempting to use such powers to obtain a new basis for the surviving spouse's assets on the death of the deceased spouse. The notion that an individual can have a general power to appoint the assets of another person also seems inconsistent with the seemingly prevalent IRS view that, for transfer tax purposes, only one person owns any particular interest in property at any one time. See, *e.g.,* Treas Reg §25.2523(f)-1(f), Examples 10 and 11, concerning the treatment of inter vivos QTIP trusts that may make distributions to the grantor after the death of the spouse.

Nevertheless, the literal language of IRC §2041 raises concern. In addition, parallel language in Prob C §611(a) creates a risk that the agent's creditors could pursue assets subject to a general power under Prob C §682.

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§6.25 b. Power to Amend Trust: Agent's Possible Tax Consequences

If an agent is given the power to amend the principal's trust and if the agent may use this power to direct trust benefits to the agent or the agent's creditors or to the agent's estate or its creditors, the agent has a general power of appointment. Treas Reg §20.2041-1(b)-(c). An agent granted a general power of appointment may escape the tax consequences of the power by making a valid disclaimer. The disclaimer, however, must be coupled with refusal to act as agent under the power of attorney because disclaimers are not valid if the disclaimant retains the power to direct enjoyment of the disclaimed property. IRC §2518(b); Treas Reg §20.2041-3(d)(6).

On the other hand, a power to amend only the administrative provisions of a trust instrument (Treas Reg §§20.2041-1(b)(1) and 25.2514-1(b)(1)),

> which cannot substantially affect the beneficial enjoyment of the trust property or income, is not a power of appointment. The mere power of management, investment, custody of assets, or the power to allocate receipts and disbursements as between income and principal, exercisable in a fiduciary capacity, whereby the holder has no power to enlarge or shift any of the beneficial interests therein except as an incidental consequence of the discharge of such fiduciary duties is not a power of appointment.

Several cases illustrate the distinction between administrative and substantive provisions. See, *e.g., Estate of Dean S. Edmonds* (1979) 72 TC 970 (power to amend only trust administrative provisions that do not affect beneficial enjoyment and power to create additional trusts as long as they do not relate to changing beneficiaries' trust interests do not constitute general power of appointment); *Estate of Anders Jordahl* (1975) 65 TC 92, acq 1977-2 Cum Bull 1 (power to substitute assets of equal value is not general power of appointment, but by doing so agent may cause trust to become grantor trust for income tax purposes under IRC §675(4)(C)).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.26 c. Avoiding Tax and Creditor Consequences to Agent

§6.26 c. Avoiding Tax and Creditor Consequences to Agent

The principal can avoid adverse tax consequences to the agent and availability of funds to the agent's creditors that would result from creation of a general power of appointment by qualifying the extent of the agent's authority to make gifts in any of the following ways:

- Forbidding the agent to make gifts to himself or herself or to discharge any of the agent's legal obligations, including an obligation of support;
- Allowing the agent to make distributions to himself or herself only if structured in the form of a "5 or 5" withdrawal power (see §§6.43-6.44);
- Limiting the agent's authority to the annual exclusion amount (IRC §2503(b)) and limiting the class of potential donees;
- Allowing the agent to make only gifts limited by an "ascertainable standard" relating to the health, support, maintenance, or education of the beneficiary (see IRC §§2041(b)(1)(A), 2514(c)(1)); or
- Allowing the agent under a primary DPOA to make gifts only to a limited class that excludes the agent and the agent's creditors, and executing a secondary DPOA granting another agent who is not a permissible recipient of gifts under the primary DPOA the authority to make gifts to the primary agent.

These solutions parallel those involved in ensuring that a bypass trust is not included in the estate of a surviving spouse who, as trustee or otherwise, has distribution or withdrawal powers.

PRACTICE TIP: If problems remain after consideration of these safe harbors, it may be necessary to give the gift power to someone who will not benefit from the power.

CAVEAT: Gifts to a "disqualified" person are invalid. See §§4.46-4.48, 6.27. Also, an agent who gifts the principal's assets to himself or herself without specific authority to do so may face income tax consequences similar to those faced by an embezzler. See *James v U.S.* (1961) 366 US 213, 6 L Ed 2d 246, 81 S Ct 1052.

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III. SPECIFIC GIFT AND ESTATE TAX PLANNING POWERS OF AGENT

§6.27 A. Gifts

An agent may not use a DPOA to make gifts on the principal's behalf unless the DPOA specifically authorizes the agent to do so. Prob C §4264(c). Examples of gifts are the following:

- The $10,000 (plus cost-of-living adjustments) gift tax annual exclusion amount ($13,000 in 2009 (IRC §2503(b); Rev Proc 2008-66, 2008-45) (see §6.28));
- Gifts up to the federal gift tax applicable exclusion amount ($1 million) (IRC §2505(a));
- Gifts to charity;
- Asset shifting between spouses for public-benefits-planning purposes;
- Splitting gifts with a spouse;
- Making payments of tuition and medical costs that qualify under IRC §2503(e) as exclusions from federal gift tax; and
- End-of-life gifts.

The principal can limit the gifts to members of a specific class or generation of persons, such as the children and grandchildren of the principal, and require that any such gifts be made in equal amounts to members of the class or generation. The principal can also limit charitable gifts by granting the authority to complete only pledges previously made by the principal. For discussion of including authority to make gifts in the DPOA or a revocable living trust, see §§6.14-6.15.

If the DPOA does not authorize the agent to make gifts on the principal's behalf, any ratification by the principal of such gifts must be in writing. *Estate of Swanson v U.S.* (2000) 46 Fed Cl 388, aff'd (Fed Cir 2001) 10 Fed Appx 833.

WARNING: For discussion of the possible problems involved with authorizing an agent to make gifts to himself or herself or to certain other persons, see §§4.72-4.74. For discussion of the possible problems of making gifts to "disqualified persons," see §§4.46-4.48.

PRACTICE TIP: The attorney and the principal should discuss the possibility of making gifts of the annual exclusion amount at the time the DPOA is executed. These gifts should not be undertaken without careful planning by the principal. To qualify gifts as annual exclusion gifts, see §6.28. Some clients, however, are adamantly opposed to annual gifts despite the tax planning benefits. The DPOA can expressly prohibit gifts, although this is not necessary (because gifts must be specifically authorized in a DPOA).

PRACTICE TIP: If there is concern that a marital deduction trust will be depleted on the incapacity of the spouse, the attorney and the client should discuss having the trust instrument provide that the spouse's withdrawal power may be exercised through the DPOA. The DPOA should authorize the exercise of the spouse's withdrawal power and authorize the agent to make gifts from the withdrawn assets. See discussion in §6.15 for issues that may arise from this power. The drafter should bear in mind Medi-Cal rules concerning the ineligibility period arising out of transfers from trusts. See California Elder Law Resources, Benefits, and Planning: An Advocate's Guide, chaps 9-11 (Cal CEB 2003). For forms giving an agent authority regarding government benefits, see §§5.22-5.23.

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§6.28 1. Qualifying Cash Gifts for Annual Gift Tax Exclusion

If specifically authorized to do so in the DPOA, an agent can make gifts (Prob C §4264(c)) at any time before the principal's death and still have them qualify for the annual gift tax exclusion. If the power of attorney does not contain specific authorization, it may not be construed to grant authority to make a gift. Prob C §4264. If the net value of the principal's estate (assuming no prior taxable gifts have been made) does not exceed the estate tax applicable exclusion amount, then an agent generally should not make such gifts, because (1) there is no taxable estate and therefore no advantage to transferring assets on a tax-free basis and (2) the principal might recover or the funds might be necessary for the principal's care. If, however, the principal's estate exceeds the applicable exclusion amount and death is imminent, the DPOA can authorize the agent to make lifetime advancements of specific or residuary gifts (preferably of assets with tax bases higher than fair market value because the donee takes the donor's tax basis) of up to the annual exclusion amount per person.

Whether these predeath gifts are properly excludable from a decedent's estate as annual exclusion gifts depends on whether the decedent's power of attorney authorized such gifts and whether the gift was completed before the principal's death. If unauthorized, the gifts are revocable, *i.e.,* voidable, because made without authority, and they are therefore "pulled back" into the estate. If authorized, the gifts are irrevocable and properly excludable from the estate. Annual exclusion gifts made by an agent in accordance with an express provision in the decedent's DPOA should therefore be excluded from the principal's estate. See *Estate of Yetta Bronston*, TC Memo 1988-510.

In addition to being authorized, a gift must be complete before the decedent's death in order to qualify for the gift tax exclusion. A noncharitable gift of a check that is written before death but is paid after death is not a complete gift and so is not excludable from the estate. Rev Rul 96-56, 1996-2 Cum Bull 16; *Rosano v U.S.* (2d Cir 2001) 245 F3d 212; *Metzger v Commissioner* (4th Cir 1994) 38 F3d 118. See also *Estate of Sarah H. Newman* (1998) 111 TC 81 (checks representing noncharitable gifts that were written by agent before death of bedridden decedent and accepted and paid by drawee bank after death were not completed gifts).

PRACTICE TIP: If the principal's death is imminent, the agent should make such gifts in cash or cashier's checks or should urge beneficiaries to cash checks immediately.

The DPOA can specify to whom gifts may be made, whether the gift should be treated as in satisfaction of a testamentary gift, and whether all gifts to persons within a class should be equal. See California Will Drafting §§12.14-12.15 (3d ed Cal CEB 1992) for further discussion of satisfaction and for form.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.29 2. Noncash Gifts, Gifts Over Annual Exclusion Amount, and Charitable Gifts

§6.29 2. Noncash Gifts, Gifts Over Annual Exclusion Amount, and Charitable Gifts

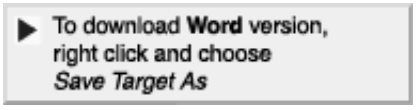
Agents attempting to engage in predeath tax planning should be careful when considering gifts that exceed the annual exclusion amount (see §6.28), even if the DPOA authorizes such gifts. Income tax basis considerations (*i.e.,* under current federal law, no new basis for capital gains purposes on property gifted during lifetime, as opposed to a step-up in basis on property transferring on death) should discourage making gifts of appreciated property. Furthermore, if the $1 million IRC §2505 gift tax applicable exclusion amount has been exhausted, gifts in excess of the IRC §2503(b) annual exclusion amount are rarely worth making in an end-of-life situation because the "gross-up rule" of the integrated gift and estate tax system includes gift taxes paid within 3 years before death in the principal's taxable estate. See IRC §2035.

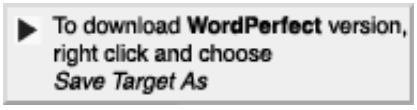
The drafter and principal should also consider practical matters such as the potential for abusing authority, the risk of creating family disharmony, and possible tax problems for the agent. See §6.27. If the principal has a pattern of charitable giving that he or she would like to continue in the event of incapacity, or if the principal has made pledges that he or she intends to complete, these matters should be discussed. The DPOA can be modified to include provisions allowing the agent to make gifts to charitable organizations. Limitations on amount and potential charitable donees are recommended.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.30 3. Form: Authority to Make Annual Gifts up to Annual Gift Tax Exclusion Amount

§6.30 3. Form: Authority to Make Annual Gifts up to Annual Gift Tax Exclusion Amount





6.30-1 Authority to make annual gifts up to annual gift tax exclusion amount

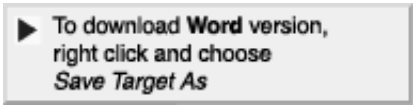
The Agent is authorized to make gifts on the Principal's behalf to a class composed of the Principal's children, any of their issue, or both, _ _[*or the spouses of any of them*]_ _, to the full extent of the federal annual gift tax exclusion under Internal Revenue Code §2503(b) or any successor statute and, for such purposes, to remove the Principal's assets from any revocable trust of which the Principal is a grantor.

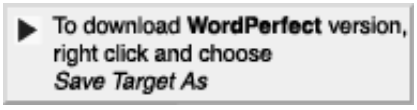
Comment: See §§6.27-6.29 for discussion of tax issues and §§4.46-4.48 for discussion of invalidity of gifts to a "disqualified" person. If the principal wants the agent to have gifting power from the principal's revocable trust, this authority should also be specified in the trust.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.31 4. Form: Authority to Make Gifts Beyond Annual Gift Tax Exclusion Amount

§6.31 4. Form: Authority to Make Gifts Beyond Annual Gift Tax Exclusion Amount





6.31-1 Authority to make gifts beyond annual gift tax exclusion amount

The Agent is authorized to make gifts and other transfers without consideration or with less than full consideration, including forgiveness of loans and completion of charitable pledges made by the Principal; provided, however, that the Agent shall not make gifts to the Agent unless the gifts are for the Agent's health, support, education, and maintenance and do not exceed $_ _[*amount*]_ _ in any calendar year.

[*Optional*]

In making such gifts, the Agent is authorized to remove the Principal's assets from any revocable trust of which the Principal is a grantor.

[*Optional*]

However, the recipients of any such gifts shall be limited to _ _[*identify*]_ _.

[*Optional*]

, provided, however, that if a gift is made to any one of the Principal's children, the Agent shall make a substantially similar concurrent gift to each of the Principal's other children.

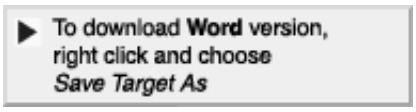
[*Optional*]

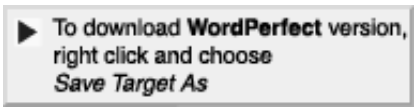
My Agent shall not be held liable for non-prorata allocation of a gift unless the non-prorata allocation of a gift was executed in bad faith, with intentional wrongdoing, or with gross negligence.

Comment: See §6.30 for an alternative provision limiting the agent's gift-making authority to the annual gift tax exclusion amount. See §§6.27-6.29 for tax issues and §§4.46-4.48 for invalidity of gifts to a "disqualified" person.

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§6.32 5. Form: Powers Relating to Gifts (Long Form)





6.32-1 Powers relating to gifts (long form)

The Agent is authorized to make gifts on the terms and conditions set forth below:

A. General Gift Authority. The Agent is authorized to make gifts, grants, or other transfers without consideration, either outright or in trust, for any legitimate estate planning purpose, to or for the benefit of _ _[*e.g., the principal's spouse or descendants or charitable organizations (including, without limitation, any private charitable foundation, charitable remainder trust, or charitable lead trust established by the principal, as well as any public charity)*]_ _**. Such gifts may include** _ _[*e.g., the forgiveness of indebtedness, the completion of any charitable pledges the principal has made, and the direct payment of tuition and medical care for the benefit of any such person under the provisions of Internal Revenue Code §2503(e) or any successor statute*]_ _**.**

Such gifts may be made in cash or in kind, or partly in each, on a prorata or non-prorata basis. If the Agent is other than the Principal's spouse and if any gifts are made to any individuals other than the Principal's spouse, then such gifts shall be made _ _[*e.g., equally to all descendants of the same generation, i.e., if a gift is made to any grandchild of the principal, then a similar gift or gifts of the same amount must be made to each then-living grandchild of the principal*]_ _**.**

B. End-of-Life Gifts.

1. Circumstances for Making and Amount of End-of-Life Gifts. Without limiting the Agent's authority to make gifts under paragraph A immediately preceding, if the Agent determines that (1) the Principal is terminally ill and unlikely to live more than 6 months from the date of determination, and (2) the Principal's estate is or may be subject to estate taxes (even if the Principal's spouse is likely to survive the Principal and estate taxes would be deferred until the spouse's death by reason of the unlimited marital deduction), then the Agent, in the Agent's sole discretion, may make gifts up to the full amount of the federal gift tax annual exclusion under Internal Revenue Code §2503(b) or any successor statute, taking into account, if the Principal is married, the amount that may be given by the Principal from the Principal's separate property, if any, if the Principal's spouse is willing to sign a consent to split the gift under Internal Revenue Code §2513 (hereinafter referred to as "end-of-life gifts").

2. Permissible Donees. The Agent is authorized to make end-of-life gifts to the following individuals:

First, to the Principal's then-living children, provided, however, that if sufficient funds or suitable property are not available to make the full amount of such gifts to all of said children, then the funds or property that are available shall be apportioned equally among said children.

Second, if there are sufficient funds or suitable property remaining after making the foregoing gifts to the Principal's then-living children, then out of the remaining funds or property gifts shall be made to the then-living children of the Principal's children (*i.e.,* the Principal's grandchildren), in equal shares, per capita and not by right of representation, provided, however, that if sufficient funds or suitable property are not available to make the full amount of the gifts to all of the grandchildren, then the funds or property that are available shall be apportioned equally among the grandchildren. "Children" and "grandchildren" _ _[*shall/shall not*]_ _ **include** _ _[*adopted/step*]_ _ **persons.**

C. Completion of End-of-Life Gifts Before Principal's Death. The Principal requests that the Agent take all actions reasonably necessary to ensure that the end-of-life gifts authorized hereunder are completed for federal gift tax purposes before the Principal's death, including making cash gifts by wire transfer, electronic funds transfer, or other method that is reasonably calculated to complete the gifts before death. If the Principal is in an irreversible coma or vegetative state and the Principal's life is being prolonged solely by artificial

means under circumstances in which the timing of death may be subject to the control of the Principal's health care agent, the conservator of the Principal's person, or other legal representative, then the Principal requests that the Agent hereunder confer with the health care agent, conservator, or legal representative concerning the timing of the gifts in relation to the timing of the Principal's death.

[*If appropriate, add*]

D. Effect on Testamentary Plan. It is the Principal's desire that the Agent make the end-of-life gifts in order to save estate taxes, even if doing so is inconsistent with the Principal's testamentary plan. For example, if the Principal's will or living trust provides for distribution of the Principal's estate to the Principal's children in equal shares on the Principal's death, it is the Principal's desire that the Agent include the Principal's grandchildren in such end-of-life gifts if estate taxes could thereby be reduced, even if the effect would be to reduce the amounts passing to the Principal's children at the Principal's death or to shift the total amount passing to each line of descent.

[*Continue*]

[E.] Effect of Pay-on-Death, Joint Tenancy, and Similar Arrangements. Notwithstanding the provisions of the preceding paragraph D, the Principal hereby confirms any pay-on-death, joint tenancy, or other such designations or arrangements previously made by the Principal with respect to any bank, brokerage, or similar accounts, including but not limited to any such designations made for the benefit of the Agent. The Agent shall not be required to "break" any such accounts in order to make the end-of-life gifts described above, even if such funds are the only funds available with which to make such gifts, provided, however, that if doing so would save estate taxes, the Agent may distribute the funds or property in any such account to the person or persons who would otherwise take such account on the Principal's death if doing so would reduce the amount of, or possibility of, estate taxes.

[F.] Limitation on Gifts to Agent. Notwithstanding the provisions of paragraphs A and B above, any gifts the Agent is authorized to make to himself or herself, or for his or her benefit, either directly or indirectly, including the discharge of his or her legal obligations, shall be limited to the greater of (1) five thousand dollars ($5000), or (2) five percent (5%) of the Principal's net worth during any calendar year. This power shall be noncumulative and shall lapse at the end of each calendar year, provided, however, that gifts to the Agent may exceed such limitation if a person named herein as a successor agent, who has an interest "substantially adverse" (as that term is defined in Treasury Regulation §20.2041-3(c)) to making gifts to the Agent, consents in writing to the gift to the Agent. The Principal hereby appoints this successor agent as "special agent" for this limited purpose only.

[G.] Income Tax Effects. In making gifts under this instrument, the Agent may, but shall not be required to, consider the income tax effects of making a gift of any asset for which the income tax basis differs from fair market value, including the possibility of a step-up in basis at the Principal's death (or the death of the Principal's spouse with respect to community property) under Internal Revenue Code §1014, as amended from time to time, or any successor statute. In that regard, the Agent shall have the sole discretion to determine whether the estate tax savings of making such gifts outweighs the income tax consequences.

[H.] Discretionary Nature of Gifts. The Agent shall have the sole discretion to determine whether and to what extent to make gifts under this instrument, provided, however, that except as otherwise provided above in paragraph B, it is the Principal's desire that the donees of each generation be treated equally. Nothing stated herein shall be construed to require the Agent to make any such gifts, and the Agent shall not be liable to any person for failing to make any gifts authorized hereunder or for the manner in which such gifts are made, except for the Agent's bad faith, willful misconduct, or gross negligence, including without limitation the estate tax or income tax consequences to the Principal's estate, beneficiaries, or heirs at law. The Agent shall be held free and harmless from any such liability, loss, cost, or expense, including reasonable attorney fees, arising from the Agent's acts or omissions in connection with making any gifts under the provisions of this instrument.

[I.] Payments to or for Benefit of Minors. If a gift is made under this instrument to any person who is under the age of twenty-one (21), and if no trust is established for such person, such person's gift may, in the discretion of the Agent, be distributed to an adult member of such person's family (to be selected by the Agent) as custodian until such age as the Agent determines (but not to exceed 21 years), under the California Uniform Transfers to Minors Act.

[J.] Consent to Split Gifts. The Agent is authorized to consent to split gifts made by the Principal's spouse (if the Principal is married at such time) under Internal Revenue Code §2513 or any successor statute and similar provisions of any state or local gift tax laws.

[*Optional*]

[K.] Limitation on Liability. The Agent shall not be held liable for non-prorata allocation of a gift unless the non-prorata allocation of a gift was executed in bad faith, with intentional wrongdoing, or with gross negligence.

Comment: Paragraph D should not be included without careful review with the principal. The agent's power to override the principal's testamentary plans in order to save taxes could significantly alter the principal's intended distribution plan. It may be rare that a principal actually wants tax considerations to be the controlling factor affecting his or her estate plan. In addition, if the agent is a child or grandchild of the principal, it may be necessary to limit the agent's authority to redirect the principal's estate plan.

The provision of paragraph F that refers to a special agent requires the principal to name a successor agent. As an alternative, the principal may name the person who is to act as special agent for the purposes set out in paragraph F in the paragraph itself without naming that same person as the successor agent or without naming a successor agent at all.

With regard to paragraph G, note that the step-up in income tax basis on the property owner's death is repealed in 2010 (IRC §1014(f)) and replaced by a provision allowing the owner's executor to allocate an aggregate basis increase of $1.3 million (plus $3 million for property passing to a surviving spouse) to the owner's property (IRC §1022) but is reinstated in 2011 under the sunset provision of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA-2001) (Pub L 107-16, 115 Stat 38). See §6.7.

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B. Special Needs Trusts

§6.33 1. Amending Trust to Create Special Needs Trust

Occasionally, a beneficiary of a trust established by the principal is a person with a disability or has an accident and becomes disabled and eligible for needs-based public benefits such as Supplemental Security Income (SSI) or Medi-Cal. In other instances, a beneficiary predeceases the principal, and the deceased beneficiary's share passes to the deceased beneficiary's descendants, one of whom may be disabled and receiving SSI or Medi-Cal. Because these events may occur when the principal is incapacitated, it may be beneficial to have a clause in the DPOA empowering the agent to amend the client's revocable trust to transform a provision for the beneficiary with a disability into a third party special needs trust.

On special needs trusts in general, see Special Needs Trusts: Planning, Drafting, and Administration (Cal CEB 2008).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.34 2. Form: Authority to Create Special Needs Trust

§6.34 2. Form: Authority to Create Special Needs Trust

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6.34-1 Authority to create special needs trusts

If any beneficiary of the _ _[*name*]_ _ trust is receiving or is likely (in my Agent's discretion) to receive needs-based public benefits such as Supplemental Security Income (SSI), Medi-Cal (Medicaid), or similar needs-based public or private benefits, my Agent is authorized to explore and implement special needs trust planning strategies and options and to amend the trust to establish a special needs trust or other discretionary supplemental trust to assure that public or private financial and care assistance to the beneficiary will not be affected.

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C. Moving Assets to or From Trusts

§6.35 1. Authority to Transfer Assets to or Remove Assets From Trusts

If the principal wants the agent to have the power to transfer assets to or remove assets from the principal's revocable trusts, the power should be specifically included in both the DPOA and the trust instrument. Probate Code §15401(c) requires express authorization in the trust instrument in order for an agent to modify or revoke the trust. Also, Prob C §4264(a) requires express authorization in the DPOA to create, modify, or revoke a trust. See §6.18. The two documents must be coordinated. See Drafting California Revocable Trusts §§22.7-22.10 (4th ed Cal CEB 2003). For DPOA provision, see §6.36.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.36 2. Form: Authority to Transfer Assets to and Remove Assets From Revocable Living Trust

§6.36 2. Form: Authority to Transfer Assets to and Remove Assets From Revocable Living Trust

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6.36-1 Authority to transfer assets to and remove assets from revocable living trust

The Agent is authorized to transfer assets to and remove assets from any and all revocable living trusts of which the Principal is or becomes a settlor.

Comment: This clause should be used sparingly because it grants the agent power to take assets out of the protection of a trust when a trustee has the duty to act and to safeguard assets. Some oil and gas companies may require that the agent have specific authority to assign to the principal's trust all of the principal's interest in the companies' oil and gas leases.

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D. Funding Trust Not Created by Principal

§6.37 1. Authority to Fund Trusts Not Created by Principal

If the principal wants the agent to have the authority to fund trusts not created by the principal (or a person authorized to create a trust on behalf of the principal), that authority must be written in the DPOA. Prob C §4264(b).

See §6.38 for form authorizing the agent to fund trusts not created by the principal or created by a person authorized by the principal.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.38 2. Form: Authority to Fund Trusts Not Created by Principal

§6.38 2. Form: Authority to Fund Trusts Not Created by Principal

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6.38-1 Authority to fund trusts not created by principal

The Agent is authorized to transfer assets to any and all trusts, even when the Principal did not create the trust, or to a trust created by a person authorized by the Principal.

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E. Powers of Appointment

§6.39 1. Exercise of Powers of Appointment

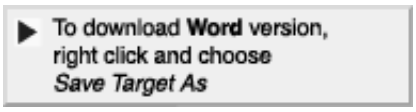
An agent's exercise of powers of appointment held by the principal can often constitute sound tax planning. Good planning requires that the authority to exercise a principal's power of appointment be expressly authorized in the DPOA. However, care should be taken that the powers granted to the agent are not so broad that a general power of appointment in the agent's favor is inadvertently created. See generally §§6.22, 6.24-6.26 for power of appointment issues.

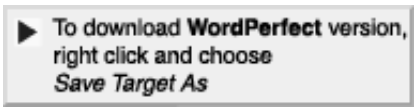
See §6.40 for form authorizing the agent to exercise powers of appointment on behalf of the principal.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.40 2. Form: Authority to Exercise Powers of Appointment

§6.40 2. Form: Authority to Exercise Powers of Appointment





6.40-1 Authority to exercise powers of appointment

The Agent is authorized to exercise on the Principal's behalf all powers of appointment held by the Principal. Notwithstanding the foregoing, however, the Agent shall have no authority to exercise any power of appointment that would itself constitute a general power of appointment in favor of the Agent personally. The Agent may not exercise any power of appointment in favor of _ _[*himself/herself*]_ _, _ _[*his/her*]_ _ estate, _ _[*his/her*]_ _ creditors, or the creditors of _ _[*his/her*]_ _ estate.

Comment: This provision illustrates how carefully a DPOA must be drafted to avoid inadvertently giving the agent a general power of appointment. If the principal has a power of appointment that the principal would exercise in favor of the agent and wants the agent to have that power, the form may be modified, but only after consideration of the tax implications of creating a general power of appointment in the agent. See §§6.22, 6.24-6.26.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/ F. Miscellaneous Tax Provision/§6.41 1. Authority to Prepay or Postpone Taxes and to Borrow for Purposes of Tax Planning

F. Miscellaneous Tax Provision

§6.41 1. Authority to Prepay or Postpone Taxes and to Borrow for Purposes of Tax Planning

Decisions about prepayment or postponement of property taxes, income taxes, or other taxes; payment or postponement of deductible expenses; sale of depreciated assets in order to preserve availability of tax losses; and other tax matters can all be made by an agent in appropriate situations if authority is given in the DPOA.

Often, the principal's liquid assets will be insufficient to prepay property taxes, implement other advisable end-of-life tax planning, or avoid end-of-life sales of appreciated property in order to pay the principal's medical expenses and other costs. The agent's authority under a DPOA to borrow for purposes of end-of-life tax planning can be as important as any other tax planning authority.

PRACTICE TIP: The power to borrow should not be routinely included in a DPOA unless the matter has been discussed with the principal. See §6.42 for form authorizing an agent to borrow and encumber the principal's assets.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.42 2. Form: Authority to Prepay or Postpone Taxes and to Borrow and Grant Security Interests

§6.42 2. Form: Authority to Prepay or Postpone Taxes and to Borrow and Grant Security Interests

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6.42-1 Authority to prepay or postpone taxes and to borrow and grant security interests

The Agent is authorized to prepay or postpone property taxes, income taxes, or other taxes. The Agent may pay or postpone deductible expenses or sell or postpone the sale of depreciated assets in order to preserve availability of tax losses and to otherwise manage the tax efficiency of the Principal's property and business transactions.

The Agent may also borrow such sums as the Agent finds necessary for the proper management of the Principal's property, including but not limited to tax and estate planning matters, and to mortgage, convey by deed of trust, grant security interests in, or otherwise encumber any real or personal property now or hereafter owned by the Principal, whether acquired by the Principal or the Agent.

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G. Withdrawal Rights From Trusts

§6.43 1. Authority to Exercise Annual "5 or 5" Power

The exercise or release of a general power during the powerholder's lifetime results in the inclusion of the subject property in the powerholder's estate if the powerholder has a retained interest in the resulting transfer under IRC §§2036-2038. During any calendar year, a lapse (as distinguished from a release or an exercise) of a general power of appointment is not considered a release of the power to the extent that, at the time of the lapse, the property that could have been appointed does not have a value greater than $5000 or 5 percent of the aggregate value of the property from which an exercise of the lapsed power could have been satisfied. IRC §§2041(b)(2), 2514(e). A general power that comes entirely within this safe harbor is often called a "5 or 5" power. Spouses are sometimes given such powers in irrevocable trusts such as credit shelter trusts (also known as "bypass trusts").

If the principal wants the agent to have annual withdrawal rights from a trust from which the principal has withdrawal rights, the power should be specifically included in the DPOA. See §6.44 for form. If the principal holds broader powers than the "5 or 5" power described in this form, the form may be modified to grant the agent the same broader authority. A withdrawal right exceeding "5 or 5" powers may be a general power of appointment over the principal in the trust. Counsel should consider whether the agent should have the authority to disclaim the withdrawal right and, if so, should include an express provision in the DPOA. See Warning in §6.45 discussing qualified disclaimers and lapsing general powers of appointment.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.44 2. Form: Authority to Exercise Annual Withdrawal Rights

§6.44 2. Form: Authority to Exercise Annual Withdrawal Rights

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6.44-1 Authority to exercise annual withdrawal rights

The Agent is authorized to exercise on the Principal's behalf and for the Principal's benefit the Principal's annual withdrawal rights, if any, from trusts (created by someone other than the Principal) that are limited to the greater of $5000 or 5 percent of the value of the total trust property and to take possession of and use or distribute such withdrawn property to or for the benefit of the Principal.

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H. Disclaimers

§6.45 1. Use of Disclaimers

Disclaiming property can result in tremendous tax savings for a principal who neither needs nor wants assets inherited late in life. Disclaimers may be used to achieve a wide variety of goals, such as qualifying a transfer for the marital or charitable deduction, avoiding generation-skipping transfer tax problems, allowing transfers without the imposition of successive estate or gift taxes, or permitting an IRA to pass to contingent beneficiaries who can make withdrawals over a longer life expectancy. See Prob C §§260-295 for California's disclaimer statutes.

An agent under a DPOA can make disclaimers only if expressly authorized to do so in the DPOA. Prob C §4264(d). See §6.48 for form. The disclaimer can be effective for tax purposes only if the agent had authority to make disclaimers under state law. See IRS Letter Ruling 9015017 (under Delaware's disclaimer statutes, which are similar to California's, agent had express authority to disclaim under Delaware DPOA; disclaimer was effective for federal tax purposes).

NOTE: If the DPOA is springing as opposed to immediate, note that the requirements to make the DPOA effective must be met before the disclaimer is executed. See IRS Letter Ruling 8522003. See also §§4.11-4.14.

Before making a disclaimer, an agent should be familiar with the principal's estate plan and the effect of the disclaimer on both the principal's intentions and beneficiaries. If the disclaimed assets will pass to persons who are not intended beneficiaries, or if they will pass outright to beneficiaries for whom the principal intended the assets to be held in trust, the agent may not want to make the disclaimer.

From a tax perspective, the authority to disclaim generally can be included in a DPOA more safely than can other tax planning powers because it does not involve substituted judgment regarding the selection of the ultimate recipient. Disclaimed property passes as described in the granting documents, without any direction from the disclaimant. If the agent makes a "qualified disclaimer" on the principal's behalf, no gift tax is imposed on the principal-disclaimant (IRC §2518) because the general effect of the disclaimer is to treat the principal-disclaimant as having predeceased the creator of the interest. See Prob C §282. See §6.46 on requirements for a qualified disclaimer.

An agent granted the power to disclaim may disclaim an interest to be received by the principal from a trust. The disclaimed property will then pass under the terms of the trust. If, for example, the trust is divided into a survivor's trust and a disclaimer trust to be funded with assets, if any, disclaimed by the survivor, after the first spouse dies the survivor's agent may disclaim all or a portion of the deceased spouse's interest in the trust on behalf of the surviving spouse. If the disclaimer trust is designed to act like a bypass trust, this has the effect of using the deceased spouse's estate tax exemption while providing the surviving spouse lifetime use of the property. To take advantage of the deceased spouse's estate tax exemption, the DPOA would allow the agent to disclaim if the surviving spouse is incapacitated. Likewise, a coordinating provision in the trust itself should address the agent's power to disclaim. Otherwise, court approval to disclaim should be obtained. Prob C §4264(d).

WARNING: A disclaimer has a negative effect on the principal's eligibility for Medi-Cal. See California Elder Law Resources, Benefits, and Planning: An Advocate's Guide §11.53 (Cal CEB 2003).

On the use of disclaimers in estate planning, see California Estate Planning, chap 27 (Cal CEB 2002).

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2. Legal Requirements for Disclaimer

§6.46 a. Federal Requirements for Qualified Disclaimer

For any disclaimer to be effective for estate or gift tax purposes, it must meet the requirements for a "qualified disclaimer" under IRC §2518. Under §2518, in order to be effective, a disclaimer must be in writing, received by the transferor of the interest or his or her personal representative, and made within 9 months of the creation of the interest. A disclaimer will not be valid if the principal has accepted the benefits of the transfer; the disclaimed property must pass without any direction of the person making the disclaimer (in this case, the agent acting on behalf of the principal).

WARNING: There may be a problem if the power of attorney is immediately effective or if the agent is acting during a period of the principal's incapacity. During the 9-month period in which the agent may make a qualified disclaimer, an agent who holds the power to disclaim assets that will then pass to the agent arguably holds a general power of appointment. See Treas Reg §20.2041-1(b). If IRC §2041 applies in this situation, the agent who allows the power to lapse (*i.e.,* the agent who fails to disclaim) presumably will have made a gift to the principal at the end of the 9-month period of the amount in excess of the greater of $5000 or 5 percent of the total value of the assets that have passed to the agent if the agent disclaimed. Filing a gift tax return might therefore be required for the tax year during which the power lapsed. Further, if the agent dies during the 9-month period, the amount subject to the power might be included in the agent's estate. Therefore, if, as is often the case, the agent is a close relative who would likely be a recipient of disclaimed property, the principal should consider naming an independent special agent who alone is given the power to make disclaimers.

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§6.47 b. California Requirements

If a disclaimer satisfies the requirements of Prob C §§260-295, a "disclaimant" (*i.e.,* a beneficiary who executes a disclaimer for himself or herself or a person who executes a disclaimer on behalf of a beneficiary; see Prob C §264) will be treated as never having owned the transferred property for any state law purpose. The disclaimer is irrevocable and binding on the beneficiary and all persons claiming by, through, or under the beneficiary. Prob C §281.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.48 3. Form: Authority to Execute Disclaimers

§6.48 3. Form: Authority to Execute Disclaimers

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6.48-1 Authority to execute disclaimers

The Agent is authorized to execute and deliver disclaimers under Internal Revenue Code §2518 and California Probate Code §§260-295 or any successor statute.

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I. Farm and Business Interests

§6.49 1. Qualification for Special-Use Valuation of Farm and Business Interests

Special use valuation under IRC §2032A provides a potential tax savings device for a decedent's estate. The IRS has taken the position that an agent's acts under a DPOA cannot be used to meet the material-participation tests or the qualified-use tests outlined in §2032A. See *Mangels v U.S.* (8th Cir 1987) 828 F2d 1324 (IRS contested and lost on issue of whether conservator satisfied requirement of "material participation" for purposes of special-use valuation under IRC §2032A; it appears IRS will oppose any extension of *Mangels* to agent under DPOA). Therefore, the agent under any DPOA that grants the authority to make IRC §2032A elections should also be an independently qualifying family member under §2032A. See IRC §2032A(b)(1), (e)(2).

To qualify for special use valuation under IRC §2032A, all persons holding an interest in the property must file their consent to the special-use valuation election. IRC §2032A(d)(2). Thus, granting the authority to make the election can be crucial to family tax planning. This power should be specifically included in any DPOA when a family member is elderly or in deteriorating health and holds an interest in a farm or family business that may be concurrently seeking an election under §2032A regarding the estate of another family member. See §6.50 for form.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.50 2. Form: Authority to Make Elections and File Consents to Special-Use Valuation

§6.50 2. Form: Authority to Make Elections and File Consents to Special-Use Valuation

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6.50-1 Authority to make elections and file consents to special-use valuation

The Agent is authorized to execute and file consents, agreements, and related documents under Internal Revenue Code §2032A or any successor statute for the special-use valuation of any property of which the Principal is a beneficiary or in which the Principal holds an interest that is affected by Internal Revenue Code §§2032-2046.

Comment: A qualifying family member under IRC §2032A is the only agent that may use this authority. See §6.49.

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J. Family-Owned Businesses

§6.51 1. Qualification for Estate Tax Deduction for Qualified Family-Owned Business

Internal Revenue Code §2057 provides an estate tax deduction for qualified family-owned business interests included in the estates of decedents dying after 1997 and before January 1, 2004 (or after 2010). The executor must elect the application of the deduction and file a consent agreement signed by each person who has an interest in the business. IRC §2057(b)(1)(B), (h). When the principal's family owns a business that may qualify for this deduction and the family-owned business may be concurrently seeking a deduction under §2057 regarding the estate of another family member, the power to consent to its application should be specifically included in the DPOA if the principal is elderly or in deteriorating health and holds an interest. See §6.52 for form.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.52 2. Form: Authority to Consent to Estate Tax Deduction for Qualified Family-Owned Business

§6.52 2. Form: Authority to Consent to Estate Tax Deduction for Qualified Family-Owned Business

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6.52-1 Authority to consent to estate tax deduction for qualified family-owned business

The Agent is authorized to execute and file consents, agreements, and related documents under Internal Revenue Code §2057 or any successor statute for the estate tax deduction of any property that is a qualified family-owned business under §2057.

Comment: See §6.51 for applicable dates for IRC §2057.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/ K. Installment Payment of Federal Estate Taxes/§6.53 1. Qualification for Installment Payment of Federal Estate Taxes

K. Installment Payment of Federal Estate Taxes

§6.53 1. Qualification for Installment Payment of Federal Estate Taxes

The IRS has issued letter rulings that appear to authorize an agent under a DPOA to run a closely held business on a principal's behalf to meet the active trade or business test required by IRC §6166 to qualify for installment payment of federal estate taxes. See IRS Letter Rulings 8327009, 8244003, 8144012, and 8133022. In appropriate circumstances, this power should be specifically included in any DPOA when there are either multiple elderly family members or a recently deceased family member and the DPOA is executed for a remaining elderly family member. See §6.54 for form.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.54 2. Form: Authority to Qualify for Installment Payment of Federal Estate Taxes

§6.54 2. Form: Authority to Qualify for Installment Payment of Federal Estate Taxes

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6.54-1 Authority to qualify for installment payment of federal estate taxes

The Agent is authorized to take all action and execute all consents, agreements, or related documents required in order to qualify for installment payment of federal estate taxes for any estate of which the Principal may be a beneficiary, specifically including but not limited to the estate of _ _[*name*]_ _. This authorization shall include but not be limited to the authority to continue to manage any enterprise or run any business on behalf of the Principal in order to meet the active trade or business test required under Internal Revenue Code §6166 or any successor statute.

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L. Transmutation

§6.55 1. Conversion of Separate Property to Community Property

Transmuting separate property to community property can effect a new income tax basis on both the deceased spouse's half-interest in community property and the surviving spouse's half-interest. IRC §1014(a), (b)(6). However, IRC §1014(e) provides that appreciated property given to a decedent within 1 year before death does not receive a new basis if the property then passes from the decedent back to the original donor or the donor's spouse. See also IRC §1022(d)(1)(C), applicable in 2010 (property acquired by decedent within 3 years before death, including property acquired by decedent from decedent's spouse when spouse acquired such property during the 3-year period for less than adequate and full consideration, does not receive an aggregate basis increase). Internal Revenue Code §2035(c)(1) draws back into a decedent's taxable estate certain property transferred within 3 years before death. These sections may limit the tax planning utility of such transfers if the principal's death is imminent.

NOTE: The step-up in basis is repealed in 2010 (IRC §1014(f)) and replaced by a provision allowing the executor to allocate an aggregate basis increase of $1.3 million (plus $3 million for property passing to a surviving spouse) to the property (IRC §1022). The step-up-in-basis rules are reinstated in their pre-2010 form under the sunset provision of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA-2001) (Pub L 107-16, §901, 115 Stat 38). See §6.7.

In spite of the tax advantages transmutations may offer, it is rarely prudent to grant an agent the power to transmute the principal's separate property to community property. Such a transmutation is essentially a gift of one-half of the principal's separate property to the principal's spouse. (If the power to transmute property were limited to a single asset, the gift to the principal's spouse would be limited to one-half of that asset.) If the principal owns separate property that he or she is unwilling to transmute to community property at the time the DPOA is drafted, it is hard to imagine circumstances under which the principal would want another person to have the power to make such a transmutation in the future. If the principal expects to acquire separate property in the future, *e.g.,* by gift or inheritance, and wishes the property to be community property, the principal may make a prospective transmutation himself or herself. No agent is needed for this.

At a minimum, the principal should not give his or her spouse the power to transmute the principal's separate property to community property. Granting such power to the principal's spouse gives the spouse a general power of appointment. If the spouse predeceases the principal and holds such a power, the appointive property (*i.e.,* one-half of the principal's separate property) will be included in the spouse's gross estate. IRC §2041.

PRACTICE TIP: In the author's experience, some of the bitterest postdeath disputes arise between the beneficiaries who favor characterizing the decedent's property as separate property and those who favor characterizing it as community property. Thus, in the author's opinion, it is usually advisable to limit the agent's conversion power to the transmutation of joint tenancy property to community property. See form in §6.56.

WARNING: A transmutation may also have very serious unintended consequences even if prepared in contemplation that it would only be used for estate planning. See *Marriage of Holtemann* (Sept. 15, 2008, B203089) 2008 Cal App Lexis 1424. In *Holtemann,* husband and wife were married in June 2003, signed the estate planning documents and transmutation agreement in March 2005, and separated on June 2, 2006. There were no children of the marriage, but each party had adult children from prior marriages. At the time of marriage, husband had considerable assets and wife had few. The court of appeal held that the transmutation agreement that purported to transmute husband's separate property to community property was valid, notwithstanding the fact that the transmutation was expressly conditioned on a specified revocable trust disposition on the death of the survivor.

If contemplating a transmutation, attorneys should read Moore, *Transmutation of Separate Property to Community Property: Family Code §2640 Lays a Trap for the Unwary,* 5 Cal Trusts and Estates Q 11 (Summer 1999).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.56 2. Form: Conversion of Joint Tenancy Property to Community Property

§6.56 2. Form: Conversion of Joint Tenancy Property to Community Property

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6.56-1 Conversion of joint tenancy property to community property

The Agent is authorized to execute documents of transfer or conveyance or marital property agreements that convert the character of property in which the Principal has an interest from joint tenancy to community property with the Principal's spouse (if the Principal is married at such time) for the purpose of obtaining a step-up in basis on the entire value of such property under Internal Revenue Code §1014, as amended from time to time, or any successor statute if the Agent deems such transaction to be in the Principal's best interest or in the best interest of the beneficiaries of the Principal's estate.

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M. Aggregate Property Agreements

§6.57 1. Entering Into Aggregate Property Agreement

When spouses or domestic partners have a joint trust, it is often desirable to clarify that the division of community and quasi-community property on the first death can be made non-prorata. For example, if the principal has a large estate, but it consists of a highly disproportionate share of qualified plan benefits, it might be advantageous for the client and the client's spouse or domestic partner to enter into an aggregate community property agreement. See Prob C §§100(b), 101(b), 104.5; Fam C §297.5. If the principal becomes incapacitated, the power granted to an agent to enter into such an agreement with the incapacitated principal's spouse or domestic partner might be valuable. Such a power should not be granted to the principal's spouse or domestic partner; the power is best reserved to an independent agent because of potential conflicts in the execution of the agreement.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.58 2. Form: Entering Into Aggregate Property Agreement

§6.58 2. Form: Entering Into Aggregate Property Agreement

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6.58-1 Entering into aggregate property agreement

The Agent is authorized to enter into an aggregate property agreement with my _ _[*spouse/domestic partner*]**_ _ under California Probate Code §§100(b), 101(b), and 104.5, provided that each of the _ _**[*spouses/domestic partners*]**_ _ owns an undivided one-half interest in the total aggregate value of our community property assets, as contrasted with an undivided one-half interest in each and every community property asset; that each of us shall designate the other as the primary beneficiary of our retirement benefits and shall continue as the sole owner of our own retirement benefits pursuant to the agreement and California Probate Code §5023(b)(3); and that 100 percent of the value of such benefits shall be considered as funding the surviving _ _**[*spouse/domestic partner*]**_ _'s 50 percent interest in the aggregate community property at the first _ _**[*spouse/domestic partner*]**_ _'s death.**

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N. Splitting Gifts With Spouse

§6.59 1. Consent to Split Gifts With Spouse

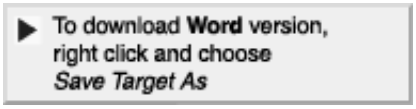
The authority to consent to split gifts with a spouse can be included in a DPOA more safely than some other tax-related powers because it usually has less effect on the principal's own assets. The principal's spouse will be deciding to make a gift of his or her own property, not of the principal's property. The agent will merely be executing IRS forms on behalf of the incapacitated principal to allow the split gift, *e.g.,* the principal's annual exclusion amount from gift tax to be applied to gifts of the other spouse's assets. Gift-splitting, however, should not be used if the gifts will use the principal's annual exclusion or gift tax applicable exclusion amount in a way that is incompatible with the principal's estate plan.

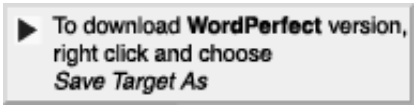
On IRS rules permitting an agent under a DPOA to sign a gift tax return in limited situations, see §6.63. See §6.60 for form. See also IRS Letter Ruling 9231003 (transfers made by agent under DPOA without specific authority to make gifts were incomplete; consent of principal's spouse to gift-split not effective).

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§6.60 2. Form: Authority to Consent to Split Gifts With Spouse





6.60-1 Authority to consent to split gifts with spouse

The Agent is authorized to consent to split gifts made by the Principal's spouse to third persons under Internal Revenue Code §2513 or any successor statute and similar provisions of any state or local gift tax laws.

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O. Tuition and Medical Expenses

§6.61 1. Payment of Tuition and Medical Expenses

Payments from the principal's assets of tuition and medical expenses for other persons will not affect either the principal's annual gift tax exclusion amount or lifetime unified gift and estate tax credit. IRC §2503(e). This exclusion for a qualified transfer is permitted without regard to the relationship between the donor and the donee. Treas Reg §25.2503-6(a). The donee need not be a family member. Thus the authority to make such transfers in appropriate situations can potentially save considerable tax dollars for an incapacitated wealthy principal. The payments must be made directly to the educational organization or the person who provides the medical care; *i.e.,* the payment cannot be made to the beneficiary who then pays the tuition or medical expense. IRC §2503(e).

See §6.62 for form. On payment of medical and tuition expenses, see California Estate Planning §§10.114-10.117 (Cal CEB 2002).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.62 2. Form: Authority to Pay Third Party Tuition and Medical Expenses

§6.62 2. Form: Authority to Pay Third Party Tuition and Medical Expenses

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6.62-1 Authority to pay third party tuition and medical expenses

The Agent is authorized to make direct payments to the provider for tuition and medical care for persons in the class composed of _ _[*e.g., the Principal's issue*]_ _ under Internal Revenue Code §2503(e) or any successor statute that excludes such payments from gift tax liability.

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P. Execution of Tax Returns and Representation on Other Tax Matters

§6.63 1. Authority to Sign Tax Returns

An agent may sign any tax return on a taxpayer's behalf if the authority is both permitted under the Internal Revenue Code and its regulations and specifically granted in the power of attorney. Treas Reg §601.504(a)(6). The regulations permit an agent under a power of attorney to sign a tax return only in limited situations.

NOTE: The language granting power with respect to tax matters in a California statutory form power of attorney is sufficient for this purpose. Prob C §4463(a).

The agent may sign an individual income tax return if the taxpayer is unable to sign because of disease or injury or continuous absence from the United States for at least 60 days before the return's due date or if the agent has requested and received written permission from the IRS district director because good cause exists. Treas Reg §1.6012-1(a)(5). "Good cause" appears to be more than mere convenience. See Treas Reg §25.6019-1(h).

The agent may sign a gift tax return if the taxpayer is unable to sign within the time prescribed by reason of illness, absence, or nonresidence. Treas Reg §25.6019-1(h). An absence of 60 days is not specified in the regulation.

NOTE: The instructions for IRS Form 2848, Power of Attorney and Declaration of Representative, refer to the 60-day time period when discussing authority to sign the taxpayer's return. The pertinent section of the instructions cites only the applicable income tax regulation (Treas Reg §1.6012-1(a)(5)) and then specifically mentions authority to sign an income tax return, so it is unclear whether its mention of 60 days is also intended to refer to gift tax returns.

When the agent files a gift tax return, the agent must also file with the return a statement explaining why the taxpayer could not sign the return. Within a reasonable time after the taxpayer becomes able to do so, he or she must ratify a gift tax return filed by the agent by signing and filing a statement under penalty of perjury that he or she has carefully examined the gift tax return filed by the agent and ratifies the return as that of the taxpayer-donor. Treas Reg §25.6019-1(h).

PRACTICE TIP: Note that no power of attorney is needed for a spouse to sign the tax return of an incapacitated spouse (Treas Reg §1.6012-1(a)(5)) or for a conservator to sign a conservatee's return (IRC §6012(b)(2)).

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§6.64 2. Other Tax Matters Requiring Power of Attorney

In addition to requiring a power of attorney to authorize an agent to sign tax returns for a taxpayer, the IRS requires a power of attorney to authorize a representative to perform any of the following acts on behalf of the taxpayer (Treas Reg §601.504(a)):

- Represent the taxpayer before the IRS;
- Offer or execute waivers;
- Execute consents;
- Execute closing agreements; and
- Receive (but not endorse or collect) a check drawn on the United States Treasury. With regard to receipt of checks drawn on the Treasury, the power of attorney must specifically grant authority to receive such checks.

Treasury Regulations §§601.501-601.509 govern the representation of taxpayers before the IRS under the authority of a power of attorney. See §§6.66-6.71 on filing a power of attorney with the IRS.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.65 3. Tax Matters Not Requiring Power of Attorney

§6.65 3. Tax Matters Not Requiring Power of Attorney

The IRS does not require a power of attorney in the following situations:

- To request disclosure of confidential tax information (Treas Reg §601.504(b)(1)). Nevertheless, a power of attorney may be used for this purpose, if properly filed, as long as the power of attorney places no limitation on such disclosure. Treas Reg §601.504(b)(1). In order for a taxpayer's representative to receive or inspect confidential tax information without a power of attorney, IRS Form 8821, Tax Information Authorization, must be filed. See Treas Reg §601.501(b)(15). Filing a new Form 8821 revokes all prior tax information authorization forms related to the same tax matters, but not prior powers of attorney. The new form may specifically state that one or more prior forms on file are not to be revoked by the new form. See instructions for Form 8821.
- To provide representation at a conference concerning an estate tax case if the representative is an attorney, CPA, enrolled agent, actuary, or other person described in Treas Reg §601.502(b) or is the attorney of record for the personal representative of the estate before the appropriate probate court (Treas Reg §601.504(b)(2)).
- To handle bankruptcy matters for a principal by a trustee, receiver, or attorney appointed by a court having jurisdiction over a taxpayer-debtor (Treas Reg §601.504(b)(3)).
- To act as a fiduciary standing in the position of the taxpayer (*e.g.,* a trustee, conservator, receiver, executor, or administrator of an estate). The fiduciary should, however, notify the IRS of the fiduciary relationship by filing IRS Form 56, Notice Concerning Fiduciary Relationship. Treas Reg §601.503(d).

A power of attorney is not required to be submitted by an attorney of record in a case that is docketed in the tax court. Treas Reg §601.509.

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4. IRS Power of Attorney Procedures

§6.66 a. Types of Documents IRS Accepts and Other Required Procedures

If a power of attorney is required for an agent to act on a taxpayer's behalf, the IRS will accept two types of documents:

- IRS Form 2848 (see §6.67); or
- A power of attorney document other than IRS Form 2848, if it meets certain requirements (see §6.68).

For filing procedures and required periodic resubmission of forms, see §§6.69-6.70. For procedures for substitution or delegation of authority or revocation of the power of attorney, see §6.71.

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§6.67 b. IRS Form 2848

A properly completed IRS Form 2848, Power of Attorney and Declaration of Representative, satisfies the requirements for both a power of attorney, as described in Treas Reg §601.503(a), and a declaration of representative, as described in Treas Reg §601.502(c). Treas Reg §601.503(b)(1). See also Treas Reg §601.501(b)(6).

NOTE: The Director of IRS Office of Professional Responsibility announces that tax practitioners who file a Form 2848 will undergo a tax check to ensure that they have timely filed and paid their own taxes. See discussion under the developments section, federal income tax in 30 CEB Est Plan Rep 3 (Dec. 2008).

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§6.68 c. Power of Attorney Other Than IRS Form 2848

The IRS will recognize power of attorney documents other than IRS Form 2848 if either of the following two requirements is met:

(1) The power of attorney contains all information required by Treas Reg §601.503(a). This includes the taxpayer's name and mailing address, taxpayer identification number, employee plan number if applicable, name and mailing address of the representative, description of the matters for which representation is authorized (including type of tax involved, federal tax form numbers, specific years or periods involved, and date of decedent's death in estate matters), and a clear expression of the taxpayer's intention concerning the scope of authority granted. The representative should transmit the power of attorney to the IRS with a completed IRS Form 2848 attached. Because Form 2848 is not the power of attorney in this case, it need not be signed by the taxpayer. The representative, however, must sign a declaration of representative as set forth in Treas Reg §601.502(c) and Part II of Form 2848. Treas Reg §601.503(b)(2).

(2) The power of attorney does not contain all information required by Treas Reg §601.503(a) but the agent completes and executes IRS Form 2848 on behalf of the taxpayer, supplying the missing information. The form must be submitted with a copy of the actual power of attorney executed by the taxpayer. This method is available only if (a) the original power of attorney authorizes the agent to handle federal tax matters (*e.g.,* by stating that the agent has authority to handle any and all acts), and (b) the agent attaches to Form 2848 a statement, signed under penalty of perjury, asserting that the original power of attorney is valid under the laws of the governing jurisdiction. Treas Reg §601.503(b)(3).

NOTE: IRS rules no longer require the taxpayer's signature on a power of attorney to be notarized or witnessed.

PRACTICE TIP: It is advisable to include in a general DPOA the broad authority to handle tax matters, the specific authority to sign tax returns as permitted by the IRS and state and local authorities, and the authority to delegate authority to another or to substitute another to represent the taxpayer before the IRS. Provision for powers of delegation and substitution will enable the holder of the power to appoint tax professionals to act on behalf of the principal. See §6.72 for form.

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§6.69 d. Filing Forms With IRS

A power of attorney, declaration of representative, and any other required statements must be filed in each IRS office with which the agent will be dealing. Treas Reg §601.504(c). Once the power of attorney or tax information authorization is filed, the IRS will generally issue a Centralized Authorization File (CAF) number, which is unique to a specific representative or appointee and which should be reported on every power of attorney or tax information authorization filed by that person. Treas Reg §601.506(d).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.70 e. Resubmission of Power of Attorney Forms After 3 Years

§6.70 e. Resubmission of Power of Attorney Forms After 3 Years

A document must relate to a specific tax period to be entered into the CAF system. Treas Reg §601.506(d)(3)(i). A power of attorney relating to extended tax periods will be recorded on the CAF system for future tax periods ending no later than 3 years after the IRS received the power of attorney. Treas Reg §601.506(d)(3)(ii). Thereafter, the representative must resubmit a copy of the power to continue its effectiveness for IRS purposes. Treas Reg §601.506(d)(3)(iv).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.71 f. Substitution, Delegation, or Revocation of Power

§6.71 f. Substitution, Delegation, or Revocation of Power

An authorized representative under a power of attorney can substitute or delegate authority under a power of attorney to sign tax returns or represent the taxpayer on tax matters only if the power specifically permits substitution or delegation. Treas Reg §601.505(b)(2). To make a substitution or delegation, the representative must submit the following to the IRS offices where the power of attorney was filed (Treas Reg §601.505(b)(2)):

- A statement signed by the representative with the name and mailing address of the new representative;
- A declaration of representative signed by the new representative, as described in Treas Reg §601.502(c); and
- A copy of the power of attorney specifically authorizing substitution or delegation.

After a substitution is made, only the new representative will be considered the taxpayer's representative. Treas Reg §601.501(b)(14).

Either the taxpayer or the representative may use IRS Form 2848 to revoke a power of attorney, as explained in the instructions for the form.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/6 Estate and Tax Planning Using Powers of Attorney/§6.72 5. Form: Authority to Represent Principal on Tax Matters and Sign Tax Returns

§6.72 5. Form: Authority to Represent Principal on Tax Matters and Sign Tax Returns

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6.72-1 Authority to represent principal on tax matters and sign tax returns

The Agent is authorized to prepare and file all income and other federal, state, and other tax returns that the Principal is required to file; to sign the Principal's name on tax returns, including Forms _ _[*e.g., IRS 1040, FTB 540*]**_ _; to hire preparers and advisers and pay for their services; and to do whatever is necessary to protect the Principal's assets from assessments for income taxes and other taxes for the years _ _**[*e.g., 2006 to 2016*]**_ _. The Agent is specifically authorized to receive confidential information; to receive checks in payment of any refund of taxes, penalties, or interest; to execute waivers (including offers of waivers) of restrictions on assessment or collection of tax deficiencies and waivers of notice of disallowance of claims for credit or refund; to execute consents extending the statutory period for assessment or collection of taxes; to execute closing agreements under Internal Revenue Code §7121 or any successor statute; and to delegate authority or substitute another representative concerning all the above matters.**

Comment: The instructions for IRS Form 2848 direct the principal to specify the years or periods covered by the power of attorney but do not limit the period. The DPOA instrument should provide as broad a range as possible to give the agent authority as needed. See §6.70 regarding the need to resubmit Form 2848 every 3 years.

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7

Advance Health Care Directives: The Fundamentals

Fay Blix

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I. INTRODUCTION

§7.1 A. Preliminary Considerations

No estate planning consultation is complete without a discussion about how health care decisions will be made if the client becomes incapacitated. Such discussions should not be reserved exclusively for situations in which the client is very ill or elderly. In fact, Nancy Cruzan, the key individual in the landmark case *Cruzan v Missouri Dep't of Health* (1990) 497 US 261, 111 L Ed 2d 224, 110 S Ct 2841, was only 25 years old at the time of her tragic automobile accident, and Terri Schiavo was only 26 when she collapsed into a coma. Thus, the advance health care directive (AHCD) may well be the most important document the client ever signs.

The attorney must make sure that the client understands the potential consequences of not signing an advance directive. Without an AHCD, the client could be subject to a conservatorship proceeding that seeks court authorization to make critical health decisions in the event of incapacity. Such proceedings are often expensive and time-consuming and can be an affront to the client's dignity. In the event of a family dispute over a client's wishes, a client without an advance directive might even be thrust into the national and political limelight, as in the heart-wrenching case of Floridian Terri Schiavo. See §§9.19-9.22.

Despite the importance of having an advance directive, the client must also understand that no health care provider can require a patient to have one by conditioning admission or treatment on the execution of an AHCD. See Prob C §4677.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.2 B. California's Natural Death Act

§7.2 B. California's Natural Death Act

The former Natural Death Act (former Health & S C §§7185-7194.5) was repealed effective July 1, 2000, because the statute was no longer needed in light of the much broader provisions of the Health Care Decisions Law (HCDL) (Prob C §§4600-4806) that took effect on that date. However, former Natural Death Act declarations executed before July 1, 2000, remain valid, as do later-executed declarations that are executed on printed forms. Prob C §4665. Other declarations executed after July 1, 2000, can be relied on by an agent in making health care decisions under Prob C §4684.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.3 C. Definitions of Common Health Care Planning Terms

§7.3 C. Definitions of Common Health Care Planning Terms

An "**advance health care directive**" means either an individual health care instruction or a power of attorney for health care (PAHC). Prob C §4605. A written advance health care directive may include a nomination of the conservator of the person, or the estate, or both, in the event of protective proceedings. Prob C §4672(a). Such a nomination would have the effect provided in Prob C §1810, giving precedence to the most recent writing. Prob C §4672(b).

An "**individual health care instruction**" is defined as a patient's written or oral direction concerning a health care decision for the patient. Prob C §4623. Probate Code §4670 provides that these individual instructions may be limited, to take effect only if a specified condition arises.

"**Health care decisions**" are broadly defined by the Health Care Decisions Law (HCDL) (Prob C §§4600-4806) as decisions regarding the patient's health care, including such things as (1) selection and discharge of health care providers and institutions; (2) approval or disapproval of diagnostic tests, surgical procedures, and programs of medication; and (3) directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation. Prob C §4617. The Law contains explicit statutory prohibitions against mercy killing, assisted suicide, and euthanasia. Prob C §4653. See §§7.45-7.46.

"**Principal**" and "**patient**" are both used in the HCDL. "Patient" is specifically defined as an adult whose health care is under consideration, including a principal under a PAHC and an adult who has given an individual health care instruction or designated a surrogate. Prob C §4625. "Principal" is a more narrow term, referring only to an adult who has executed a PAHC. Prob C §4633.

"**Reasonably available**" is defined as readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the patient's health care needs. Prob C §4635. Unless the PAHC provides otherwise, the designated agent, who is known to the health care provider to be "reasonably available" and willing to make health care decisions, has priority over anyone else to make health care decisions for the patient. Prob C §4685.

"**Surrogate**" means an adult, other than a patient's agent or conservator, authorized under the HCDL to make a health care decision for the patient. See §7.40.

For definitions of the terms "capacity," "primary physician," and "supervising health care provider," see §§7.8-7.10.

For further definitions, see Prob C §§4605-4643.

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D. Attorney's Role

§7.4 1. Defining Client's Wishes on Health Care Issues

Planning for incapacity requires sensitivity, understanding, compassion, empathy, sympathy, and—most of all—tolerance on the attorney's part. Some clients are elderly individuals attempting to maintain control over their lives. Many clients are very lucid, while others have only moments of lucidity.

An attorney can play a helpful educational role by teaching the agent how to effectively advocate on the patient's behalf to ensure that the patient's wishes are honored, how to use the AHCD as a tool, and how to convey the patient's value system to his or her health care providers.

PRACTICE TIP: If a client does not have anyone who can or will act as an agent under a power of attorney, the client should still be urged to execute an advance directive in which he or she states his or her directions regarding health care treatment. The attorney may also provide the client with a list of professional fiduciaries who are willing to serve as health care agents, and the attorney may further suggest that the client meet with one or more of them to determine whether the client would prefer that an individual represent his or her wishes. The client can then choose one among those interviewed. Professional fiduciaries in California are listed on the website of the Professional Fiduciary Association of California at http://www.pfac-pro.org/pages/ref_referrals.htm. Even with planning, a conservatorship sometimes becomes necessary. Therefore, the client should include a nomination of conservator in an AHCD in the event a conservatorship of the person is needed.

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§7.5 2. Advising Client After Execution of Health Care Documents

The attorney should encourage clients to discuss the AHCD and their wishes about medical care with their physicians and, if a power of attorney is included, with their agents. After the AHCD is executed, clients should be advised to have their physicians read the document. If a physician is unwilling to honor the client's wishes as expressed in the AHCD, the client then has the chance to change physicians before an incapacitating illness or accident requires the physician to transfer the patient to another physician who is willing to do so. However, the client should be cautioned that it is not unusual for the physician of the client's choice to be unavailable at the time when the AHCD might actually be needed.

The attorney should advise the client that a copy of the AHCD has the same effect as the original. Prob C §4660.

PRACTICE TIP: Advise clients to carry a wallet card stating that they have signed an AHCD and including the family physician's name and telephone number. If the AHCD includes a power of attorney for health care (PAHC), the agent's name and telephone number should also be given. See §8.5 for a sample wallet card that accompanies the California Medical Association Advance Health Care Directive form. For a modest annual fee, some private companies will provide cards to clients with their basic information and a number to call in the event of an emergency. The company will fax the AHCD along with emergency contacts 24 hours a day, 7 days a week. See §§7.71-7.72. Attorneys may also wish to advise their clients to take a copy of the document with them if they travel out of the state or country. Another idea is to copy the client's AHCD onto a key chain flash drive.

PRACTICE TIP: Advise clients not to keep the original AHCD in a bank safe deposit box, because the bank may not be open to access the box when a medical emergency arises. Even if the bank is open, it may be difficult to get the form from the box because bank personnel may not allow anyone, including the agent named in the AHCD, to retrieve the original from the box without first consulting the bank's legal department.

PRACTICE TIP: The attorney may advise the client to obtain a reduced-size reproduction of the advance directive to fit in the client's passport whenever the client travels out of the country. The client should always update the agents' telephone numbers before taking a trip so that they can be contacted easily in an emergency.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.6 E. Distinguishing Between an Advance Health Care Directive (AHCD) and a Power of Attorney for Health Care (PAHC)

§7.6 E. Distinguishing Between an Advance Health Care Directive (AHCD) and a Power of Attorney for Health Care (PAHC)

In California, there are two primary types of health care documents executed by clients when planning for future health care decisions: an advance health care directive (AHCD) and a power of attorney for health care (PAHC).

NOTE: All PAHCs are AHCDs; however, not all AHCDs are PAHCs.

A PAHC is defined as "a written instrument designating an agent to make health care decisions for the principal." Prob C §4629. In comparison, an AHCD means "either an individual health care instruction or a power of attorney for health care." Prob C §4605. Thus, an AHCD may be only a written health care instruction that indicates a preference for a type of health care but may not designate an agent.

For nearly all purposes, however, the two terms are used interchangeably because nearly all AHCDs appoint a health care agent and thus would also be defined as a PAHC.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.7 F. Types of Advance Health Care Directives

§7.7 F. Types of Advance Health Care Directives

Under the Health Care Decisions Law (HCDL) (Prob C §§4600-4806), there are two basic types of AHCDs: a statutory form (Prob C §4701) and any other writing such as attorney-drafted forms (Prob C §4700). This law authorizes an adult having capacity to make an oral or written "individual health care instruction" that provides direction for future health care decisions or for the patient to appoint an agent under a power of attorney for health care (PAHC). Prob C §§4605, 4623. The PAHC is durable when the principal provides that it shall not be affected by the subsequent incapacity of the principal; in other words, it "endures" incapacity. See Prob C §4124.

NOTE: All valid powers of attorney for health care and other types of advance health care directives that were signed before July 1, 2000, are protected under the HCDL and need not be redone simply because of the law's operative date of July 1, 2000. See Prob C §4665.

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§7.8 G. AHCD Agent's Relationship With Agent Under DPOA

Whenever the agent under the AHCD is different from the agent under the durable power of attorney for financial matters (DPOA), it is important to delineate and coordinate each agent's responsibilities in the respective documents. Although the two agents share the common goal of providing for the principal's well-being, there is a strong potential for conflict. The principal should be encouraged to select individuals who will work well together.

Health care can be very expensive and can constitute the major portion of a monthly budget, especially when skilled nursing care is needed, either in a facility or at home. Health care decisions and the comfort and quality of care of the principal should generally take priority over cost-containment concerns. If the principal wants the agent under the AHCD to have primary decision-making authority about incurring health care costs, the document should be drafted with this objective in mind. Both the AHCD and the DPOA should state that the agent under the latter power of attorney is instructed and directed to pay all bills submitted by the agent under the AHCD incurred on the principal's behalf. It would be proper to exculpate the agent acting under the DPOA for any liability from following the payment instructions of the agent under the AHCD.

If the principal anticipates a need for long-term care, he or she may be concerned about preserving assets to leave an inheritance to his or her heirs. If so, the principal may wish to include planning provisions in the document to allow the principal to become eligible for needs-based public benefits like Medi-Cal. Both agents should work together in implementing the principal's wishes to preserve assets. Furthermore, if the principal's primary concern is preserving assets for his or her heirs, the drafting attorney should ask the principal whether he or she wants the agent under the DPOA to have priority in all spending decisions in order to achieve the principal's goal of asset preservation. A statement of the principal's goals should be included in both powers of attorney.

An AHCD may grant authority to the agent to make personal care decisions for the principal. Prob C §4671(b). These decisions include determining where the principal will live. Thus, it may be helpful to include specific provisions in the AHCD that address personal care concerns and coordinate these with the DPOA.

PRACTICE TIP: There have been several studies reporting the disturbing findings that physicians and other health care providers have ignored patients' advance directives and have continued to provide unwanted medical treatment or life support. One way an attorney may enhance the likelihood of a client's AHCD being honored is to include a provision in the client's DPOA barring the agent from using the client's income or assets to pay for care that the client has stated he or she does not want in the client's AHCD. The attorney might also include and prominently display in the DPOA and the AHCD that the agent under the DPOA is authorized to take appropriate legal action, if necessary, to enforce the client's right of self-determination as intended by the AHCD. See §8.24 for suggested form. However, the attorney might suggest that before threatening legal action, the agent request a consultation with the ethics committee of the health care facility where the patient is receiving care. See §7.25.

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H. Capacity for Health Care Decision Making

§7.9 1. "Capacity" Defined

There is a rebuttable presumption that a patient has capacity to make a health care decision and to give or revoke an AHCD or to appoint or disqualify a surrogate. Prob C §4657. See §§3.30-3.38 for further general discussion of assessing capacity. Unless otherwise provided in an AHCD or PAHC, the authority of the agent becomes effective only on a determination that the principal lacks capacity. Prob C §4682. "Capacity" is defined in Prob C §4609 as

> a person's ability to understand the nature and consequences of a decision and to make and communicate a decision, and includes in the case of proposed health care, the ability to understand its significant benefits, risks, and alternatives.

Unless the AHCD states otherwise, a determination of capacity or a determination of the authority of the agent shall be made by the primary physician. Prob C §4658. The "primary physician" is defined as a physician designated by the patient or the patient's agent, conservator, or surrogate to have primary responsibility for the patient's health care, or, absent designation or availability of that physician, any physician who undertakes the responsibility. Prob C §4631. A sample physician's certificate of incapacity is located at §7.9A.

PRACTICE TIP: In these days of managed care and "stranger medicine," when many patients do not have long-standing relationships with their physicians based on trust, clients may be uncomfortable with the notion that the sole responsibility for capacity determinations is placed in the hands of the physician, particularly any physician "who undertakes the responsibility." To allay these concerns, the attorney might suggest drafting provisions describing alternative mechanisms for determining capacity in the AHCD or PAHC to assure the client that such determinations may be made by the physician in consultation with the persons in whom the client places confidence.

For complete coverage of assessing and litigating capacity in the context of medical decision making and the appointment of agents, see Capacity and Undue Influence: Assessing, Challenging, and Defending (Cal CEB Action Guide February 2008).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.9A 2. Form: Physician's Certificate of Incapacity

§7.9A 2. Form: Physician's Certificate of Incapacity

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Physician's Certification of Incapacity

I, _ _[*name*]_ _ , am a physician whose professional office is located at _ _[*address*]_ _, County of _ _[*name*]_ _, State of California. My office telephone number is _ _[*phone number*]_ _.

1. I am a physician licensed to practice in the State of California acting within the scope of my licensure.

2. I am a physician attending to the continuing care of _ _[*name*]_ _ hereinafter referred to as "Patient". The most recent occasion on which I saw Patient was on _ _[*date*]_ _.

3. It is my professional opinion that Patient has become severely impaired physically and mentally and that _ _[*he/she*]_ _ is currently unable to care properly for _ _[*himself/herself*]_ _ or for _ _[*his/her*]_ _property. Also in my professional opinion, Patient is no longer able to understand or appreciate information relevant to making any decision(s) concerning _ _[*his/her*]_ _ own health care, nutrition, finances, shelter, clothing, hygiene or safety.

4. It is my further opinion that _ _[*he/she*]_ _ is not able to intellectually understand options for meeting _ _[*his/her*]_ _ financial or personal care needs or to appreciate the reasonably foreseeable consequences of any decision(s) or lack of decision. In my opinion, _ _[*he/she*]_ _ therefore lacks capacity and competence to provide for _ _[*his/her*]_ _ physical needs, or to manage _ _[*his/her*]_ _ personal affairs, or to give informed consent to any legal or other decision(s) regarding any aspect of _ _[*his/her*]_ _ life, including the management or other exercise of control or care over finances and property.

5. In the event that Patient should show any improvement(s) suggesting recovery of partial capacity and competence to exercise a measure of control over _ _[*his/her*]_ _ personal affairs and to make informed decisions regarding _ _[*his/her*]_ _ care, my recommendation is that any doubts, uncertainties or ambiguities regarding such capacity or competence should be resolved in favor of any trustee, attorney-in-fact, agent or other caretaker charged with authority and responsibility for management of _ _[*his/her*]_ _ person or estate.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

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§7.10 3. Principal's Rights

The supervising health care provider must, if possible, promptly communicate to the patient the decision made and the identity of the person making the decision before implementing a health care decision. Prob C §4730. The "supervising health care provider" is defined in Prob C §4641 as the primary physician or the health care provider who has undertaken primary responsibility for a patient's health care. This provision is apparently intended to show respect for the patient's autonomy by providing for periodic reassessments of the patient's decision-making ability.

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§7.11 4. Agent's Rights

Under Prob C §4685, unless the PAHC (or nearly all AHCDs; see §7.5) provides otherwise, the designated agent who is known to the health care provider to be "reasonably available" and willing to make health care decisions has priority over anyone else to make health care decisions for the patient. "Reasonably available" is defined as readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the patient's health care needs. Prob C §4635. Probate Code §4689 prohibits the agent from making health care decisions if the principal who has capacity objects to the decision. However, if there is a question concerning the capacity of the principal to make a health care decision, the agent is specifically authorized to petition the court (Prob C §4765(d)) for a determination of the principal's capacity to make health care decisions. Prob C §4766(a).

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§7.12 I. Federal Protection of Right to Execute Advance Directive for Health Care

The Patient Self-Determination Act (PSDA) (42 USC §1395cc(f)) is the first federal statute dealing generally with health care decision making. This act requires service providers, Medicare Advantage Plans, and prepaid or eligible organizations participating in the Medicare or Medicaid (Medi-Cal in California) program to follow specified requirements regarding the rights of individuals to execute advance directives. The act defines "advance directive" as "a written instruction, such as a living will or durable power of attorney for health care, recognized under State law (whether statutory or as recognized by the courts of the State) and relating to the provision of such care when the individual is incapacitated." 42 USC §1395cc(f)(3).

The requirements include (1) advising individuals in writing about their rights under state law to execute such directives, and the provider's written policies on implementing these rights, (2) documenting in a prominent part of the individual's current medical record whether he or she has executed an advance directive, (3) not discriminating against an individual based on whether he or she has executed an advance directive, (4) ensuring compliance with state law requirements on advance directives, and (5) educating the staff and the community on issues concerning advance directives. See 42 USC §1395cc(f)(1).

Federal regulations have been issued under the PSDA and may be found in 42 CFR Pts 417, 431, 434, 483, 484, 489, and 498. Providers must meet certain requirements with respect to the right of individuals receiving medical care to execute an advance directive. 42 CFR §§417.436(d), 489.102. These regulations reiterate the requirements of 42 USC §1395cc(f)(1). In addition, the regulations state that a provider organization is not required to provide care that conflicts with an advance directive. 42 CFR §§417.436(d)(2)(i), 489.102(c)(1). Nor is the provider required to implement an advance directive if, as a matter of conscience, the provider cannot do so and state law allows a health care provider or an agency of such provider to conscientiously object. 42 CFR §§417.436(d)(2)(ii), 489.102(c)(2). Each state must develop a written description of the state law, whether statutory or as recognized by the courts of the state, concerning advance directives, to be distributed by Medicaid providers and health maintenance organizations. 42 CFR §431.20. Revisions to the description must be incorporated and distributed to Medicaid providers and HMOs within 60 days after the effective date of the change. 42 CFR §431.20. See also 42 CFR §§417.436(d), 489.102, requiring Medicare providers to provide written information on an individual's rights under state law to make health care decisions and advance directives.

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II. CONTENTS AND PROCEDURES

§7.13 A. Basic Considerations

An adult having capacity has the right to give an individual health care instruction. Prob C §4670. An adult having capacity may also sign a power of attorney for health care (PAHC) authorizing an agent to make health care decisions. Prob C §4671(a). The power of attorney may include these individual health care instructions as well as grant authority to the agent to make personal care decisions, such as determining living arrangements, hiring employees, providing transportation, and arranging for meals and recreation. Prob C §4671.

The principal may authorize the agent to make health care decisions, effective immediately. Usually, however, the agent's authority is triggered only on a determination that the principal lacks capacity, and unless otherwise specified, the capacity determination is to be made by the primary physician. See Prob C §4658. See §7.9 for further discussion, and see §7.14 on the problem of obtaining protected health information before a capacity determination is made.

The agent has a duty to act consistently with the principal's desires as expressed in the PAHC or otherwise made known to the agent at any time or, if the principal's desires are not known, to act in the principal's best interest, and the law requires the agent to consider the principal's personal values when determining what would be in the principal's best interest. Prob C §4684. See §§7.23, 7.37.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.14 B. HIPAA Concerns

§7.14 B. HIPAA Concerns

At times, the agent may need to act before there has been a determination of incapacity. In order to gain access to protected health information under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub L 104-191, 110 Stat 1936) (see particularly 42 USC §1320d-2; 45 CFR pts 160, 164), it may be necessary to execute a HIPAA release or to include qualifying wording in the advance directive. See discussion of HIPAA at §§7.76-7.84 and forms at §§8.34-8.38.

Much of the initial concern surrounding the implementation of the HIPAA privacy regulations has subsided. However, clients may still be experiencing problems with certain individual providers regarding the release of protected information. Thus, the attorney may wish to draft advance directives in such a way as to eliminate any ambiguities with regard to HIPAA issues. This may be accomplished in several ways.

- First, the attorney can draft an immediately effective AHCD, thereby eliminating the need for any triggering mechanism to launch the agent's authority. For many clients, this does not pose a problem, because they have chosen close, trustworthy family or friends as agents to act on their behalf. However, the client should be advised that such immediate effectiveness could cause invasion of privacy and loss of control should the agent choose to exercise his or her authority prematurely.
- Second, the principal could specify that any agent named in the AHCD is considered to be "currently acting" as a personal representative under HIPAA and thereby authorized to receive protected medical information under HIPAA whether or not the principal has been deemed incapacitated. See 45 CFR §164.502(g). See also §7.83.

While the Confidentiality of Medical Information Act (CMIA) (CC §§56-56.37) does not directly deal with agents under an advance health care directive, Prob C §§4678 and 4733 explicitly authorize the agent to obtain, and direct the health care provider to provide, information that would assist the agent in acting in the client's best interest. It is unclear whether HIPAA would preempt this state law. Therefore, it is wise to draft the AHCD as suggested above to assure the client that the agent will have no problem obtaining the client's medical information when the need arises.

Some attorneys suggest drafting a completely separate authorization form for HIPAA purposes, to be presented apart from the AHCD when seeking disclosure of private medical information before an incapacity determination has triggered the agent's authority under an AHCD. For several examples of such forms, see §§8.35-8.38.

PRACTICE TIP: Some attorneys suggest that the easiest way to surmount the HIPAA privacy rules is to advise the client to sign every HIPAA release form of every health care provider, releasing all pertinent information to the agent and the attorney as well as to any other individuals of the client's choosing. Because providers trust their own forms more than other forms, there should be no problem in subsequently having the releases honored.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.15 C. Contents and Execution Requirements

§7.15 C. Contents and Execution Requirements

To be legally sufficient, a PAHC or other written AHCD must (1) contain the date of its execution, (2) be signed either by the patient or in the patient's name by another adult as directed by the patient and in the patient's presence, and (3) be either acknowledged before a notary public or signed by at least two witnesses who meet the requirements of Prob C §§4673-4675. See §7.16 for witnessing requirements. In keeping with advances in technology, Prob C §4673(b) now also provides for the acceptance of a digital signature in the case of an electronic advance health care directive.

PRACTICE TIP: Unfortunately, many pre-1992 forms are still in circulation. It is not unusual for clients to be given these old forms from hospitals or public agencies. Under pre-1992 law, unless the PAHC specifically designated a shorter period, the document expired in 7 years, except if, at the end of that time, the principal lacked capacity to make health care decisions for himself or herself. See former CC §2436.5. This 7-year limit still applies to PAHCs executed between January 1, 1984, and January 1, 1992. If clients use these old forms, they should be aware that the old forms still carry the 7-year statute of limitation. Thus, even if the clients indicate that they have already executed a PAHC after January 1, 1992, the attorney should review the document for the limitation. Practically, however, the unenforceable PAHC would still likely be used by health care providers as a statement of wishes from the patient.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/ 1. Witnessing/§7.16 a. Statutory Requirements

1. Witnessing

§7.16 a. Statutory Requirements

Although the Health Care Decisions Law (HCDL) (Prob C §§4600-4806) prescribes very specific witnessing requirements if the PAHC or other AHCD is signed by witnesses rather than notarized, these witnessing requirements are the same for every written document, regardless of whether it is a printed form, the statutory form, or any other writing, such as a form drafted by an attorney. On proper witnesses, see §7.19.

If the patient is in a skilled nursing facility as defined in Health & S C §1250 (Prob C §4639) when signing a PAHC, a patient advocate or ombudsman, as designated by the Department of Aging, must be one of the witnesses. Prob C §4675(a). See §7.20.

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§7.17 b. Oral Acknowledgment May Be Permissible

In *Estate of Rabinowitz* (2003) 114 CA4th 635, 7 CR3d 722, the court construed the witnessing requirements for a durable power of attorney with reasoning that could be similarly applied to an AHCD or PAHC. In *Rabinowitz,* the decedent signed a durable power of attorney naming his brother as his attorney in fact. The next day, the decedent told his mother about it, and a couple of months later he also informed his cousin. Two weeks before decedent's death, the brother executed a trust and funded it with decedent's separate property because decedent wanted his estate to go to charity. Decedent died without a will.

The decedent's widow challenged the power of attorney because no one had witnessed him sign it. After receiving the petition challenging the document, both mother and cousin signed the attestation clauses to the power of attorney.

The court considered the meaning of Prob C §4121, which requires that in order for the document to be valid, witnesses to a power of attorney must witness "the principal's acknowledgment of … the power of attorney." The court held that "nothing in the statute precludes acknowledging the document orally," drawing further support from the Law Revision Comments on acknowledgment of wills. 114 CA4th at 639.

This argument could be applied to the witnessing requirements for AHCDs or PAHCs. It is possible that witnesses who signed attestation clauses following an incapacity determination or after the death of the principal could render the document valid under similar facts. It is also important to note that the court in *Rabinowitz* probably would have arrived at a different conclusion if there had been any indication of fraud.

NOTE: In 2006, the California Supreme Court ruled that witnesses must sign a will before the principal's death in order for the will to be valid. *Estate of Saueressig* (2006) 38 C4th 1045, 44 CR3d 672. The case did not raise the question of whether a power of attorney signed by witnesses after the principal's incapacity or after an action by the agent is valid. In light of *Saueressig,* the validity of *Rabinowitz* is subject to question, but it has not yet been overruled. Consequently, courts may be hesitant to uphold actions of agents when the witnesses (or the agent) have signed it after the principal has become incapacitated.

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§7.18 2. Notarization

The AHCD or PAHC may be acknowledged before a notary public as an alternative to witnessing. Prob C §4673(a)(3).

NOTE: The California Legislature amended CC §1189, effective January 1, 2008, to alter the required wording of the certificate of acknowledgment form. It is important that practitioners ensure that clients using pre-2008 AHCD or PAHC forms are using the correct acknowledgment form. See §8.35 for a copy of the new acknowledgment form.

None of the witnessing provisions of Prob C §4674(c)-(f) applies to a notary public. Prob C §4674(g). Thus, it may be perfectly appropriate for an employee notary of the patient's health care provider to notarize an AHCD. However, if the AHCD is notarized for a patient in a skilled nursing facility, the patient advocate or ombudsman must still witness the signing and sign a declaration. Prob C §4675(a). See §7.20.

An electronic advance health care directive is legal if it is digitally signed by a patient using California electronic standards and is acknowledged by an electronic notary. The digital signature must be unique to the person using it, capable of verification, under the sole control of the person using it, created to prevent fraud and forgery, and bound to a digital certificate, which is bound to the document. Prob C §4673(b).

PRACTICE TIP: Current valid identification documents are often a problem for the elderly, both in the community and in skilled nursing facilities. Many have had their driver's licenses taken away from them because of impaired driving or have chosen not to renew their licenses and have not replaced the license with a California identification card. Because the frailty of many seniors has limited their ability to travel, often their passports have expired. As a matter of standard protocol, attorneys should advise seniors and their families to maintain current valid identification documents at the time of initial consultation. Otherwise, lack of proper identification could become an obstacle in notarizing documents, particularly now that California's new notary requirements no longer accept "personal knowledge" of the signer as adequate for identification purposes.

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D. Witnesses

§7.19 1. Proper Witnesses

Any adult can be a witness, with the following exceptions (Prob C §4674(c)):

- The patient's health care provider;
- An employee of the patient's health care provider;
- The operators or employees of community care facilities and residential care facilities for the elderly; and
- The agent of the PAHC.

Each witness must, in substance, make the following declaration: (Prob C §4674(d)):

> I declare under penalty of perjury under the laws of California (1) that the individual who signed or acknowledged this advance health care directive is personally known to me, or that the individual's identity was proven to me by convincing evidence, (2) that the individual signed or acknowledged this advance directive in my presence, (3) that the individual appears to be of sound mind and under no duress, fraud or undue influence, (4) that I am not a person appointed as agent by this advance directive, and (5) that I am not the individual's health care provider, an employee of the individual's health care provider, the operator of a community care facility, an employee of an operator of a community care facility, the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly.

In addition, at least one of the two witnesses cannot be related to the patient by blood, marriage, or adoption and cannot be entitled to any portion of the patient's estate under an existing will or by operation of law. Prob C §4674(e). That witness must also, in substance, make the following declaration (Prob C §4674(f)):

> I further declare under penalty of perjury under the laws of California that I am not related to the individual executing this advance health care directive by blood, marriage or adoption, and, to the best of my knowledge, I am not entitled to any part of the individual's estate upon his or her death under a will now existing or by operation of law.

See §7.16 for further discussion of witnessing.

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§7.20 2. Ombudsman as Witness

Because of the possible inability of some patients in skilled nursing facilities (as defined by Health & S C §1250(c)) to make truly voluntary decisions by virtue of the custodial nature of their care, special precautions are required to ensure that they are capable of willfully and voluntarily executing an AHCD. It is the role of the patient advocate or ombudsman, as designated by the Department of Aging, to provide this special assurance. Under Prob C §4675(a), if the principal is a patient in a skilled nursing facility when the AHCD is executed, the AHCD is not effective unless a patient advocate or ombudsman as designated by the Department of Aging for this purpose signs the instrument as a witness, either as one of two witnesses or in addition to notarization. The patient advocate or ombudsman must declare that he or she is serving as a witness as required by Prob C §4675(a). The form in §7.21 may be used.

PRACTICE TIP: Because most ombudsmen are volunteers, they are not usually present every day in the skilled nursing facility. Thus, it is usually best to make arrangements ahead of time about when it would be mutually convenient for you and your client to meet with the ombudsman. The social worker at the nursing home is often very helpful in making these arrangements.

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§7.21 3. Form: Ombudsman as Witness

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7.21-1 Ombudsman as witness

I further declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and that I am serving as a witness as required by California Probate Code §4675(a).

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Comment: The ombudsman witness may rely on the representations of the administrators or staff of the skilled nursing facility, or those of the patient's family, as convincing evidence of the identity of the patient if the ombudsman believes that the representations provide a reasonable basis for ascertaining the patient's identity. Prob C §4675(b).

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E. The Agent

§7.22 1. Who May Serve

The Health Care Decisions Law (HCDL) (Prob C §§4600-4806) defines "agent" as the individual designated in a PAHC to make a health care decision for the principal. Prob C §4607(a).

NOTE: Probate Code §4200, which provides that only a person having the capacity to contract is qualified to act as an agent, does not apply to an AHCD under the Health Care Decisions Law. However, for the agent to give informed consent on behalf of the principal, the definition of "capacity" found in Prob C §4609 would seem to apply to the agent as well as to the principal.

Almost anyone age 18 or older who has capacity can be appointed as a health care agent. However, Prob C §4659(a) prohibits the following from serving as agent:

- The supervising health care provider or an employee of a health care institution where the principal is receiving care;
- An operator or employee of a community care facility where the principal is receiving care; and
- An operator or employee of a residential care facility for the elderly (RCFE) where the principal is receiving care.

A person related to the principal by blood, marriage, or adoption, or who is the principal's registered domestic partner, may serve as agent even if the person is an employee of the treating health care institution, community care facility, or RCFE. Prob C §4659(b)(1). Also, a person employed at the same facility as the principal may serve as agent. Prob C §4659(b)(2). However, supervising health care providers are not allowed to serve as agents, regardless of whether they are related to the principal, are the principal's registered domestic partner, or work in the same facility. Prob C §4659(b)(1)-(2).

A conservator under the Lanterman-Petris-Short Act (Welf & I C §§5000-5500) may not be designated as an agent to make health care decisions for the conservatee unless (1) the PAHC is otherwise valid, (2) the conservatee is represented by legal counsel, and (3) the attorney for the conservatee signs a certificate stating, in substance, the following (Prob C §4659(c)):

> I am a lawyer authorized to practice law in the state where this advance health care directive was executed, and the principal or patient was my client at the time this advance directive was executed. I have advised my client concerning his or her rights in connection with this advance directive and the applicable law and the consequences of signing or not signing this advance directive, and my client, after being so advised, has executed this advance directive.

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§7.23 2. Selection

Selecting the agent under the PAHC is one of the most important decisions the principal will make. A good agent should have the intellectual and emotional fortitude and willingness to carry out the principal's wishes, and abundant common sense in making discretionary decisions. Some individuals without these qualities are not well suited to act as agents. The usual choices for agents are the principal's spouse, domestic partner, adult child, other relative, or close friend. The principal should consider the health, life expectancy, decision-making ability, and diplomacy of the prospective agent because the primary reason for a PAHC is to give the agent the power to make decisions after the principal becomes incapacitated.

If possible, a principal should also name one or more successors or alternative agents, in case an agent becomes incapacitated, dies, or resigns. Doing so will allow a smooth transition to the new agent, avoid any court involvement, and give the principal greater peace of mind. If an agent cannot act or refuses to act, and the instrument does not designate an alternative agent, it may be necessary to seek instructions in a court proceeding (see Prob C §4766) or to have the court appoint a conservator.

The effectiveness of a PAHC depends largely on the agent's integrity, ability, and willingness to act. The lawyer should encourage clients to discuss their wishes with the individuals designated as agents. Knowing the principal's desires and personal values is important because the agent is obligated to make health care decisions in accordance with the principal's health care instructions and other wishes, if known, or to make decisions in the principal's best interest in the context of the principal's personal values, if known to the agent. Prob C §4684. The agent's decisions are subject to any limitations the principal has included in the PAHC. The agent can also be guided by information gained from a review of the principal's medical records because the agent has the authority to sign a release of the principal's records to the extent necessary for the agent to be able to fulfill his or her duties. Prob C §4683.

Many attorneys recommend that the principal obtain a written acceptance from the appointed agent. An advantage of having the agent sign the document is that the act of signing often leads to a discussion between the agent and the principal about the principal's wishes. See form in §8.32. Occasionally, clients will have very strong feelings about certain persons whom they do *not* want to serve as agents or even to offer their views and feelings about the decisions that will have to be made. In these circumstances, the attorney might include a provision making a "negative designation" specifying whose input a health care provider should not consider. See §8.25 for a sample of a negative-designation form. This provision can also be included in preprinted forms in the "Other Wishes" section of the forms.

PRACTICE TIP: A provision for a negative designation may be especially useful in unmarried or same-sex relationships in which the family is clearly at odds with the significant other or the relationship in general. For a discussion and form for limiting the power of such family members to petition the court to interfere with the unmarried or same-sex partner's role as agent, see §§7.73-7.75-1.

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3. Multiple Agents and Decision-Makers

§7.24 a. Multiple Agents

Even though the Health Care Decisions Law (HCDL) (Prob C §§4600-4806) is silent about the appointment of multiple agents, the possibility is presumed. The Law's definition of "agent" includes a successor or alternate agent (Prob C §4607(b)), thereby implying the involvement of more than one agent. In addition, the statutory form under the Law, found at Prob C §4701, instructs the principal that he or she may name an alternate agent. Furthermore, the Uniform Act on which the statute is based permits the appointment of co-agents and alternate agents (Uniform Health-Care Decisions Act of 1993 §1(2) comment). The appointment of multiple agents can create problems under a PAHC when it is important, or even critical, that decisions be made quickly. Additionally, most physicians prefer to deal with one spokesperson.

Many attorneys strongly recommend to clients with multiple agents that they name one agent to be the final decision-maker in case of disagreement. Another solution to avoid conflict is to include a mechanism in the PAHC to break a deadlock when agents have reached an impasse, *e.g.,* requiring a consultation with the ethics committee of the health care provider and requiring that the agents follow the recommendation of that committee. See §7.25 for sample form.

On involving multiple parties in decision making while naming only a single agent, see §7.26.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.25 b. Form: Co-Agent Decision-Maker if Dispute

§7.25 b. Form: Co-Agent Decision-Maker if Dispute

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7.25-1 Co-agent decision-maker if dispute

[*Add one of the following alternatives*]

[*Alternative 1: Individual is final decision-maker*]

It is my desire that my co-agents must act jointly in making my health care decisions, carefully considering what they know my wishes to be. However, in the event my co-agents cannot come to agreement on any health care decision or course of treatment on my behalf, I authorize _ _[*name*]_ _ alone to make the decision.

[*Alternative 2: Ethics committee to decide*]

It is my desire that my co-agents must act jointly in making my health care decisions, carefully considering what they know my wishes to be. However, in the event my co-agents cannot come to agreement on any health care decision or course of treatment on my behalf, they must request a consultation with the ethics committee or equivalent mechanism of the health care provider and follow the recommendation of that committee with regard to the future course of action regarding my health care.

Comment: The individual named in Alternative 1 could be one of the agents or another, completely neutral third party.

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§7.26 c. Single Agent With Advisers

Another way to include multiple individuals is to name a single agent but to direct the agent to consult with an advisory committee before making a final treatment decision on behalf of the client. In this way, all of the named interested parties can be involved in making the decision, but only the agent has the ultimate authority. By allowing each interested party to express his or her feelings and concerns, a great deal of conflict is often avoided. See §7.27 for sample form.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.27 d. Form: Provision for Advisory Committee

§7.27 d. Form: Provision for Advisory Committee

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7.27-1 Provision for advisory committee

I direct my agent to consult with _ _[*names*]_ _ to seek their wisdom and advice regarding the appropriate course of action to be taken before making health care decisions on my behalf. However, this duty to consult with these individuals shall not in any way affect my agent's ability to make the ultimate decisions on my behalf even if my agent makes a decision contrary to the advice of these individuals.

Comment: It is appropriate to include medical professionals as well as family and friends as part of the advisory committee.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.28 e. Excluding Involvement of Outside Organizations or Government Officials

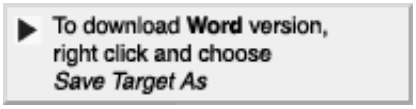
§7.28 e. Excluding Involvement of Outside Organizations or Government Officials

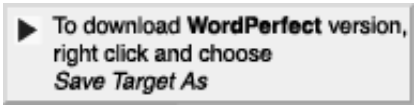
In light of the Terri Schiavo case in Florida (see §§9.19-9.22), the client may wish to include language in the PAHC expressing his or her wishes to preclude the involvement in health care decisions of outside organizations, including government officials. See §7.29 for sample form.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.29 f. Form: Excluding Unwanted Outsider Involvement

§7.29 f. Form: Excluding Unwanted Outsider Involvement





7.29-1 Excluding unwanted outsider involvement

Under no circumstances shall _ _[*name(s) of organizations or government officials*]**_ _ have any input or participate in any way in making health care decisions on my behalf.**

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4. Resignation

§7.30 a. Procedures

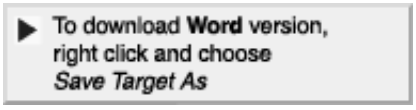
No specific procedures for the resignation of an agent are set forth in the Health Care Decisions Law (HCDL) (Prob C §§4600-4806). However, the HCDL states that when the statute does not provide a rule governing agents under the PAHC, then "the law of agency applies." Prob C §4688.

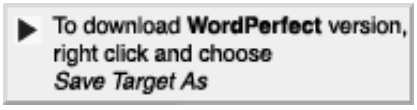
If the principal still has capacity to execute an advance directive, it would probably be easiest to execute a new PAHC naming new agents. However, if the principal no longer has capacity, it would be appropriate for the resigning agent to execute a simple statement of resignation. Copies of this statement should be sent to every provider who received a copy of the original PAHC, and the alternate agent, if any, should be contacted and briefed about his or her responsibilities. See §7.31 for sample form. Occasionally, there are situations in which a parent may stay with a child in one state for several months of the year and then travel to a different state to stay with another child for the remaining months of the year. In these situations, if the child in one state is the primary named agent of the PAHC and the child in the other state is the named alternate agent, and the parent now lacks capacity to execute a new PAHC, when the move is made to the other state, it may be appropriate for the primary agent to execute a temporary resignation as agent for as long as the parent remains with the other child, so there is no delay in accessing the appropriate agent in the event of an emergency. See §7.32 for temporary resignation form.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.31 b. Form: Resignation as Agent

§7.31 b. Form: Resignation as Agent





7.31-1 Resignation as agent

I hereby resign as agent for _ _[*name*]_ _ under the power of attorney for health care signed by _ _[*name*]_ _ on _ _[*date*]_ _. Upon my resignation, the alternate agent named in this power of attorney, namely, _ _[*name*]_ _, shall serve as primary agent for _ _[*name*]_ _. This resignation is effective immediately.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

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§7.32 c. Form: Temporary Resignation as Agent

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7.32-1 Temporary resignation as agent

Since _ _[*name*]_ _ is temporarily moving to _ _[*address*]_ _, I hereby temporarily resign as primary agent under the power of attorney for health care signed by _ _[*name*]_ _ on _ _[*date*]_ _ to allow _ _[*name*]_ _, who was named as alternate agent, to serve as primary agent for _ _[*name*]_ _ as long as _ _[*name*]_ _ remains in _ _[*address*]_ _. I will become the alternate agent. When _ _[*name*]_ _ returns to _ _[*address*]_ _, then I shall again resume the position of primary agent, and _ _[*name*]_ _ shall again become the alternate agent.

The purpose of this resignation is to ensure that _ _[*name*]_ _ is represented by the agent who is the most geographically proximate to _ _[*him/her*]_ _ at all times. This resignation is effective immediately.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.33 F. Expiration

§7.33 F. Expiration

A PAHC will exist for an indefinite period of time unless the time is specifically limited in the document. See Prob C §4686.

NOTE: A 7-year limit still applies to PAHCs executed between January 1, 1984, and January 1, 1992, unless a shorter period was specifically designated in the document or if, at the end of that time, the principal lacked capacity to make health care decisions for himself or herself. See former CC §2436.5. If clients use these old forms, they should be aware that the old forms still carry the 7-year statute of limitation. Thus, even if the clients indicate that they have already executed a PAHC after January 1, 1992, the attorney should review the document to ascertain whether it still contains the limitation.

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G. Revocation

§7.34 1. Procedures and Effect

Interestingly, there is no provision in the Health Care Decisions Law (HCDL) (Prob C §§4600-4806) for an AHCD to be amended. It can, however, be revoked. There is a rebuttable presumption that the principal has the capacity to revoke an AHCD. Prob C §4657. The burden of proof is on the person seeking to establish that the patient lacks the capacity to revoke the power. See Comment to Prob C §4657.

The HCDL differentiates between the revocation of the designation of an agent and other revocations. Revocation of a designation of an agent is accomplished only by a signed writing or by the patient's personally informing the supervising health care provider. Prob C §4695(a). The entire PAHC and any other part of an AHCD, other than the designation of the agent, can be revoked at any time and in any manner that communicates the intent to revoke. Prob C §4695(b). A health care provider, conservator, or agent who is informed that the AHCD has been revoked is mandated to promptly communicate the fact of the revocation to the supervising health care provider and to any health care institution where the patient is receiving care. Prob C §4696. The supervising health care provider is then obligated to promptly record the existence of a revocation in the patient's medical record and, if the revocation is in writing, request a copy of the revocation and arrange for it to be maintained in the patient's health care record. Prob C §4731(a). The supervising health care provider must also make a "reasonable effort" to notify the agent of the revocation. Prob C §4731(b).

When an AHCD conflicts with an earlier advance directive, the earlier advance directive is revoked only to the extent of the conflict. Prob C §4698.

PRACTICE TIP: Although oral revocations are allowed by law (Prob C §4695), counsel should suggest to clients that revocations be in writing. See §7.35 for sample form. Having a written revocation to give to agents and providers eliminates confusion and ensures that the principal's most recent designations and wishes will be recognized and honored. It is helpful to suggest that the client keep a list of all those individuals and providers to whom the PAHC or AHCD has been given, so that all persons and entities on this list can be given notice of the revocation as well.

PRACTICE TIP: When drafting a PAHC, counsel should be careful not to revoke all previously executed durable powers of attorney, but only previously executed PAHCs. Otherwise, the principal may unintentionally revoke a durable power of attorney for financial management (DPOA).

When a spouse has been named as agent, unless the PAHC expressly provides otherwise, a dissolution or annulment revokes any designation of the former spouse as agent. Prob C §4697(a). The appointment is revived by the principal's remarriage to the former spouse. Prob C §4697(b). If there is an amicable divorce, it is recommended that former spouses who may choose to name each other as agents complete a new PAHC.

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§7.35 2. Form: Revocation of PAHC

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7.35-1 Revocation of PAHC

I hereby revoke the power of attorney for health care signed by me on _ _[*date*]_ _ in all its particulars and direct all health care providers to refuse to honor it in any way. This revocation shall be effective immediately upon receipt, and no health care provider shall be held liable for failing to honor that power of attorney for health care that was signed on _ _[*date*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.36 H. Execution in Another State

§7.36 H. Execution in Another State

Almost all states now have statutes authorizing the appointment of a health care agent. However, health care agent legislation varies greatly from state to state. A document executed in one state may not be valid in another.

In California, a written AHCD, defined to include a PAHC (Prob C §4605), that is executed in another state or jurisdiction in compliance with the laws of that state or jurisdiction or of California is valid and enforceable to the same extent as a written advance directive validly executed in California. Prob C §4676.

PRACTICE TIP: As a practical matter, however, if the principal who has moved to this state from another still has capacity to execute an AHCD, it would be wise for him or her to do so. Even though the law recognizes a valid AHCD from another state, the hospital or other medical provider may automatically send it to legal counsel for review because the document looks unfamiliar. Such a process not only causes unnecessary delay but also exposes a family to undue stress at an already painful time.

The law allows a person to execute multiple directives. Under Prob C §4698, a subsequent AHCD does not revoke an earlier one unless the two are inconsistent, and then the earlier one is revoked only to the extent of the conflict. If the client executes AHCDs in different states, it is important that these documents do not contain conflicting provisions. If a client intends California law to apply to each AHCD, then a provision should be added to every AHCD that it is to be interpreted under California law.

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III. AGENT'S AUTHORITY

§7.37 A. General Principles

The Health Care Decisions Law (HCDL) (Prob C §§4600-4806) authorizes the agent to make health care decisions for the principal to the same extent the principal could make health care decisions if the principal had the capacity to do so (Prob C §4683(a)), as well as to make postmortem decisions (Prob C §4683(b)). An agent under a PAHC can grant consent, refuse consent, or withdraw consent to health care for the principal. Probate Code §4617 specifically includes the right to provide, withhold, or withdraw artificial nutrition and hydration in the definition of health care decisions.

In exercising the authority under the PAHC, the agent has a duty to act consistently with the principal's desires as expressed in the individual health care instructions or otherwise made known to the agent at any time or, if the principal's desires are not known, to act in the principal's best interests. The principal's personal values are to be taken into consideration when determining what would be in the principal's best interest. Prob C §4684. It may be helpful, therefore, for the PAHC to include statements about the principal's values for the purpose of providing guidance to the agent and the patient's health care providers when they must make health care decisions on behalf of the principal.

The PAHC generally takes effect only when the principal can no longer make decisions. While the statute does not mention the term "informed consent," as it did under former law, it does state that the agent's authority becomes effective only on a determination that the principal lacks capacity, unless the PAHC provides otherwise. Prob C §4682. In addition, the doctrine of informed consent is still applicable; see, *e.g.,* the definition of "capacity" under Prob C §4609, which essentially describes informed consent. See also Comment to Prob C §4617.

If the principal objects to any treatment or objects to withholding or withdrawing any treatment, and if the principal understands the consequences of making such objections, nothing can be given, withdrawn, or withheld over the principal's objections. Prob C §4689. See §§7.9-7.10.

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§7.38 1. Right to Receive Information

Unless limited by the AHCD, the agent or surrogate has the right to receive information about the principal's medical condition from physicians, therapists, dentists, and other treating health care providers and is authorized to review the principal's medical records and consent to their disclosure. Prob C §4678.

If the principal becomes wholly or partially incapacitated, or if there is any doubt about the principal's capacity to supervise and instruct the agent, the agent may consult and gather the information necessary to perform an agent's duties from the principal's spouse, physician, supervising health care provider, government agencies, and others specified in the statute. When consulted, these persons must disclose relevant information to the agent; such disclosure does not constitute a waiver of any privilege. Prob C §4690.

See §§7.76-7.84 for discussion of the effect of the privacy rules of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and California's Confidentiality of Medical Information Act (CMIA) (CC §§56-56.37) on the right to receive information.

It is probably helpful to include in the AHCD a provision specifically identifying the agent as a HIPAA "personal representative" who, as such, has the right to have the principal's private medical information disclosed. See §7.13. However, Health & S C §123105(e) has been amended to provide that a patient's representative can specifically mean "[a]n agent as defined in Section 4607 of the Probate Code, to the extent necessary for the agent to fulfill his or her duties as set forth in Division 4.7 (commencing with Section 4600) of the Probate Code." Health & S C §123105(e)(3).

PRACTICE TIP: It may be prudent to execute a separate HIPAA and CMIA release form to avoid any complications concerning disclosure of medical information. Sample forms are located at §§8.35-8.38.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.39 2. Right to Receive Compensation

§7.39 2. Right to Receive Compensation

Unlike the provision for reasonable compensation to agents under a financial power of attorney (Prob C §4204), the Health Care Decisions Law (HCDL) (Prob C §§4600-4806) makes no specific provision for compensation and reimbursement of agents under a PAHC. Therefore, if the principal wants to be sure that the agent will be paid for services rendered in the future, a provision in the PAHC, as well as in the DPOA, specifically authorizing reimbursement of costs and compensation of services is required.

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§7.40 3. Health Care Decisions by Surrogate

In nonemergency situations, health care decisions may be made by someone other than the agent under a PAHC only if the agent or any successor agents under the PAHC are not reasonably available and willing to make health care decisions for the principal. Prob C §4685. The Health Care Decisions Law (HCDL) (Prob C §§4600-4806) defines the meaning of "reasonably available" (Prob C §4635) as readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the patient's health care needs.

The HCDL allows a patient to make a written or oral designation of a surrogate to make health care decisions for the patient. Prob C §4711. See §2.32 for a discussion of surrogacy as an alternative to an AHCD. A surrogate is an adult, other than a patient's agent or conservator, authorized under the HCDL to make a health care decision for the patient. Prob C §4643. An oral designation of a surrogate must be promptly recorded in the patient's health care record. The surrogate chosen must make health care decisions according to the patient's instructions or wishes, if known, or in the patient's best interests as determined by the patient's personal values if the patient's wishes are not known. Prob C §4714. See §9.16.

Unless the patient specifically designates a shorter period, an oral surrogacy designation is effective only during the course of treatment or illness or during the stay in the health care institution when the designation is made, or for 60 days, whichever period is shorter. Prob C §4711. To eliminate any confusion, Prob C §4711 provides that when a patient has designated an agent under a PAHC but orally chooses to designate another to serve as surrogate during the course of treatment, the surrogate has priority over the agent for the period specified in Prob C §4711(b), but the designation of the agent under the PAHC is not revoked unless the formal requirements of revocation under Prob C §4695(a) are met. Prob C §4711(d). See §7.48 for a discussion of agent's relationship to surrogate.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.41 B. Presumptive Validity of AHCD

§7.41 B. Presumptive Validity of AHCD

In the absence of knowledge to the contrary, a physician and surgeon or other health care provider may presume that an AHCD, whether executed in another state or jurisdiction or in this state, is valid. Prob C §4676(b).

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C. Limitations on Agent

§7.42 1. Principal Has Capacity

The agent's authority becomes effective only on a determination that the principal lacks capacity, unless the power of attorney for health care provides otherwise. Prob C §4682. On capacity, see §§7.8-7.10. See also Capacity and Undue Influence: Assessing, Challenging, and Defending (Cal CEB Action Guide February 2008).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.43 2. Express Limitations in Document

§7.43 2. Express Limitations in Document

A power of attorney for health care (PAHC) may limit any power otherwise authorized by the Health Care Decisions Division of the Probate Code (Prob C §§4600-4806) by an express statement or by providing an inconsistent rule in the PAHC. Prob C §4681(a). However, there are a few statutory limitations that may not be superseded or altered by an express statement in the PAHC. These limitations include the following:

- Placement of the principal in a mental health treatment facility and certain treatments such as convulsive treatments, psychosurgery, sterilization, or abortion (see §7.44);
- Powers specifically described by the Probate Code for execution and administration of a PAHC (see §7.45); and
- Allowing the agent to participate in assisted suicide, euthanasia, or mercy killing (see §7.46).

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§7.44 a. Limitation on Placing Principal in a Facility and on Authorizing Convulsive Treatment, Psychosurgery, Sterilization, or Abortion

The PAHC does not give the agent the power to commit the principal to a mental health treatment facility or to authorize convulsive treatment, psychosurgery, sterilization, or abortion. Prob C §4652.

NOTE: These limitations are more restrictive than the limitations for conservators in Prob C §2356. See California Conservatorship Practice, chap 13 (Cal CEB 2005).

The inability to commit the principal to a mental health treatment facility is sometimes a problem when the principal is an elderly person with Alzheimer's disease who is combative or a "wanderer." Placement in a locked unit, however, may not be necessary. Often, the agent can work with the physician to prescribe appropriate medication to minimize some of the agitated behavior that is characteristic of some Alzheimer's patients.

There are licensed skilled nursing facilities with specially trained staffs and residential care facilities with secured perimeters that are able to accommodate the special needs of these patients. Often, the agent under the PAHC can thus place the principal in such a setting without having to resort to a Lanterman-Petris-Short (LPS) conservatorship to place the principal in a locked unit. See California Conservatorship Practice, chap 23 (Cal CEB 2005). It can be argued that because Prob C §4652 does not specifically limit the agent's authority to place the principal in a secured-perimeter facility and Prob C §4671(b) grants the agent the authority to determine where the principal will live, the agent has authority to place the principal in a secured-perimeter facility without probate court intervention. However, Health & S C §1569.698(b)(7) and 22 Cal Code Regs §87705(l)(4)(A) seem to imply that a conservatorship might be necessary if the principal objects and wishes to leave the facility.

Several other states have developed statutory mental health powers of attorney to allow for limited locked placement and involuntary submission to psychotropic medications for certain prescribed conditions so as to eliminate the need for an LPS-type conservatorship in these situations. California, however, has no similar statutory provision. Under Prob C §2356.5, a conservator of the person can, with court authorization, place a conservatee with dementia in certain carefully defined secured-perimeter or locked facilities for the elderly that are designed to serve people with dementia and can consent to the administration of psychotropic drugs appropriate for the care and treatment of dementia. However, the need to petition the probate court for these powers can usually be reserved for those individuals with dementia who are exhibiting severe behavioral challenges that have not been successfully treated with any other reasonable intervention. In other words, conservatorship with dementia powers should be the choice of last resort.

On dementia powers and forms, see California Conservatorship Practice §§13.58-13.68 (Cal CEB 2005).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.45 b. Specific Limitations on Execution and Use of PAHC

§7.45 b. Specific Limitations on Execution and Use of PAHC

Under Prob C §4681(b), the power of attorney may not limit the application of any statute regarding the following matters:

- Statements required to be included in a power of attorney;
- Operative dates of statutory enactments or amendments;
- Formalities for execution of a power of attorney for health care;
- Qualifications of witnesses;
- Qualifications of agents; and
- Protection of third persons from liability.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.46 c. Prohibitions Against Mercy Killing, Assisted Suicide, and Euthanasia

§7.46 c. Prohibitions Against Mercy Killing, Assisted Suicide, and Euthanasia

There are explicit statutory prohibitions against mercy killing, assisted suicide, and euthanasia contained in the Health Care Decisions Law (HCDL) (Prob C §§4600-4806) at Prob C §4653. The statute states:

> Nothing in this division shall be construed to condone, authorize, or approve mercy killing, assisted suicide, or euthanasia….

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.47 D. Relationship to Conservator of the Person

§7.47 D. Relationship to Conservator of the Person

Unlike an agent under a DPOA, an agent under a PAHC has priority over the conservator of the person in making health care decisions when both a conservatorship exists and a PAHC has been executed. Prob C §4685. The court does have the discretion, however, on a showing of good cause, to issue a temporary order prescribing the principal's health care; the order will be effective for the time ordered by the court, but no longer than necessary to permit the filing and determination of a petition under Prob C §4766. Prob C §4770. See chap 11 on judicial proceedings regarding durable powers of attorney.

PRACTICE TIP: Before petitioning for a conservatorship, the attorney should ascertain whether the proposed conservatee has a PAHC. If the agent named is a different person from the person petitioning to be appointed as conservator, it is important to ensure that no conflict will occur between the agent and the conservator. If conflict is inevitable, it might be useful to request instructions from the court on health care decision making for the conservatee.

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§7.48 E. Relationship to Surrogate

If the patient has designated an agent under a PAHC but chooses another person to serve as a surrogate as provided in Prob C §4711 (see §7.40), the surrogate has priority over the agent only during the course of treatment or illness or during the stay in the health care institution or for 60 days, whichever period is shorter. Prob C §4711(d).

On surrogacy as an alternative to a PAHC, see §2.32.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.49 F. Medical Experimentation

§7.49 F. Medical Experimentation

In an emergency room situation, the health care agent has the highest priority to act as surrogate decision-maker to withhold or grant consent regarding medical experimentation. Health & S C §24178(e).

As used in this discussion, "medical experiment" means the following (Health & S C §24174):

> (a) The severance or penetration or damaging of tissues of a human subject or the use of a drug or device, as defined in Section 109920 or 109925, electromagnetic radiation, heat or cold, or a biological substance or organism, in or upon a human subject in the practice or research of medicine in a manner not reasonably related to maintaining or improving the health of the subject or otherwise directly benefiting the subject.
>
> (b) The investigational use of a drug or device as provided in Sections 111590 and 111595.
>
> (c) Withholding medical treatment from a human subject for any purpose other than maintenance or improvement of the health of the subject.

The surrogate decision-maker must act in accordance with the advance directive and the client's other wishes, to the extent known. Health & S C §24178(g). Thus, the client should be advised to discuss with the agent the client's wishes about personal involvement in medical experimentation.

In situations involving medical experiments relating to cognitive impairment, lack of capacity, or serious or life-threatening diseases and conditions, Health & S C §24178(c) provides that surrogate informed consent may be obtained from a surrogate decision-maker with reasonable knowledge of the person. In descending order of priority, the following persons may be a surrogate for this purpose:

- The person's agent under an advance directive;
- The person's conservator or guardian;
- The spouse or registered domestic partner;
- An adult child;
- The custodial parent;
- Any adult sibling;
- Any adult grandchild;
- An available relative with the closest degree of kinship to the person.

When there are two or more available persons who are in the same order of priority and one expresses dissent, consent cannot be considered given. Health & S C §24178(d)(1). However, if the available persons are in different orders of priority, the consent of a person in a lower priority cannot override the dissent of a person in a higher priority. Health & S C §24178(d)(2).

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G. Withholding or Withdrawing Medical Treatment

§7.50 1. In General

The AHCD or PAHC may give the agent or surrogate the authority to withhold consent or to direct the withdrawal of any form of medical treatment, including life-sustaining treatment (Prob C §§4650(a), 4653) in order "to permit the natural process of dying" (Prob C §4653). See Prob C §4617(c). This authority is consistent with the case law discussed in chap 9. The Health Care Decisions Law (HCDL) (Prob C §§4600-4806) explicitly provides that "[t]his Division is not intended to permit any affirmative or deliberate act or omission to end life other than withholding or withdrawing health care pursuant to an advance health care directive, by a surrogate, or as otherwise provided, so as to permit the natural process of dying." Prob C §4653. The attorney should discuss the client's wishes about life-sustaining treatment to establish the nature and extent of the power to be granted and the circumstances in which those wishes will be honored.

Long-term-care residents and their surrogates have the same right to accept or reject medical treatment as any other patient. See, *e.g.,* Health & S C §1599.72; 22 Cal Code Regs §72527(a)(4). Increasingly, however, considerable nationwide debate and discussion are taking place about the enormous cost of dying. Money concerns may be replacing ethical concerns. The advent of managed care and the inception of de facto medical care rationing has significantly limited the kinds of care available and offered to patients. Thus, attorneys may find themselves in the strange position of drafting provisions in the AHCD that require doctors and hospitals to authorize or maintain certain medical procedures and treatment. Such provisions might be generated by the client's concerns and fears that treatment and care will be withdrawn prematurely because of economic rather than medical considerations.

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§7.51 2. Use of Detailed Forms

There are several advance directive forms in circulation that go into great detail to determine a client's wishes in five or six common illness scenarios. These forms have set up grids allowing the client to give responses along a spectrum, beginning with "I want" all the way to "I would never want." The object of such forms is to more effectively guide the agent through the terrain of medical decision making. Certain clients find these forms excellent springboards for discussion, while others find them so daunting that they fail to execute any advance directive. Probably the greatest benefit of such detailed forms is that they prompt the client to discuss and think about the issues while working with the forms. The problem with these forms is the emphasis on life-preserving technology rather than the personal choices a person may make. There also is an implicit but mistaken assumption that a person can absolutely control and perfectly predict the circumstances in which that person may find himself or herself. Simply stated, reality as it unfolds seldom looks like the scenarios anticipated in these forms. Several physicians have also indicated that the detailed form itself offers little more guidance about the patient's wishes than does a less complicated basic AHCD. The attorney should simply be guided by the client's preference, and if the client enjoys the process of using such a grid, the attorney should not discourage the exercise.

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§7.52 3. Artificially Administered Nutrition and Hydration

The phrase "artificial nutrition and hydration" usually refers to supplying food and fluid through tubes inserted in the patient's veins, nose and throat, stomach, or small intestine. These are the means by which critically ill persons can be nourished. Probate Code §4617(c) defines health care decisions specifically to include directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation. See Comment to Prob C §4653. See also Prob C §4650(a) (the law recognizes that an adult has the fundamental right to control the decisions relating to his or her own health care, including the decision to have life-sustaining treatment withheld or withdrawn), §4653 (withholding or withdrawing health care allowed in order "to permit the natural process of dying"). The AHCD should explicitly define health care decisions to include withholding or withdrawal of artificial nutrition and hydration if that is the client's wish. See §8.21 for this form.

Deciding whether to deny a dying or comatose patient food or water is emotionally traumatic for the patient's family. Thus, knowing the client's wishes can be very comforting to family members as they face this difficult decision. For a client who wishes an agent or surrogate to make health care decisions to withhold or withdraw life-sustaining treatment in certain situations, it is important to ask whether he or she wishes to include artificially administered nutrition and hydration as well as forced spoon feeding. Documenting these wishes has become glaringly important in the wake of the tragic Florida case of Terri Schiavo. Every estate planning attorney should become familiar with this case and be able to respond to the client's concerns triggered by the vast publicity surrounding it. See §§9.19-9.22 for a detailed discussion of the case.

PRACTICE TIP: Because the definition of "health care decisions" was broadened under the Health Care Decisions Law (HCDL) (Prob C §§4600-4806) to specifically include the withholding or withdrawal of artificial nutrition and hydration (Prob C §4617), it is important to consult with those clients who have advance directives validly executed under prior law before July 1, 2000, to ascertain whether those clients intended to include the authority to withhold or withdraw artificial nutrition and hydration.

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§7.53 H. Postmortem Authority

The PAHC is the only power of attorney that confers powers on the agent after the principal dies unless the principal expressly limits the powers. The powers conferred are to dispose of the remains (see §7.54), to authorize an autopsy (see §7.57), and to donate all or part of the principal's body for transplant, education, or research purposes (see §§7.58-7.63). Prob C §4683(b).

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§7.54 1. Disposition of Remains

The power to direct the disposition of the principal's remains involves the authority to decide whether the body should be buried and, if so, where; whether it should be cremated and how the desired disposition of the remains should be carried out; and whether there should be a memorial service and, if so, what kind of service. The agent under the PAHC after the principal's death takes priority over all other individuals in making these decisions. See Prob C §4683(b). See also Health & S C §7100(a) as qualified by Health & S C §7100.1. However, if the principal has previously signed a contract with a particular mortuary and stated preferences about burial, it will be very difficult for the agent to change the contractual provisions unless the principal's AHCD or financial power of attorney specifically grants the power to amend the principal's burial contract.

NOTE: The right of an agent under a power of attorney to direct the disposition of the remains of a decedent principal is subject to the principal's known instructions under Prob C §4684 and to his or her known written instructions under Health & S C §7100.1.

PRACTICE TIP: To minimize confusion and conflict at the time of death, it is helpful for the attorney to urge the client to clearly express in the AHCD the client's wishes with regard to postdeath arrangements, to make all family members aware of these decisions, and to leave the same specific instructions with the mortuary or cremation society as those stated in the AHCD. Many wills contain funeral and burial instructions. The attorney needs to be sure that the will and the AHCD provisions do not conflict. It is especially helpful to the agent if the client has signed a cremation authorization for the mortuary or cremation society if the client prefers to be cremated.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.55 a. Agent Not Responsible for Funeral Expenses

§7.55 a. Agent Not Responsible for Funeral Expenses

The agent is not liable for funeral expenses unless the agent agrees to assume liability or the agent makes decisions resulting in costs that cannot be paid out of the decedent's estate. Health & S C §7100.

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§7.56 b. Principal's Killer Loses Rights Over Disposition of Remains

If the person who has the right of control over the disposition of the remains has been charged with first- or second-degree murder or manslaughter in connection with the death of the decedent, the right of control over the disposition of the remains is barred and the right is passed on to the next kin in priority under Health & S C §7100(a). Health & S C §7100(b).

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§7.57 2. Authorize Autopsy

The agent under a PAHC has the power to authorize an autopsy under Health & S C §7113. If the client wishes to limit the circumstances in which an autopsy may be performed, these limits should be specified in the AHCD. However, the attorney should advise the client that in some circumstances autopsies are required by law and in such cases the agent cannot prohibit it.

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§7.58 3. Anatomical Gifts

An anatomical gift is defined as "a donation of all or part of a human body to take effect after the donor's death for the purpose of transplantation, therapy, research or education." Health & S C §7150.10(a)(3). In 2007, the revised Uniform Anatomical Gift Act (UAGA) was passed in California. The UAGA repeals and adds Chapter 3.5 (§§7150-7151.40) of Part 1 of Division 7 of the Health and Safety Code and amends §§12811 and 13005 of the Vehicle Code.

NOTE: On enactment of the UAGA in California, see §§9.44-9.64. For a full discussion of the UAGA as it is being applied nationwide, see http://www.anatomicalgiftact.org/.

NOTE: If a client wishes to make anatomical gifts, the forms in §§8.46-8.47 should be considered in addition to the statement in the AHCD.

PRACTICE TIP: The client should understand that an anatomical gift authorizes any reasonable postmortem examination necessary to ensure the medical acceptability of the gift. In addition, the body may have to be kept on life support while waiting for the screening to be completed in order to preserve the integrity of the organ. See §§9.62-9.63.

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§7.59 a. Agent's Authorization to Make Anatomical Gift

An agent of the donor may make an anatomical gift if expressly provided for by the PAHC or other record. Health & S C §7150.15(b). See also Prob C §4683(b)(1).

Probate Code §4683 states:

> Subject to any limitations in the power of attorney for health care:…
> (b) The agent may also make decisions that may be effective after the principal's death, including the following:
> (1) Making a disposition under the Uniform Anatomical Gift Act (Chapter 3.5 (commencing with Section 7150) of Part 1 of Division 7 of the Health and Safety Code).

It seems that under this section an agent can make the gift as long as there are no limitations in the PAHC to the contrary. This is broader authority than Health & S C §7150.15(b), which requires express permission to make a gift in the PAHC. At this time, it is unknown whether an agent would be authorized to make a gift absent express permission in the PAHC.

If the proposed donor no longer has capacity to make an anatomical gift, and if he or she has left no instructions (and if not violative of Health & S C §7150.30 (principal has a written refusal; see §7.63) or Health & S C §7150.35 (principal has already made gift or intent known)), others may authorize an anatomical gift in the following order of priority (Health & S C §7150.40(a)):

(1) An agent under a power of attorney for health care or other record that expressly permits the agent to make an anatomical gift;

(2) The spouse or domestic partner of the decedent;

(3) The adult children of the decedent;

(4) The parents of the decedent;

(5) The adult siblings of the decedent;

(6) The adult grandchildren of the decedent;

(7) The grandparents of the decedent;

(8) An adult who "exhibited special care and concern for the decedent during the decedent's lifetime";

(9) The guardians or conservators of the person of the decedent at the time of the decedent's death;

(10) Any other person having "the authority to dispose of the decedent's body," such as the coroner, medical examiner, or hospital administrator, provided "reasonable effort has been made to locate and inform" persons in higher priority.

"Reasonable effort" for purposes of Health & S C §7150.40(a)(10) is defined as a search for at least 12 hours. The search is mandated to include a "check of local police missing persons records, examination of personal effects, and the questioning of any persons visiting the decedent before his or her death or in the hospital, accompanying the decedent's body, or reporting the death, in order to obtain information that might lead to the location of any persons listed," except in cases "where the useful life of the part does not permit."

If there is more than one member of a class listed in Health & S C §7150.40(a) paragraphs (1), (3), (4), (5), (6), (7), or (9) (as stated above) entitled to make an anatomical gift, an anatomical gift may be made by a member of the class unless that member or a person to whom the gift may pass knows of an objection by another member of the class. If an objection is known, the gift may be made only by a majority of the members of the class who are reasonably available. Health & S C §7150.40(b).

Further, a person shall not make an anatomical gift if, at the time of the decedent's death, a person in a prior class under subdivision (a) is reasonably available to make, or to object to the making of, an anatomical gift. Health & S C §7150.40(c).

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§7.60 b. Making Anatomical Gift

The Uniform Anatomical Gift Act provides several ways to make an anatomical gift by a donor (Health & S C §7150.20(a)(1)-(4)):

> (1) By authorizing a statement or symbol indicating that the donor has made an anatomical gift to be imprinted on the donor's driver's license or identification card and included on a donor database registry.
> (2) Directly through the Donate Life California Organ and Tissue Donor Registry Internet Web site. [See http://www.donatelifecalifornia.org/.]
> (3) In a will.
> (4) During a terminal illness or injury of the donor, by any form of communication that clearly expresses the donor's wish, addressed to at least two adults, at least one of whom is a disinterested witness. The witnesses shall memorialize this communication in a writing and sign and date the writing.
> (5) As provided in subdivision (b).

Subdivision (b) states that an anatomical gift may be made by a donor card or some other record signed by the donor or the donor's representative or by authorizing that a statement or symbol, indicating that the donor has made an anatomical gift, be included on a donor registry. Health & S C §7150.20(b). If the donor or the donor's representative is for some reason unable to physically sign a record, another person can sign on the donor's behalf at the donor's direction as long as the signing is witnessed by at least two adults, one of whom is a disinterested witness, and a statement that it has been signed and witnessed at the request of the donor or the donor's representative is included in the record. Health & S C §7150.20(b)(1)(2).

PRACTICE TIP: Because time is critical in the organ donation process, it is essential for the agent to be aware of the principal's wishes. By registering to be an organ and tissue donor on the Donate Life California website, http://www.donatelifecalifornia.org, a prospective donor has the option of sending a notification form to inform family members of the decision to be a donor. If the client wishes to donate his or her body for research, it is vital to have the client sign up directly with the medical school in question. The client may also wish to register with the Living Bank or the California Transplant Donor Network. See form in §§8.46, 9.51.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/ c. Revoking or Amending Anatomical Gift/§7.61 (1) By Donor or by Agent Under Power of Attorney

c. Revoking or Amending Anatomical Gift

§7.61 (1) By Donor or by Agent Under Power of Attorney

A donor or other person authorized to make an anatomical gift, including an agent under a power of attorney for health care (PAHC) (see §7.59), may amend or revoke an anatomical gift by either of the following (Health & S C §7150.25(a)):

(1) A record signed by any of the following and recorded in a donor registry database:
(A) The donor.
(B) The other person.
(C) Subject to subdivision (b), another individual acting at the direction of the donor or of the other person, if the donor or other person is physically unable to sign.
(2) A later-executed document of gift that amends or revokes a previous anatomical gift or portion of an anatomical gift, either expressly or by inconsistency.

If the person wishes to revoke or amend his or her anatomical gift but is physically unable to sign under Health & S C §7150.25(a)(1)(C), the revocation or amendment must comply with both of the following (Health & S C §7150.25(b)):

(1) It shall be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the donor or the other person.
(2) It shall state that it has been signed and witnessed as provided in paragraph (1).

A donor or other person authorized to make an anatomical gift, including an agent under a PAHC (see §7.59), may also revoke an anatomical gift by the following actions (Health & S C §7150.25(c)):

- Destroying the document including the anatomical gift;
- Canceling the gift on a donor database registry; or
- Canceling the portion of the document of gift used to make the gift, with the intent to revoke the gift.

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§7.62 (2) By Other Third Parties

An anatomical gift authorized by one of the persons authorized under Health & S C §7150.40(a) (see §7.59) may be amended or revoked either orally or in a record by any member of a prior class who is reasonably available. However, if there is more than one member of a prior class reasonably available, then the gift can be amended only if a majority of the members of the class agree; the gift can be revoked only by a majority of the members of the class or if the members are equally divided about revoking the gift. Health & S C §7150.45(b). Additionally, such revocation is effective only if it has been conveyed to the procurement organization, the transplant hospital, or the physician before an incision is made to remove the part or before invasive procedures have been made to prepare the recipient. Health & S C §7150.45(c).

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§7.63 d. Written Refusal to Make Anatomical Gift

Because other individuals are allowed to make an anatomical gift if principals are silent regarding their wishes (see §7.59), some persons may wish to make clear that they do not want their body or body parts ever to be donated for any reason. This is called a refusal. Health & S C §7150.10(a)(26). An individual's unrevoked refusal to make an anatomical gift *bars* all other persons (including agents under a power of attorney for health care) from making an anatomical gift of the whole or a part of the individual's body. Health & S C §7150.30(d). See §§9.56-9.58 for a form of a refusal.

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§7.64 IV. RIGHTS AND LIABILITIES OF HEALTH CARE PROVIDERS

Even though the law clearly states that health care providers are not subject to civil or criminal liability for honoring the principal's or agent's instructions to terminate life-sustaining treatment, in reality, health care providers are very concerned about the risks of following instructions regarding a patient who lacks capacity.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.65 A. Law Limits Health Care Professional's Liability

§7.65 A. Law Limits Health Care Professional's Liability

Probate Code §4740 limits civil and criminal liability (and professional discipline) when a health care provider does any of the following:

- Complies with a health care decision of a person that the provider believes in good faith has the authority to make the decision for the patient, including a decision to withhold or withdraw health care;
- Declines to comply with a health care decision in the belief that the agent making the decision lacks authority;
- Complies with an advance health care directive, assuming the directive to be valid and presently effective; or
- Declines to comply with a health care decision for reasons of conscience (Prob C §4734(a)), or because of a conscience-based institutional policy if such policy was timely communicated to the patient or the agent (Prob C §4734(b)), or because the decision requires medically ineffective health care or health care contrary to generally accepted medical standards (Prob C §4735).

The Health Care Decisions Law (HCDL) (Prob C §§4600-4806) also explicitly "does not authorize or require a health care provider … to provide health care contrary to generally accepted health care standards." Prob C §4654. The health care provider is granted further protection by being allowed to presume that an AHCD or similar instrument, even one executed in another state or jurisdiction, is valid. Prob C §4676(b).

Obviously, the immunity granted to a health care provider under the HCDL does not relieve the provider from malpractice liability or from failing to provide the agent with accurate and reliable information necessary to give informed consent. See Comment to Prob C §4740.

PRACTICE TIP: Some attorneys have found it helpful to distribute copies of a small booklet by Hank Dunn entitled Hard Choices for Loving People (A & A Publishers, Inc., P.O. Box 1098, Herndon, VA 20172-1098, (703) 707-0174); text available online to individuals for nonprofessional purposes at http://www.hardchoices.com) to both clients and health care providers. The information in this booklet often empowers the agent to be a better advocate and may temper the entrenched positions of certain providers. Another helpful pamphlet is titled Finding Your Way: A Guide for Medical Decisions Near the End of Life (Sacramento Healthcare Decisions, (916) 851-2828) at http://www.sachealthdecisions.org/docs/fyw_brochure.pdf. Also, there is a host of planning materials provided by the Gundersen Lutheran Medical Center. The materials are titled Making Choices and can be found at http://www.gundluth.org by following the link "Advance Care Planning" and then clicking on the "planning guide" and "information booklet" links in the text.

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§7.66 B. Physician Orders for Life-Sustaining Treatment

One way practitioners can assist their clients in making sure the client's end-of-life decisions will be honored by his or her health care professional is to have completed a document titled the Physician Order for Life-Sustaining Treatment (POLST). The form is a physician order form that follows the patient's wishes and treatment intentions and enhances the appropriateness and quality of patient care. The physician will complete and sign the form following a discussion with the patient, or if the patient is incapacitated, with the patient's legally authorized representative.

Effective January 1, 2009, a POLST is authorized at Prob C §§4780, 4781.2. A POLST essentially converts a patient's wishes concerning life-sustaining treatments into medical orders that are immediately actionable. If an instruction in the POLST directly conflicts with the person's AHCD, then the later-executed document's instruction prevails. Prob C §4781.4.

Further information regarding this program can be accessed through the California Coalition for Compassionate Care at (916) 552-7573 or http://www.finalchoices.org.

See §7.67 for a copy of the POLST form.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.67 C. Form: Physician Orders for Life-Sustaining Treatment (POLST)

§7.67 C. Form: Physician Orders for Life-Sustaining Treatment (POLST)



HIPAA PERMITS DISCLOSURE OF POLST TO OTHER HEALTH CARE PROFESSIONALS AS NECESSARY

Physician Orders for Life-Sustaining Treatment (POLST)

EMSA #111 B
(Effective 1/1/2009)

First follow these orders, then contact physician. This is a Physician Order Sheet based on the person's current medical condition and wishes. Any section not completed implies full treatment for that section. Everyone shall be treated with dignity and respect.

Last Name	
First /Middle Name	
Date of Birth	Date Form Prepared

A — CARDIOPULMONARY RESUSCITATION (CPR): *Person has no pulse and is not breathing.*

Check One

☐ **Attempt Resuscitation/CPR** ☐ **Do Not Attempt Resuscitation/DNR** (Allow Natural Death)
(Section B: Full Treatment required)

When not in cardiopulmonary arrest, follow orders in **B** and **C**.

B — MEDICAL INTERVENTIONS: *Person has pulse and/or is breathing.*

Check One

☐ **Comfort Measures Only** Use medication by any route, positioning, wound care and other measures to relieve pain and suffering. Use oxygen, suction and manual treatment of airway obstruction as needed for comfort. Antibiotics only to promote comfort. ***Transfer*** *if comfort needs cannot be met in current location.*

☐ **Limited Additional Interventions** Includes care described above. Use medical treatment, antibiotics, and IV fluids as indicated. Do not intubate. May use non-invasive positive airway pressure. Generally avoid intensive care.

☐ ***Do Not Transfer to hospital for medical interventions. Transfer*** if comfort needs cannot be met in current location.

☐ **Full Treatment** Includes care described above. Use intubation, advanced airway interventions, mechanical ventilation, and defibrillation/cardioversion as indicated. ***Transfer*** *to hospital if indicated. Includes intensive care.*

Additional Orders: _____

_____

C — ARTIFICIALLY ADMINISTERED NUTRITION: *Offer food by mouth if feasible and desired.*

Check One

☐ No artificial nutrition by tube. ☐ Defined trial period of artificial nutrition by tube.

☐ Long-term artificial nutrition by tube.

Additional Orders: _____

D — SIGNATURES AND SUMMARY OF MEDICAL CONDITION:

Discussed with:

☐ Patient ☐ Health Care Decisionmaker ☐ Parent of Minor ☐ Court Appointed Conservator ☐ Other:

Signature of Physician

My signature below indicates to the best of my knowledge that these orders are consistent with the person's medical condition and preferences.

Print Physician Name	Physician Phone Number	Date
Physician Signature (required)	Physician License #	

Signature of Patient, Decisionmaker, Parent of Minor or Conservator

By signing this form, the legally recognized decisionmaker acknowledges that this request regarding resuscitative measures is consistent with the known desires of, and with the best interest of, the individual who is the subject of the form.

Signature (required)	Name (print)	Relationship (write self if patient)
Summary of Medical Condition	Office Use Only	

SEND FORM WITH PERSON WHENEVER TRANSFERRED OR DISCHARGED

Print

HIPAA PERMITS DISCLOSURE OF POLST TO OTHER HEALTH CARE PROFESSIONALS AS NECESSARY

Patient Name (last, first, middle)	Date of Birth	Gender: M F
Patient Address		

Contact Information

Health Care Decisionmaker	Address		Phone Number
Health Care Professional Preparing Form	Preparer Title	Phone Number	Date Prepared

Directions for Health Care Professional

Completing POLST

- Must be completed by health care professional based on patient preferences and medical indications.
- POLST must be signed by a physician and the patient/decisionmaker to be valid. Verbal orders are acceptable with follow-up signature by physician in accordance with facility/community policy.
- Certain medical conditions or medical treatments may prohibit a person from residing in a residential care facility for the elderly.
- Use of original form is strongly encouraged. Photocopies and FAXes of signed POLST forms are legal and valid.

Using POLST

- Any incomplete section of POLST implies full treatment for that section.

Section A:

- No defibrillator (including automated external defibrillators) should be used on a person who has chosen "Do Not Attempt Resuscitation."

Section B:

- When comfort cannot be achieved in the current setting, the person, including someone with "Comfort Measures Only," should be transferred to a setting able to provide comfort (e.g., treatment of a hip fracture).
- IV medication to enhance comfort may be appropriate for a person who has chosen "Comfort Measures Only."
- Non-invasive positive airway pressure includes continuous positive airway pressure (CPAP), bi-level positive airway pressure (BiPAP), and bag valve mask (BVM) assisted respirations.
- Treatment of dehydration prolongs life. A person who desires IV fluids should indicate "Limited Interventions" or "Full Treatment."

Reviewing POLST

It is recommended that POLST be reviewed periodically. Review is recommended when:

- The person is transferred from one care setting or care level to another, or
- There is a substantial change in the person's health status, or
- The person's treatment preferences change.

Modifying and Voiding POLST

- A person with capacity can, at any time, void the POLST form or change his/her mind about his/her treatment preferences by executing a verbal or written advance directive or a new POLST form.
- To void POLST, draw a line through Sections A through D and write "VOID" in large letters. Sign and date this line.
- A health care decisionmaker may request to modify the orders based on the known desires of the individual or, if unknown, the individual's best interests.

This form is approved by the California Emergency Medical Services Authority in cooperation with the statewide POLST Task Force.

For more information or a copy of the form, visit **www.capolst.org**.

SEND FORM WITH PERSON WHENEVER TRANSFERRED OR DISCHARGED

Comment: The California POLST form is to be printed on 65# Cover Pulsar Pink paper stock.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.68 D. Health Care Providers' Penalties for Violating Health Care Decisions Act

§7.68 D. Health Care Providers' Penalties for Violating Health Care Decisions Act

Any health care provider who intentionally violates the provisions of the Uniform Health Care Decisions Act (Prob C §§4670-4743), which govern advance health care directives, will be subject to liability for damages of $2500 or actual damages, whichever is greater, plus attorney fees. Prob C §4742(a). See §9.29.

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V. DOCUMENT REGISTRATION

§7.69 A. State Registry System

The Secretary of State under Prob C §4800 has established a central information center where anyone who has executed a PAHC or AHCD may register information about the document. The information will be available on request to any health care provider, the public guardian, or anyone else authorized by the registrant. The request must state the need for the information. Prob C §4800(a). Only limited information, as specified in the statute, may be received and released. The information may include an intended place of deposit or safekeeping of the document and the name and telephone number of the agent and any alternative agent. Prob C §4800(c). At the request of the registrant or his or her representative, the Secretary of State will transmit the information received to the registry of another jurisdiction. Prob C §4800(e). Further provisions describe the procedures the Secretary of State is to establish for the registry system (Prob C §§4801-4802) and the effect of registration or failure to register the documents (Prob C §§4804-4805). The Secretary of State, in conjunction with the Attorney General and the Department of Health Services, has a mandate under Prob C §4806 to develop information about end-of-life care and registration of advance directives, making links available to such information on various state government websites.

NOTE: Ensuring easy access to the client's health care directives is particularly important in light of a study reporting that advance directives were unavailable approximately 75 percent of the time when needed at hospitals. Morrison, Olson, Mertz, & Meier, *The Inaccessibility of Advance Directives on Transfer from Ambulatory to Acute Care Settings,* 224 JAMA 478 (1995).

A client who wishes to register can obtain a registration form from the Secretary of State, Special Filings Unit, P.O. Box 942877, Sacramento, CA 94277-0001, (916) 653-3984. At present, there is no fee for filing the form. The form is reproduced in §7.70. The Secretary of State will issue an Advance Health Care Directive Registry identification card to any registrant who deposits advance health care information with the registry. Prob C §4800(d). Within 24 hours of a patient's arrival in an emergency room, a hospital must make reasonable efforts to contact the patient's agent or family member. Reasonable efforts include contacting the Secretary of State to inquire whether a patient has registered with the state registry if the hospital finds evidence of a registry identification card. Prob C §4717. The Secretary of State must respond by the close of business on the next business day to a request for information made by the emergency department of a general acute care hospital. Prob C §4800(b).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.70 B. Form: Registration of Written Advance Health Care Directive (Secretary of State Form SFL-461)

§7.70 B. Form: Registration of Written Advance Health Care Directive (Secretary of State Form SFL-461)



State of California
Secretary of State

File # _____

REGISTRATION OF WRITTEN ADVANCE HEALTH CARE DIRECTIVE

(Probate Code sections 4800-4805)

IMPORTANT - Read all instructions before completing this form.

This Space For Filing Use Only

1. CHECK THE APPLICABLE BOX (NOTE: CHECK ONLY ONE BOX)

☐ New Registration..... For a new registration, check this box and complete the entire form. **There is a $10.00 filing fee for registration of a new directive.**

☐ Amendment..... For an amendment to a previously filed registration form (not the directive), check this box, complete Items 3 and 7 and the appropriate section that changed. There is no filing fee.

☐ Revocation Only..... For a revocation (change) of a written advance health care directive that has been registered previously with the Secretary of State *or* a revocation of your registration, check this box and complete Items 3 and 7. There is no filing fee.

☐ Revocation (change) of Prior Directive and New Registration..... For a revocation (change) of a written advance health care directive that has been registered previously and the registration of a new directive, check this box and complete the entire form. **There is a $10.00 filing fee for registering the new directive.**

2. CHECK THE APPLICABLE STATEMENT(S):

☐ The written advance health care directive is attached

☐ This serves as notification of intended place of deposit or safekeeping of a written advance health care directive

3. REGISTRANT'S INFORMATION:

NAME (LAST)	(FIRST)	(MIDDLE)
STREET ADDRESS	CITY AND STATE	ZIP CODE
DATE OF BIRTH	PLACE OF BIRTH	

ENTER AT LEAST ONE ITEM:

a. Social Security Number	b. Driver's License Number and State or Country Issuing	c. Other Identifying Number Established By Law and State or Country Issuing

4. AGENT INFORMATION (if any):

NAME (LAST)	(FIRST)	(MIDDLE)
HOME TELEPHONE NUMBER ( )	WORK TELEPHONE NUMBER ( )	

5. ALTERNATE AGENT INFORMATION (if any):

NAME (LAST)	(FIRST)	(MIDDLE)
HOME TELEPHONE NUMBER ( )	WORK TELEPHONE NUMBER ( )	

6. INTENDED PLACE OF DEPOSIT OR SAFEKEEPING OF THE WRITTEN ADVANCE HEALTH CARE DIRECTIVE (if applicable):

7. SIGNATURE OF REGISTRANT	DATE
TYPE OR PRINT NAME OF REGISTRANT	

Print

INSTRUCTIONS

Registering a written advance health care directive (directive) or its location is voluntary. Registration or failure to register does not affect the validity of the directive.

A directive or information regarding the location of a directive may be filed with the Secretary of State pursuant to Probate Code sections 4800-4805 by using this form. If any information on the registration form changes, or if the actual directive is revoked (changed), the registrant must complete and submit this form to the Secretary of State.

A registrant must re-register upon execution of a subsequent directive.

1. If this is a new registration of your directive, check the New Registration box on the form and complete the entire form. Attach to the form a check payable to the Secretary of State in the amount of $10.00 and mail the check and completed form to the address below.

   If this is an amendment or change to a registration form that you have previously filed with the Secretary of State (for example, a change of address or a change in the location of your directive), check the Amendment box on the form, complete Items 3 and 7, and provide the information that changed in the applicable section. There is no filing fee. Mail the completed form to the address below.

   If this is notification that your directive previously registered with the Secretary of State has been revoked or has changed, and you are not registering a new directive with the Secretary of State, OR if you want to revoke your prior registration of your directive with the Secretary of State, check the Revocation Only box on the form and complete Items 3 and 7. There is no filing fee. Mail the completed form to the address below.

   If this is notification that your directive previously registered with the Secretary of State has been revoked or has changed, and you want to register a new directive with the Secretary of State, check the Revocation (change) of Prior Directive and New Registration box on the form and complete the entire form. Attach to the form a check payable to the Secretary of State in the amount of $10.00 for the new registration and mail the check and completed form to the address below.

2. Check the appropriate statement indicating if your directive is attached to this form or if you are providing the location of the directive.

3. Print your name, address, date of birth and place of birth. Also include at least one of the following: social security number, driver's license number and state or country of issuance, or another form of identification issued by a government agency. The identification numbers will not be disclosed to the public; however, they will be used by this office to ensure the correct information for the correct person is provided to your health care provider when requested.

4. Print the full name and telephone number of your agent, if any, who is authorized to make health care decisions for you as indicated in your directive.

5. Print the full name and telephone number of your alternate agent, if any, who is authorized to make health care decisions for you as indicated in your directive.

6. Provide the address or location of the directive (e.g. safe in the closet in the spare room at 123 Any Street, Any City, CA 99999) if this is the purpose of the registration.

7. Sign, date and type or print your name below.

If you are unable to fill out or sign the form, another adult can complete it in your presence and at your direction. (2 Cal. Code of Regs. section 22610.2(a))

Mail the completed form and any applicable filing fees to:

Secretary of State, Special Filings Unit, P.O. Box 942877, Sacramento, CA 94277-0001 (916) 653-3984

Pursuant to Probate Code section 4800 and 2 Cal. Code of Regs. section 22610.2, the information on this form is requested by the Secretary of State's Office, Special Filings Unit, P.O. Box 942877, Sacramento, CA 94277-0001, Telephone number (916) 653-3984. Providing the information is necessary in order to identify you should there be a request to receive information as specifically authorized by law. Information received on lines 3(a), 3(b), and 3(c) of the form will not be disclosed except as specifically authorized by law, although at least one of the items must be provided by you for identification purposes.

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C. Alternate Registry Services

§7.71 1. DocuBank

DocuBank, a private registry service available 24 hours a day, can be contacted at (610) 667-3524 or at http://www.docubank.com. DocuBank stores copies of each member's health care directives in its document bank. The member receives a wallet card containing his or her emergency contact information, attorney's name, and instructions to call 1-800-DOCUBANK. Members can also include critical medical information on the card. When hospital staff calls the 800 number, DocuBank immediately faxes them a copy of the advance directive. DocuBank contacts each member annually to confirm that the documents are still current and to update the contact information for agents and providers. It charges a yearly membership fee for this service.

PRACTICE TIP: Some attorneys pay the first-year DocuBank membership fee for clients as part of their estate planning services. Discounts are available for professionals who make this a regular part of their practice. The National Academy of Elder Law Attorneys has made DocuBank an affinity partner; thus, DocuBank gives special discounts to NAELA members. See 16 NAELA News 1 (Feb. 2004).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.72 2. Legal Directives, LLC

§7.72 2. Legal Directives, LLC

Legal Directives, LLC, is a private registry service available 24 hours a day and can be contacted at 52 Gettysburg Pike, Mechanicsburg, PA 17055, (866) 363-4894, http://www.legaldirectives.com. Legal Directives provides emergency access to clients' advance directives. It designs a customized wallet card with the attorney's logo and provides clear instructions on the back of the card that explain how the advance directives can be accessed online or by facsimile. It charges a yearly membership fee for this service.

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VI. LIMITING COURT ENFORCEMENT

§7.73 A. Limiting Power to Petition

In the AHCD instrument, the principal may eliminate the authority of anyone except the conservator of the person or the agent to petition the court for certain purposes. Prob C §4753(b). In light of the involvement of the President of the United States, George W. Bush, Congress, the Florida Legislature, Florida Governor Jeb Bush, and several national right-to-life groups in the Terri Schiavo case (see §§9.19-9.22), some attorneys have suggested that this limiting power could be used to prevent the involvement of strangers in a client's health care.

The conservator of the person cannot be prevented from petitioning the court to (1) determine whether an advance health care directive is in effect, or (2) declare the agent's or surrogate's authority terminated on the court's determination that (a) the agent or surrogate authorized an illegal act or that the agent or surrogate failed to act in a manner consistent with the patient's desires or acted contrary to the patient's best interest and (b) at the time of the determination by the court, the patient lacks capacity to execute or revoke an advance directive or disqualify a surrogate. Prob C §§4753(b)(1), 4766(b), (d).

The principal's restrictions in limiting the agent's power are similar. The principal cannot eliminate the agent's authority to petition the court to determine (1) whether the PAHC is in effect or has terminated, or (2) whether the agent's (or surrogate's) acts or proposed acts are consistent with the principal's known desires and, if not known, are in the best interests of the principal. Prob C §§4753(b)(2), 4766(b)-(c).

If the AHCD eliminates the authority of a person to petition, it must meet two execution requirements (Prob C §4753(a)(1)-(2)):

(1) The individual must execute the AHCD with the advice of an attorney authorized to practice law in the state where the power of attorney is executed; and

(2) The attorney must sign and attach the following certification to the AHCD:

> I am a lawyer authorized to practice law in the state where this advance health care directive was executed, and _ _[*insert name*]_ _ was my client at the time this advance directive was executed. I have advised my client concerning his or her rights in connection with this advance directive and the applicable law and the consequences of signing or not signing this advance directive, and my client, after being so advised, has executed this advance directive.

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§7.74 B. Practical Considerations

Great care should be taken in considering limiting court access to persons seeking review of the agent's authority, administration, or decisions. Limiting court access for review or enforcement purposes reduces the safeguards that protect the patient from abuse by the agent. Limiting court access could block avenues available to persons acting in good faith who question an agent's actions. Thus, to provide the safest climate for the patient, while limiting access for some persons, it may be wisest to at least grant the authority for someone like a court investigator or public guardian to petition the court for review.

However, if the agent is likely to encounter hostility and interference from anyone authorized to petition under Prob C §4765, the principal might seriously consider eliminating that individual's power to seek court review. This provision might be particularly helpful in unmarried couple relationships if the principal's family members are at odds with the partner who has been appointed agent. Eliminating the family's ability to challenge the partner-agent's actions in court could be an effective means of avoiding problems.

Even in a potentially fractious family situation, instead of limiting authority to petition the court, it may be preferable to nominate a completely independent person to act as conservator if the need arises, minimizing the risk of court involvement while preserving some protection. Another solution might be for the AHCD to contain contingency restrictions on the right to invoke court supervision. This use of Prob C §4753 may be more reasonable than wholesale elimination of all petitioning authority.

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§7.75 C. Form: Limitation on Authority to Petition for Court Enforcement of Agent's Duties

▶ To download **Word** version, right click and choose *Save Target As*

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7.75-1 Limitation on authority to petition for court enforcement of agent's duties

[*Add one of the following alternatives*]

[*Alternative 1: Authority limited to agent or conservator*]

No one other than my agent or the conservator of my person shall have the right to file a petition under California Probate Code §4766.

[*Alternative 2: Authority limited to specific purpose*]

No one other than my agent or the conservator of my person shall have the right to file a petition under California Probate Code §4766, except for the following purposes: _ _[*Identify limitations, e.g., to determine that the principal lacks the capacity to give or to revoke a power of attorney for health care*]_ _**.**

[*Alternative 3: Authority limited during spouse's competency*]

As long as my spouse has capacity, my children shall have no right to file a petition under California Probate Code §4766.

[*Alternative 4: Authority of specific person limited*]

_ _[*Name*]_ _ **shall have no right to file a petition under California Probate Code §4766** _ _[*e.g., as long as he is incarcerated under the supervision of the California Department of Corrections*]_ _**.**

Comment: If any of the above clauses are used, the attorney's certification on limiting the authority to petition must also be included. For the language of the certification, see §7.73.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.76 VII. SUMMARY OF HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (HIPAA) AND CALIFORNIA'S CONFIDENTIALITY OF MEDICAL INFORMATION ACT (CMIA)

§7.76 VII. SUMMARY OF HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (HIPAA) AND CALIFORNIA'S CONFIDENTIALITY OF MEDICAL INFORMATION ACT (CMIA)

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub L 104-191, 110 Stat 1936) (particularly the HIPAA privacy provisions in 42 USC §1320d-2) is directed at the health care industry and requires the Secretary of Health and Human Services to adopt national standards to protect the security and privacy of certain health information. The resulting HIPAA Privacy Rule (45 CFR pts 160, 164) is the first comprehensive federal scheme to protect patient confidentiality and the privacy of patient-identifiable information. Before HIPAA, patients' personal health information was protected by a checkerboard of state and federal laws. Personal health information could be distributed without the patient's consent for purposes completely unrelated to medical treatment or the payment of insurance claims. Patients now have increased control over the use and disclosure of their medical information.

The Department of Health and Human Services (HHS) Office for Civil Rights is charged with enforcing the privacy rule. The threat of penalties, including monetary fines and imprisonment (42 USC §§1320d-5-1320d-6), has rendered providers cautious in the interpretation of the regulations and has affected access to health care information. However, the Office of Legal Counsel in the U.S. Department of Justice has issued a ruling that the criminal enforcement provision (42 USC §1320d-6) applies only to covered entities (see §7.77) and that individual employees of these entities may not be liable directly under the statute except in accordance with general principles of corporate criminal liability. Memorandum for Alex M. Azar II, General Counsel, Department of Health and Human Services, by Timothy J. Coleman, Senior Counsel to the Deputy Attorney General (June 1, 2005). See Pear, *Ruling Limits Prosecution of People Who Violate Law on Privacy of Medical Records,* New York Times, Late Edition, June 7, 2005, p A16, col 1.

HIPAA has become the subject of much discussion and consternation among estate planning attorneys. Over a thousand pages of regulations and comments have resulted in regulations that provide very little guidance to providers concerning how to implement them. The HIPAA standards have required major changes in how the health care industry handles all facets of personal information, including patient records, case management, reimbursement coding, and security. HIPAA consultants have become a new profession and millions of dollars have been spent across the nation to become HIPAA-compliant. To handle the required documentation, most medical providers have been forced to computerize their handling of all personal health information.

NOTE: Many provisions of California's Confidentiality of Medical Information Act (CMIA) (CC §§56-56.37) correspond to those of HIPAA. The HIPAA regulations preempt state law unless the state law provides broader privacy protection. 45 CFR §160.203. CMIA in some ways goes beyond the HIPAA regulations, and to the extent that CMIA is stricter than the HIPAA regulations, CMIA is therefore not preempted.

For more coverage of HIPAA and CMIA as they affect the issues of capacity and undue influence in the context of estate planning and litigation, see Capacity and Undue Influence: Assessing, Challenging, and Defending (Cal CEB Action Guide February 2008). See also Soskin, *How to Be a HIPAA Lawyer,* 26 CEB Est Plan Rep 125 (Apr. 2005).

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A. Some Basic Terms and Requirements

§7.77 1. Covered Entities

Attorneys should become familiar with several new HIPAA terms in order to be the best advocate for their clients who encounter access problems. For a complete glossary, go to the HHS website at http://www.cms.hhs.gov/apps/glossary/.

HIPAA applies to all "covered entities." A covered entity is any health care provider that electronically transmits medical information, health plan, or health care clearinghouse. 45 CFR §§160.102-160.103. Covered entities thus include medical practices, employee benefit plans, hospitals, rehabilitation centers, skilled nursing facilities, pharmacies, public health authorities, life insurance agencies, vendors, billing agencies, and some service organizations and universities. See 45 CFR §160.103. Prescription drug card sponsors were added to covered entities by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub L 108-173, 117 Stat 2066). See 42 USC §1395w-141(h)(6)(A); 42 CFR §403.812.

Covered entities cannot circumvent HIPAA regulations by using a "business associate," such as a billing service, to handle electronic transactions. HIPAA requires covered entities to guarantee that business associates have protections in place to avoid accidental disclosure or mishandling of personal health information. 45 CFR §§164.502(e), 164.504(e).

For corresponding Confidentiality of Medical Information Act (CMIA) (CC §§56-56.37) provisions, see CC §56.05(i).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.78 2. Protected Health Information

§7.78 2. Protected Health Information

Covered entities are prohibited from disclosing "protected health information" (PHI). PHI is "individually identifiable health information," including demographic data, that relates to the following (45 CFR §160.103):

- An individual's past, present, or future physical or mental health or condition;
- Provision of health care to the individual; or
- Past, present, or future payment for the provision of health care to the individual that identifies the individual or that can be reasonably believed could be used to identify the individual.

Health information is individually identifiable if it includes any of many common identifiers, including telephone, Social Security, and health plan identification numbers. See 45 CFR §164.514(b).

For corresponding Confidentiality of Medical Information Act (CMIA) (CC §§56-56.37) provisions, see CC §56.05(f).

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§7.79 3. Written Authorization for Use or Disclosure

A covered entity must obtain the individual's written authorization for any use or disclosure of protected health information that is not for treatment, payment, or health care operations or otherwise permitted or required by the regulations. 45 CFR §§164.502(a), 164.508(a). A covered entity is generally prohibited from conditioning treatment, payment, enrollment, or benefits eligibility on an individual's granting an authorization. 45 CFR §164.508(b)(4).

The authorization must include the following items:

- A specific and meaningful description of the information to be used or disclosed, the name or description of the class of persons authorized to make and to receive the disclosure, and a description of the purposes for the disclosure (45 CFR §164.508(c)(1));
- A statement that the individual has the right to revoke the authorization, how to do so, and any exceptions to the right to revoke (unless the information on how to revoke and regarding exceptions is included in the covered entity's notice of privacy practice that is required under 45 CFR §164.520, in which case it is sufficient for the authorization to include a reference to that notice policy) (45 CFR §164.508(c)(2)(i));
- A statement that the information being disclosed is subject to redisclosure (45 CFR §164.508(c)(2)(iii)); and
- An expiration date or "expiration event" (45 CFR §164.508(c)(1)(v)).

For Confidentiality of Medical Information Act (CMIA) (CC §§56-56.37) provisions, see CC §56.11.

For sample authorization forms, see §§8.35-8.38.

The regulations have specific rules for the release of psychotherapy notes, as defined in 45 CFR §164.501. A covered entity must obtain an individual's authorization to use or disclose psychotherapy notes, except that the covered entity who originated the notes may use them for treatment purposes or to avert a serious and imminent threat to public health or safety. 45 CFR §164.508(a)(2). See CMIA provisions at CC §§56.10(c)(12), 56.104.

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§7.80 4. Disclosure Limited to "Minimum Necessary"

Disclosures other than those for treatment of the individual or at the request of the Secretary of HHS must be limited to the "minimum necessary," that is, the minimum amount of protected health information needed to accomplish the intended purpose of the use, disclosure, or request. 45 CFR §164.502(b). The covered entity must develop policies and procedures to comply with the "minimum necessary" rule. 45 CFR §164.514(d).

The Confidentiality of Medical Information Act (CMIA) (CC §§56-56.37) has no minimum-necessary rule, but while HIPAA places no restriction on the ability of a recipient of health information who is not a health care provider to disclose to others the information received, under CMIA a person who receives information under an authorization may not further disclose that information except under a new authorization. CC §56.13.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.81 5. Required Notice to Patient

§7.81 5. Required Notice to Patient

Each covered entity is required to provide each patient a notice of its privacy practices. 45 CFR §164.520(a), (c). The notice is required to describe the rights of the individual. 45 CFR §164.520(a). Under HIPAA, the individual has the following fundamental rights:

- The right to receive a notice about a covered entity's privacy policy (45 CFR §164.520);
- The right to access the medical information that a covered entity maintains about the individual (45 CFR §164.524);
- The right to limit the uses and disclosure of medical information (45 CFR §164.522);
- The right to request amendments to the individual's medical record (45 CFR §164.526);
- The right to revoke or limit authorization (45 CFR §164.508(b)(5)); and
- The right to an accounting of disclosures of protected health information (PHI) (45 CFR §164.528).

In addition, the individual has the right to complain about violations of these privacy rights. 45 CFR §§164.520(b)(1)(vi), 164.530(d). The covered entity may not discriminate or retaliate against an individual for filing a complaint. Prop 45 CFR §160.316.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.82 6. Privacy Official

§7.82 6. Privacy Official

A covered entity must designate a privacy official responsible for developing and implementing its privacy policies and procedures and must designate a contact person responsible for receiving complaints and providing individuals with information regarding the covered entity's privacy practices. 45 CFR §164.530(a).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/ B. HIPAA and Health Care Agents/§7.83 1. Agents' Problems Under HIPAA

B. HIPAA and Health Care Agents

§7.83 1. Agents' Problems Under HIPAA

A "personal representative" under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub L 104-191, 110 Stat 1936) is a person authorized under state law to act on behalf of the individual regarding health care decisions. HIPAA requires a covered entity to treat a personal representative the same as the individual with respect to the use and disclosure of PHI, as well as with respect to individual rights. 45 CFR §164.502(g). The regulations permit an exception if the covered entity has a reasonable belief that the personal representative is abusing, neglecting, or otherwise endangering the individual. 45 CFR §164.502(g)(5).

An agent named in a PAHC appears to meet the HIPAA definition of "personal representative" and thus should have no problem gaining access to necessary PHI in determining the best course of action for the principal's health care.

NOTE: The Confidentiality of Medical Information Act (CMIA) (CC §§56-56.37) does not directly deal with agents under an advance health care directive, but a health care provider must give the patient's agent under an advance health care directive "the same rights as the patient to request, receive, examine, copy, and consent to the disclosure of" health information. Prob C §4678. See also Prob C §4733 (health care provider must comply with health care decisions made by health care agent to same extent that it would if decision had been made by patient with capacity).

Because of unfamiliarity with the new law, the threat of significant penalties for violating the privacy rules, and variations in interpretation of the regulations, some agents have encountered significant barriers to obtaining access to PHI.

PRACTICE TIP: Some practitioners suggest having every named agent and successor agent sign an authorization to release his or her health information to avoid problems if the agent in turn becomes incapacitated. For sample form, see §8.37.

In some instances, the problem revolves around the question of when an agent is a true personal representative. An agent's authority under a PAHC is normally not triggered until the principal has been determined to lack capacity to make medical decisions. However, access to medical records that may be necessary in order to prove that incapacity may be precluded under HIPAA because the agent is technically not yet an agent. Yet Prob C §4235 authorizes the agent to "consult with and obtain information needed to carry out the attorney-in-fact's duties" from the principal's physician and other specified individuals and provides that those individuals "shall disclose relevant information to the attorney-in-fact."

This provision could create a dilemma for the provider: Either commit a HIPAA violation or fail to comply with California law. Given the potentially stiff criminal penalties for HIPAA violations, even though the U.S. Department of Justice has ruled that individual employees of health care providers are generally not subject to criminal enforcement (see §7.77), it is not difficult to guess which course of action providers might choose. However, it appears that drafting a separate provision to address this anomaly should resolve the issue. See sample form at §§8.35, 8.38.

NOTE: Some practitioners believe that this apparent "chicken or egg" problem is not a practical problem under a typical health care directive providing that the determination of incapacity is made by the principal's primary physician. See, *e.g.,* Paragraph 5 (first alternative) in §8.12. In the view of these practitioners, it will be readily apparent to a physician when the patient cannot make his or her own health care decisions. The doctor then signs a statement to that effect and can later disclose personal health care information to the agent. See, *e.g.,* Soskin, *How to Be a HIPAA Lawyer,* 26 CEB Est Plan Rep 125 (Apr. 2005).

For further discussion of HIPAA and CMIA as they affect the determination of incapacity, see Capacity and Undue Influence: Assessing, Challenging, and Defending (Cal CEB Action Guide February 2008).

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§7.84 2. Practical Suggestions

The following suggestions may be of practical use to the attorney who anticipates or encounters difficulties:

- Urge the client to sign an authorization form for each provider specifically authorizing the provider to disclose information to the client's agents or successor agent, if any, and attorney immediately, not just in the event of incapacity.
- Urge the client to sign a general HIPAA release form. See §§8.35-8.38 for a copy of the release.
- When a problem arises, go to http://www.hhs.gov/faq/ to determine whether the HHS has already answered a similar question. New answers are added fairly frequently, so many common problems have already been addressed. The HHS's answer usually cites the pertinent regulations.
- Ask the provider in question for the names and contact numbers of the privacy official and the contact person for receiving complaints, and then speak directly to those individuals. They are more conversant with HIPAA regulations, and directing them to the specific regulation or the HHS's answer to a frequently asked question is often enough to resolve the problem.
- In those rare instances when there is no specific regulation or answer to a frequently asked question, present a cogent argument that the release of information is "in the individual's best interest," specifically referring to 45 CFR §164.510(a)(3)(i)(B). Referring to this regulation usually gives the covered entity good cause to release the requested information and still be HIPAA-compliant. Remember that remaining courteous and polite while engaging in diplomatic advocacy is the best policy because there is no individual right to sue the provider for a HIPAA violation. Only the HHS has the right to enforce the privacy rule.
- If the attorney wishes to draft documents that specifically address HIPAA issues, it is important that each document conform to every point required in an authorization under 45 CFR §164.508(c).

For further reading and differing opinions, see Soskin, *How to Be a HIPAA Lawyer,* 26 CEB Est Plan Rep 125 (Apr. 2005); Haynes, *When Worlds Collide: The Privacy Challenge to Casual Use of Protected Medical Information in Probate Courts and Estate Planning,* 24 CEB Est Plan Rep 133 (June 2003); Murphy, *Drafting Health Care Powers of Attorney to Comply With New HIPAA Regulations,* 15 NAELA News 1 (Aug. 2003).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/7 Advance Health Care Directives: The Fundamentals/§7.85 C. Resources

§7.85 C. Resources

Dunn, Hank. Hard Choices for Loving People: CPR, Artificial Feeding, Comfort Care, and the Patient With a Life-Threatening Illness. Herndon, Va., A & A Publishers, Inc., 2001.

Finding Your Way: A Guide for Medical Decisions Near the End of Life by Sacramento Healthcare Decisions, 3400 Data Drive, Rancho Cordova, CA 95670, (916) 851-2828; http://www.sachealthdecisions.org.

Fins & Maltby, Fidelity, Wisdom & Love: Patients and Proxies in Partnership: An Interactive Workbook for End-of-Life Decision-Making (Division of Medical Ethics, Weill Medical College of Cornell University, 2003). The workbook can be ordered at http://fidelitywisdomandlove.org.

Lawyer's Tool Kit for Health Care Advance Planning by the ABA Commission on Legal Problems of the Elderly, 740 Fifteenth Street, N.W., Washington, DC 20005-1019, (202) 662-1000; Service Center: 321 N. Clark St., Chicago, IL 60610, (800) 285-2221, available at http://www.abanet.org/aging.

Making Choices by Gundersen Lutheran Medical Center, 1900 South Avenue, La Crosse, WI 54601-5467, (608) 782-7300 http://www.gundluth.org, "Advance Care Planning" link.

National Academy of Elder Law Attorneys, Special Interest Group in Health Care, (520) 881-4005, http://www.naela.org.

National Hospice and Palliative Care Organization, 1700 Diagonal Road, Suite 625, Alexandria, VA 22314, (703) 837-1500, http://www.caringinfo.org.

United Network for Organ Sharing, (804) 782-4800, http://www.unos.org.

Your Way: A Guide to Help You Stay in Charge by H.E.L.P. (Healthcare and Elder Law Programs Corporation), 1404 Cravens Avenue, Torrance, CA 90501, (310) 533-1996.

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8

Advance Health Care Directives: Complete Forms and Related Documents

Fay Blix

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§8.1 I. OVERVIEW

There are three main options for the drafting of documents in planning for health care decisions:

- A statutory advance health care directive form set forth in Prob C §4701 (see §8.3);
- Preprinted forms, including the California Medical Association (CMA) form (see §8.4), the California Hospital Association (CHA) form (see §8.6), or a simply worded form from the Institute for Healthcare Advancement (see §8.7); and
- An attorney-drafted custom form, complying with statutory requirements (see §§8.8-8.33).

Selecting the appropriate option will depend greatly on the health care choices the client wishes to make. The CMA form is the most widely used because hospital staff, hospice workers, doctors, and other health care providers accept it as a legally binding document. Using the CHA form may be prudent if the person signing it wants additional protection for not prolonging his or her life in situations not covered in the CMA form. The CHA form follows the statutory language exactly, while the CMA form departs from it in several key areas. The easily understood form is useful for a client who may have trouble reading or comprehending legal documents. An attorney-drafted form may be questioned by an entry-level health care facility employee who is familiar only with the preprinted forms. Such questions may cause delays in treatment while the document is being approved by a hospital's legal department. Attorney-drafted forms may occasionally be appropriate for a client with an unusual health condition or specific health care wishes that can be effectively communicated only in a custom document.

In addition to the primary documents for health care decisions, there are several related documents that should be considered by the practitioner, including the following:

- Release of protected health care information under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the California Confidentiality of Medical Information Act (CMIA) (see §§8.35-8.38);
- Request to forgo resuscitative measures (see §§8.39-8.43); and
- Anatomical gift of body or organs (see §§8.44-8.47).

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§8.2 II. INTRODUCTION TO FILL-IN-THE-BLANK ADVANCE HEALTH CARE DIRECTIVES

This book contains four preprinted forms that may be of use to the practitioner:

- **The Prob C §4701 statutory form advance health care directive (AHCD).** The statutory form in Prob C §4701 can be used as an individual health care instruction, without appointing an agent, or as a PAHC, appointing an agent. The form provides spaces for nomination of a conservator, end-of-life decisions, instructions about relief from pain, and "other wishes" regarding end-of-life decisions and organ donation, and it allows for exceptions to the agent's postdeath authority to authorize an autopsy and direct disposition of remains. The form does not mention the right of the agent to access medical records. Part 4 provides an optional, and questionably useful, place to designate the client's primary physician. In the present climate of health management organizations (HMOs), preferred provider organizations (PPOs), and similar organizations, it may be difficult for a client to designate a primary physician of any permanence. If the client has a physician of some duration or to whom he or she has a particular connection, this part should be completed. For a copy of the statutory form, see §8.3.
- **The California Medical Association (CMA) AHCD form.** Health care providers are accustomed to using the CMA forms. Many attorneys provide their clients with the CMA's AHCD form because it is recognized by health care providers throughout California and is often more readily accepted than less familiar forms. Attorney-drafted AHCDs may be sent to a medical provider's legal counsel for review before decisions based on the instructions in the document can be made. The CMA's AHCD form allows the patient to appoint an agent or to give instructions on health care. If the client wishes to provide more specific health care instructions than those included in the form, the form offers guidance on how to do so. See §8.4 for a sample CMA AHCD and §8.5 for a form wallet card.
- **The California Hospital Association (CHA) AHCD form.** The primary difference between this form and the CMA form in §8.4 is the section concerning the prolonging of life. In the CMA form, there are only two situations in which an individual may indicate a preference for not prolonging his or her life, *i.e.,* if the person has a terminal condition that will result in death in a matter of months or an irreversible condition that renders the person unable to make decisions and life support is needed to keep the person alive. The CHA form adds a third situation in which an individual may not wish to prolong his or her life: when the likely risks and burdens of treatment would outweigh the expected benefits. This provision comes directly from the California Probate Code and provides the strongest protection for those persons who do not want to be kept alive through medical procedures, because it does not restrict the decision to particular diagnostic or prognostic categories. See §8.6 for a copy of the form. Also, the CHA form is different from the CMA form because it can be downloaded and copied for free.
- **The easy-to-use AHCD form.** In the aftermath of the Terri Schiavo case, the Institute for Healthcare Advancement (IHA), a nonprofit organization, decided to develop an AHCD specifically for those 90 million American adults who are unable to read above a fifth-grade reading level. Many of these individuals struggle to understand the complex legal documents that are typically used as AHCDs. The document, "California Advance Health Care Directive," may be downloaded for free in PDF format at http://www.iha4health.org and printed for personal use. See §8.7 for a copy of the form.

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§8.3 A. Form: Statutory Form Advance Health Care Directive (Prob C §4701)

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

8.3-1 Statutory form advance health care directive (Prob C §4701)

ADVANCE HEALTH CARE DIRECTIVE
(California Probate Code Section 4701)

Explanation

You have the right to give instructions about your own health care. You also have the right to name someone else to make health care decisions for you. This form lets you do either or both of these things. It also lets you express your wishes regarding donation of organs and the designation of your primary physician. If you use this form, you may complete or modify all or any part of it. You are free to use a different form.

Part 1 of this form is a power of attorney for health care. Part 1 lets you name another individual as agent to make health care decisions for you if you become incapable of making your own decisions or if you want someone else to make those decisions for you now even though you are still capable. You may also name an alternate agent to act for you if your first choice is not willing, able, or reasonably available to make decisions for you. (Your agent may not be an operator or employee of a community care facility or a residential care facility where you are receiving care, or your supervising health care provider or employee of the health care institution where you are receiving care, unless your agent is related to you or is a co-worker.)

Unless the form you sign limits the authority of your agent, your agent may make all health care decisions for you. This form has a place for you to limit the authority of your agent. You need not limit the authority of your agent if you wish to rely on your agent for all health care decisions that may have to be made. If you choose not to limit the authority of your agent, your agent will have the right to:

(a) Consent or refuse consent to any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a physical or mental condition.

(b) Select or discharge health care providers and institutions.

(c) Approve or disapprove diagnostic tests, surgical procedures, and programs of medication.

(d) Direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation.

(e) Make anatomical gifts, authorize an autopsy, and direct disposition of remains.

Part 2 of this form lets you give specific instructions about any aspect of your health care, whether or not you appoint an agent. Choices are provided for you to express your wishes regarding the provision, withholding, or withdrawal of treatment to keep you alive, as well as the provision of pain relief. Space is also provided for you to add to the choices you have made or for you to write out any additional wishes. If you are satisfied to allow your agent to determine what is best for you in making end-of-life decisions, you need not fill out Part 2 of this form.

Part 3 of this form lets you express an intention to donate your bodily organs and tissues following your death.

Part 4 of this form lets you designate a physician to have primary responsibility for your health care.

After completing this form, sign and date the form at the end. The form must be signed by two qualified

witnesses or acknowledged before a notary public. Give a copy of the signed and completed form to your physician, to any other health care providers you may have, to any health care institution at which you are receiving care, and to any health care agents you have named. You should talk to the person you have named as agent to make sure that he or she understands your wishes and is willing to take the responsibility.

You have the right to revoke this advance health care directive or replace this form at any time.

PART 1
POWER OF ATTORNEY FOR HEALTH CARE

(1.1) DESIGNATION OF AGENT: I designate the following individual as my agent to make health care decisions for me: _ _[*Insert name, address, and telephone number of one individual as your agent to make health care decisions for you*]**_ _.**

[*If applicable, add one or more of the following options*]

[*Option 1: First alternate agent*]

If I revoke my agent's authority or if my agent is not willing, able, or reasonably available to make a health care decision for me, I designate as my first alternate agent _ _[*insert name, address, and telephone number of one individual as your first alternate agent*]**_ _.**

[*Option 2: Second alternate agent*]

If I revoke the authority of my agent and first alternate agent or if neither is willing, able, or reasonably available to make a health care decision for me, I designate as my second alternate agent _ _[*insert name, address, and telephone number of one individual as your second alternate agent*]**_ _.**

[*Continue*]

(1.2) AGENT'S AUTHORITY: My agent is authorized to make all health care decisions for me, including decisions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care to keep me alive, except as I state here:

[*You can indicate your desires by including a statement here.*]

(1.3) WHEN AGENT'S AUTHORITY BECOMES EFFECTIVE: My agent's authority becomes effective when my primary physician determines that I am unable to make my own health care decisions unless I mark the following box. If I mark this box ..., my agent's authority to make health care decisions for me takes effect immediately.

(1.4) AGENT'S OBLIGATION: My agent shall make health care decisions for me in accordance with this power of attorney for health care, any instructions I give in Part 2 of this form, and my other wishes to the extent known to my agent. To the extent my wishes are unknown, my agent shall make health care decisions for me in accordance with what my agent determines to be in my best interest. In determining my best interest, my agent shall consider my personal values to the extent known to my agent.

(1.5) AGENT'S POSTDEATH AUTHORITY: My agent is authorized to make anatomical gifts, authorize an autopsy, and direct disposition of my remains, except as I state here or in Part 3 of this form:

[*If you want to limit the authority of your agent to consent to an autopsy, make an anatomical gift, or direct the disposition of your remains, you must state the limitations here.*]

(1.6) NOMINATION OF CONSERVATOR: If a conservator of my person needs to be appointed for me by a court, I nominate the agent designated in this form. If that agent is not willing, able, or reasonably available to act as conservator, I nominate the alternate agents whom I have named, in the order designated.

PART 2
INSTRUCTIONS FOR HEALTH CARE

[*If you fill out this part of the form, you may strike any wording you do not want.*]

(2.1) END-OF-LIFE DECISIONS: I direct that my health care providers and others involved in my care provide,

withhold, or withdraw treatment in accordance with the choice I have marked below:

[ ] (a) Choice Not To Prolong Life

I do not want my life to be prolonged if (1) I have an incurable and irreversible condition that will result in my death within a relatively short time, (2) I become unconscious and, to a reasonable degree of medical certainty, I will not regain consciousness, or (3) the likely risks and burdens of treatment would outweigh the expected benefits, OR

[ ] (b) Choice To Prolong Life

I want my life to be prolonged as long as possible within the limits of generally accepted health care standards.

(2.2) RELIEF FROM PAIN: Except as I state in the following space, I direct that treatment for alleviation of pain or discomfort be provided at all times, even if it hastens my death:

_____

_____

_____

[*Add additional sheets if needed.*]

(2.3) OTHER WISHES: [*If you do not agree with any of the optional choices above and wish to write your own, or if you wish to add to the instructions you have given above, you may do so here.*] **I direct that:**

_____

_____

_____

[*Add additional sheets if needed.*]

PART 3
DONATION OF ORGANS AT DEATH (OPTIONAL)

(3.1) Upon my death [*mark applicable box*]**:**

[ ] (a) I give any needed organs, tissues, or parts, OR

[ ] (b) I give the following organs, tissues, or parts only:

_____

_____

_____

(c) My gift is for the following purposes [*strike any of the following you do not want*]**:**

(1) Transplant

(2) Therapy

(3) Research

(4) Education

PART 4
PRIMARY PHYSICIAN (OPTIONAL)

(4.1) I designate the following physician as my primary physician: _ _[*insert name, address, and telephone number of physician*]**_ _.**

OPTIONAL: If the physician I have designated above is not willing, able, or reasonably available to act as my primary physician, I designate the following physician as my primary physician: _ _[*insert name, address, and telephone number of alternate physician*]**_ _.**

PART 5

(5.1) EFFECT OF COPY: A copy of this form has the same effect as the original.

(5.2) SIGNATURE: Sign and date the form here:

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name and address*]_ _

(5.3) STATEMENT OF WITNESSES: I declare under penalty of perjury under the laws of California (1) that the individual who signed or acknowledged this advance health care directive is personally known to me, or that the individual's identity was proven to me by convincing evidence, (2) that the individual signed or acknowledged this advance directive in my presence, (3) that the individual appears to be of sound mind and under no duress, fraud, or undue influence, (4) that I am not a person appointed as agent by this advance directive, and (5) that I am not the individual's health care provider, an employee of the individual's health care provider, the operator of a community care facility, an employee of an operator of a community care facility, the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly.

First witness	**Second witness**
_ _[*Typed name*]_ _	_ _[*Typed name*]_ _
_ _[*Address*]_ _	_ _[*Address*]_ _
__[*Signature*]__	__[*Signature*]__
_ _[*Date*]_ _	_ _[*Date*]_ _

(5.4) ADDITIONAL STATEMENT OF WITNESSES: At least one of the above witnesses must also sign the following declaration:

I further declare under penalty of perjury under the laws of California that I am not related to the individual executing this advance health care directive by blood, marriage, or adoption, and to the best of my knowledge, I am not entitled to any part of the individual's estate upon his or her death under a will now existing or by operation of law.

__[*Signature of witness*]__ __[*Signature of witness*]__

PART 6
SPECIAL WITNESS REQUIREMENT

(6.1) The following statement is required only if you are a patient in a skilled nursing facility—a health care facility that provides the following basic services: skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis. The patient advocate or ombudsman must sign the following statement:

STATEMENT OF PATIENT ADVOCATE OR OMBUDSMAN

I declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and that I am serving as a witness as required by Section 4675 of the Probate Code.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name and address*]_ _

Comment: This form may, but need not, be used to create an advance health care directive. An individual may complete or modify all or any part of the form. Prob C §4700. Some attorneys do not wish to use the entire statutory form. For example, some attorneys choose to use an abbreviated version of the statutory form for their clients. This version is posted on the California State Bar Trust & Estates Section website at http://www.calbar.org/epsection/index.htm (sample forms accessible for section members only).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/8 Advance Health Care Directives: Complete Forms and Related Documents/§8.4 B. Form: Advance Health Care Directive (California Medical Association)

§8.4 B. Form: Advance Health Care Directive (California Medical Association)



Advance Health Care Directive

Including Power of Attorney for Health Care Decisions
California Probate Code Sections 4600-4805

MY HEALTH CARE WISHES

This form lets you give instructions about your future health care.It also lets you name someone to make decisions for you if you can't make your own decisions.It's best if you fill out the whole form, but, as long as it is signed, dated and witnessed or notarized properly, you may choose only to appoint an agent (section 1) or provide health care instructions (section 5). If there is anything in this form you do not understand, read the booklet that comes with this form and the italicized instructions on the form, or ask your physician, other health care professional or an attorney for help. You may also review additional information and instructions concerning advance health care directives on the California Medical Association's website, www.cmanet.org. Internet access is available at your local public library.

SAMPLE

1. APPOINTMENT OF HEALTH CARE AGENT

☐ **Option A.** I, _____, wish to appoint a health care agent.

(Print your full name and date of birth)

Fill in below the name and contact information of the person(s) (your agent and alternate agent(s)) you wish to make health care decisions for you if you are unable to make them for yourself. You may appoint alternate agents in case your first appointed agent is not willing, able or reasonably available to make these decisions when asked to do so.
Your agent may not be:

A. Your primary treating health care provider.

B. An operator of a community care or residential care facility where you receive care.

C. An employee of the health care institution or community or residential care facility where you receive care, unless your agent is related to you or is one of your co-workers.

If you choose to name an agent, you should discuss your wishes with that person and give that person a copy of this form. You should make sure that this person understands your wishes and this responsibility and is willing to accept it.

OR

☐ **Option B.** I, _____, do not wish to appoint an agent at this time.

(Print your full name and date of birth)

If you choose not to name an agent, initial the box above, print your name on the line in the Option B above, draw a line through the next page (page 2), then continue to Section 3.

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Print

APPOINTMENT OF HEALTH CARE AGENT (continued from page 1)

I hereby appoint as my agent to make health care decisions for me:

Name (agent's name):_____

Address:_____ City:_____ State:_____ Zip:_____

Home Phone: (_____)_____ Work Phone: (_____)_____

Cell phone/pager: (_____)_____ Fax: (_____)_____ E-mail:_____

I understand this appointment will continue unless I revoke it as explained in Section 3.

If I revoke my agent's authority or if my agent is not reasonably available, able or willing to make health care decisions for me, I appoint the following person(s) to do so, listed in the order they should be asked:

OPTIONAL: 1st alternate agent:

Name: _____ E-mail: _____

Address:_____ City:_____ State:_____ Zip:_____

Home Phone: (_____)_____ Work Phone: (_____)_____

Cell phone/Pager: (_____)_____ Fax: (_____)_____

OPTIONAL: 2nd alternate agent:

Name: _____ E-mail: _____

Address:_____ City:_____ State:_____ Zip:_____

Home Phone: (_____)_____ Work Phone: (_____)_____

Cell phone/Pager: (_____)_____ Fax: (_____)_____

SAMPLE

Print

2. AUTHORITY OF AGENT

Your agent must make health care decisions that are consistent with the instructions in this document and your known desires. **It is important that you discuss your health care desires with the person(s) you appoint as your health care agent, and with your doctor(s).** If your wishes are not known, your agent must make health care decisions that your agent believes to be in your best interest, considering your personal values to the extent they are known.

If my primary physician finds that I cannot make my own health care decisions, I grant my agent full power and authority to make those decisions for me, subject to any health care instructions set forth below. My agent will have the right to:

A. Consent, refuse consent, or withdraw consent to any medical care or services, such as tests, drugs, surgery, or consultations for any physical or mental condition. This includes the provision, withholding or withdrawal of artificial nutrition and hydration (feeding by tube or vein) and all other forms of health care, including cardiopulmonary resuscitation (CPR).
B. Choose or reject my physician, other health care professionals or health care facilities.
C. Receive and consent to the release of medical information.
D. Donate organs or tissues, authorize an autopsy and dispose of my body, unless I have said something different in a contract with a funeral home, in my will, or by some other written method.

I understand that, by law, my agent may not consent to committing me to or placing me in a mental health treatment facility, or to convulsive treatment, psychosurgery, sterilization or abortion.

OPTIONAL: I want my agent's authority to make health care decisions for me to start now, **even though I am still able to make them for myself.** I understand and authorize this statement as proved by my

signature_____

3. PRIOR DIRECTIVES REVOKED

I revoke any prior Power of Attorney for Health Care or Natural Death Act Declaration.

You may revoke any part of or this entire Advance Health Care Directive at any time. To revoke the appointment of an agent, you must inform your treating health care provider personally or in writing. Completing a new California Medical Association Advance Health Care Directive will revoke all previous directives. If you revoke a prior directive, notify every person, physician, hospital, clinic, or care facility that has a copy of your prior directive and give them a copy of your new directive, if you execute one.

4. COPIES

My agent and others may use copies of this document as though they were originals.

Your agent may need this document immediately in case of an emergency. You should keep the completed original and give copies of the completed original to (1) your agent and alternate agents, (2) your physician(s), (3) members of your family and others who might be called in the event of a medical emergency, and (4) any hospital or other health facility where you receive treatment. Instruct your agent(s), family, and friends to provide a copy of your directive to your physician(s) or emergency medical personnel on request.

SAMPLE

Print

5. HEALTH CARE INSTRUCTIONS

You may, but are not required to, state your desires about the goals and types of medical care you do or do not want, including your desires concerning life support if you are seriously ill. If your wishes are not known, your agent must make health care decisions for you that your agent believes to be in your best interest, considering your personal values. **If you do not wish to provide specific, written health care instructions, draw a line through this Section.**

The following are statements about the use of life-support treatments. Life-support or life-sustaining treatments are any medical procedures, devices or medications used to keep you alive. Life-support treatments may include: medical devices put in you to help you breathe; food and fluid supplied artificially by medical device (feeding tube); cardiopulmonary resuscitation (CPR); major surgery; blood transfusions; kidney dialysis; and antibiotics.

Sign either of the following general statements about life-support treatments if one accurately reflects your desires. If you wish to modify or add to either statement or to write your own statement instead, you may do so in the space provided or on a separate sheet(s) of paper which you must date and sign and attach to this form.

OPTIONAL: The statement I have signed below is to apply if I am suffering from a terminal condition from which death is expected in a matter of months, or if I am suffering from an irreversible condition that renders me unable to make decisions for myself, and life-support treatments are needed to keep me alive.

A. I request that all treatments other than those needed to keep me comfortable be discontinued or withheld and my physician(s) allows me to die as gently as possible. I understand and authorize this statement as proved by my

signature _____

OR

B. I want my life to be prolonged as long as possible within the limits of generally accepted health care standards. I understand and authorize this statement as proved by my

signature _____

OPTIONAL: Other or additional statements of medical treatment desires and limitations:_____

_____

_____

For additional Advance Health Care Directive options, go to the California Medical Association's website at **www.cmanet.org**

OPTIONAL: I have added _____ page(s) of specific health care instructions to this directive, each of which is signed and dated on the same day I signed this directive.

SAMPLE

Print

6. ORGAN AND TISSUE DONATION

I wish to be an organ donor. I understand and authorize this statement as proved by my

signature_____

I have indicated this on ☐ my driver's license and/or ☐ optional section below.

If you do not wish to be an organ donor, please check this box: ☐

Organ and tissue donation represent one of the greatest gifts that an individual can make. **A clear statement of your intent, such as the information that follows, will help to make sure that your intentions regarding organ and tissue donations are honored.** Be sure to communicate these intentions to your family members, loved ones, and physician(s).

For more information on organ and tissue donation in Northern California, contact the California Transplant Donor Network at **www.ctdn.org** or telephone 888-570-9400; in Central California, contact One Legacy, Los Angeles, CA, at **www.onelegacy.org** or telephone (800) 786-4077; in Eastern California, contact Golden State Donor Services, Sacramento, CA, at **www.gsds.org** or telephone (916) 567-1600; in Southern California, contact Lifeshare, Southern California, San Diego, CA, at **www.lifesharing.org** or telephone (619) 521-1983.

OPTIONAL: Other or additional statements of organ and tissue donation desires and limitations.

I, _____, make this anatomical gift to take effect upon my death:

I give

- ☐ my body
- ☐ any part (e.g. organ, eye or tissue)
- ☐ only the following parts: _____

to

- ☐ a hospital, accredited medical school, dental school,college, university, or organ procurement organization for research and education
- ☐ an eye bank or tissue bank
- ☐ the following individual who will be the recipient of my donation _____

for

- ☐ transplantation or therapy
- ☐ medical education
- ☐ medical research
- ☐ all of the above

I understand and authorize this statement as proved by my

signature_____

SAMPLE

Print

7. DATE AND SIGNATURE OF PRINCIPAL

I sign my name to and acknowledge this Advance Health Care Directive:

_____ _____ _____

(signature of principal) (date of birth) (date of signing)

8. STATEMENT OF WITNESSES

This Advance Health Care Directive will not be valid unless it is either (1) signed by two qualified adult witnesses who are present when you sign or acknowledge your signature or (2) acknowledged before a notary public in California. If you use witnesses rather than a notary public, the law **prohibits using the following as witnesses:** (1) the persons you have appointed as your agent or alternate agent(s); (2) your health care provider or an employee of your health care provider; or (3) an operator or employee of an operator of a community care facility or residential care facility for the elderly. Additionally, at least one of the witnesses cannot be related to you by blood, marriage or adoption, or be named in your will, or by operation of law be entitled to any portion of your estate upon your death.

Special Rules for Skilled Nursing Facility Residents

If you are a patient in a skilled nursing facility, you must have a patient advocate or ombudsman sign as a witness and sign the Statement of Patient Advocate or Ombudsman. (See Following Pages) You must also have a second qualified witness sign below or have this document acknowledged before a notary public.

FOR SKILLED NURSING FACILITIES: STATEMENT OF PATIENT ADVOCATE OR OMBUDSMAN

If you are a patient in a skilled nursing facility, a patient advocate or ombudsman must sign the Statement of Witnesses (See Following Pages), and must also sign the following declaration.

I further declare under penalty of perjury under these laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and am serving as a witness as required by Probate Code 4675.

Name/Title Printed _____ Signature _____

Date _____ Address _____

SAMPLE

Print

STATEMENT OF WITNESSES (continued)

I declare under penalty of perjury under the laws of California (1) that the individual who signed or acknowledged this Advance Health Care Directive is personally known to me, or that the individual's identity was proven to me by convincing evidence (*see next page), (2) that the individual signed or acknowledged this Advance Health Care Directive in my presence, (3) that the individual appears to be of sound mind and under no duress, fraud, or undue influence, (4) that I am not a person appointed as agent by this Advance Health Care Directive, and (5) I am not the individual's health care provider nor an employee of that health care provider, nor an operator or employee of an operator of a community care facility or a residential care facility for the elderly.

FIRST WITNESS:

_____ _____ _____

(date) (name printed) (signature)

Residence Address: _____

SECOND WITNESS:

_____ _____ _____

(date) (name printed) (signature)

Residence Address: _____

AT LEAST ONE OF THE ABOVE WITNESSES MUST ALSO SIGN THE FOLLOWING DECLARATION:

I further declare under penalty of perjury under the laws of California that I am not related to the individual executing this Advance Health Care Directive by blood, marriage, or adoption, and, to the best of my knowledge I am not entitled to any part of the individual's estate upon his or her death under a will now existing or by operation of law.

Signature: _____ Date: _____

SAMPLE

Print

9. CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

Acknowledgment before a notary public is not required if two qualified witnesses have signed on page 7. If you are a patient in a skilled nursing facility, you must have a patient advocate or ombudsman sign the Statement of Witnesses on page 6 and the Statement of Patient Advocate or Ombudsman above, even if you also have this form notarized.

State of California)

County of_____)

On _____ before me, (here insert name and title of the officer), personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their aurthouized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)

Additional forms can be purchased from: CMA Publications, 1201 J Street, Suite 375, Sacramento, CA 95814-2905
Phone: 1-800-882-1262 • Fax: 916-551-2035 • Internet: www.cmanet.org

SAMPLE

***EVIDENCE OF IDENTITY:** The following forms of identification are satisfactory evidence of identity: a California driver's license or identification card or U.S. passport that is current or has been issued within five years, or any of the following if the document is current or has been issued within 5 years, contains a photograph and description of the person named on it, is signed by the person, and bears a serial or other identifying number: a foreign passport that has been stamped by the U.S. Immigration and Naturalization Service; a driver's license issued by another state or by an authorized Canadian or Mexican agency; an identification card issued by another state or by any branch of the U.S. armed forces, or for an inmate in custody, an inmate identification card issued by the Department of Corrections. If the principal is a patient in a skilled nursing facility, a patient advocate or ombudsman may rely on the representations of family members or the administrator or staff of the facility as convincing evidence of identity if the patient advocate or ombudsman believes that the representations provide a reasonable basis for determining the identity of the principal.

Comment: This form has no specific provision in which the principal may nominate a conservator of the person. If

the principal wishes to make different or additional statements about health care decisions, an attachment should be added as provided in the form. This attachment must be signed and dated on the same day the form is signed. Attorneys will also wish to instruct their clients to read the CMA form carefully because several options direct that a line be drawn through the option if it has not been chosen. This is a change from the previous CMA form.

This form is copyrighted 2000-2008 by the California Medical Association and is published with permission of and by arrangement with the California Medical Association. The CMA Advance Health Care Directive Kit includes the "Introduction to Advance Health Care Directives," the form reprinted above, and wallet cards (see §8.5). Copies may be purchased from California Medical Association Publications, P.O. Box 7690, San Francisco, CA 94120-7690, (800) 882-1262, http://www.cmanet.org. Prepayment by check or credit card is required. The kit, including the form, is available in English and Spanish.

NOTE: The California Legislature amended CC §1189, effective January 1, 2008, to alter the required wording of the certificate of acknowledgment form. The CMA form has been updated to the new acknowledgment form. For practitioners still using pre-January 1, 2008, forms, it is important to use a separate updated notary form and attach it to the CMA form. For a copy of the revised acknowledgment notary form, see §8.20.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/8 Advance Health Care Directives: Complete Forms and Related Documents/§8.5 C. Form: California Medical Association Wallet Identification Card; Instructions

§8.5 C. Form: California Medical Association Wallet Identification Card; Instructions



ADVANCE HEALTH CARE DIRECTIVE WALLET IDENTIFICATION CARD

These wallet cards are provided for the purpose of alerting emergency medical personnel that you have an Advance Health Care Directive in the event that you require medical treatment and are unable to talk. You should complete the cards by filling in the names and telephone numbers of your health care agent(s) or others who have a copy of your Advance Directive. Carry one of these cards with you at all times. Give the other to your spouse or other person who is likely to be contacted in the event of an emergency.

INSTRUCTIONS

1. On the top half of each card, print your full name and date of birth in the space provided.

2. On the lower half of each card, print the names and telephone numbers of the person(s) you have appointed as your health care agent and alternate agent(s) in the spaces provided. (Make sure the names and telephone numbers are the same as those listed in your Advance Health Care Directive form. Where the person has more than two phone numbers, use the numbers where the person is most likely to be reached in an emergency.) Space is also provided on the card to write in the name and telephone number(s) of a person who has a copy of your Advance Health Care Directive form. If you have not named alternate agents (or if you have not named an agent at all), you should list any other person who has a copy of your completed form. If more than three people have a copy, list the people who are most likely to be available by phone in the event of an emergency.

3. Carefully cut each card along the perforated lines, fold it in half, print sides showing, and place it in a conspicuous place in your wallet or billfold. Be sure to update the information on the card if there is a change in the telephone number(s) of any of the people you have listed on it, or if you subsequently complete a new Advance Health Care Directive form in which different individuals are designated to act as your agent and/or alternate agent(s).

(rev. 7/06)

IMPORTANT NOTICE TO
EMERGENCY MEDICAL PERSONNEL

I, _____
(name) (date of birth)
have executed an Advance Health Care Directive.
If I am unable to make my own health care decisions, my designated agent has the legal authority to make those decisions on my behalf, including decisions concerning life-sustaining treatment. In such an event, one of the persons listed on the reverse of this card should be contacted immediately, in the order listed.

❑ I wish to be an organ donor
❑ I have a pre-hospital Do Not Recuscitate (DNR) form

© California Medical Association 2000-2006

FOLD HERE

1. Agent's Name: _____
   Home: (____) _____
   Work/Cell/Pager:(____) _____
2. Alt. Agent's/Friend's Name: _____
   Home: (____) _____
   Work/Cell/Pager:(____) _____
3. Alt. Agent's/Friend's Name: _____
   Home: (____) _____
   Work/Cell/Pager:(____) _____

IMPORTANT NOTICE TO
EMERGENCY MEDICAL PERSONNEL

I, _____
(name) (date of birth)
have executed an Advance Health Care Directive.
If I am unable to make my own health care decisions, my designated agent has the legal authority to make those decisions on my behalf, including decisions concerning life-sustaining treatment. In such an event, one of the persons listed on the reverse of this card should be contacted immediately, in the order listed.

❑ I wish to be an organ donor
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© California Medical Association 2000-2006

FOLD HERE

1. Agent's Name: _____
   Home: (____) _____
   Work/Cell/Pager:(____) _____
2. Alt. Agent's/Friend's Name: _____
   Home: (____) _____
   Work/Cell/Pager:(____) _____
3. Alt. Agent's/Friend's Name: _____
   Home: (____) _____
   Work/Cell/Pager:(____) _____

Comment: A wallet card provides clients with a practical means of notifying emergency medical personnel of the existence of a power of attorney for health care. The California Medical Association has identification cards available for

purchase. Some attorneys have chosen to laminate this card for their clients.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/8 Advance Health Care Directives: Complete Forms and Related Documents/§8.6 D. Form: Advance Health Care Directive (California Hospital Association)

§8.6 D. Form: Advance Health Care Directive (California Hospital Association)



FORM 3-1

ADVANCE HEALTH CARE DIRECTIVE

INSTRUCTIONS

Part 1 of this form lets you name another individual as agent to make health care decisions for you if you become incapable of making your own decisions, or if you want someone else to make those decisions for you now even though you are still capable. You may also name an alternate agent to act for you if your first choice is not willing, able, or reasonably available to make decisions for you.

Your agent may not be an operator or employee of a community care facility or a residential care facility where you are receiving care, or your supervising health care provider or an employee of the health care institution where you are receiving care, unless your agent is related to you or is a coworker.

Unless you state otherwise in this form, your agent will have the right to:

1. Consent or refuse consent to any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a physical or mental condition.
2. Select or discharge health care providers and institutions.
3. Approve or disapprove diagnostic tests, surgical procedures, and programs of medication.
4. Direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation.
5. Donate organs or tissues, authorize an autopsy, and direct disposition of remains.

However, your agent will not be able to commit you to a mental health facility, or consent to convulsive treatment, psychosurgery, sterilization or abortion for you.

Part 2 of this form lets you give specific instructions about any aspect of your health care, whether or not you appoint an agent. Choices are provided for you to express your wishes regarding the provision, withholding, or withdrawal of treatment to keep you alive, as well as the provision of pain relief. You also can add to the choices you have made or write down any additional wishes. If you are satisfied to allow your agent to determine what is best for you in making end-of-life decisions, you need not fill out Part 2 of this form.

Give a copy of the signed and completed form to your physician, to any other health care providers you may have, to any health care institution at which you are receiving care, and to any health care agents you have named. You should talk to the person you have named as agent to make sure that he or she understands your wishes and is willing to take the responsibility.

You have the right to revoke this advance health care directive or replace this form at any time.

PART 1 – POWER OF ATTORNEY FOR HEALTH CARE

DESIGNATION OF AGENT: I designate the following individual as my agent to make health care decisions for me:

Name of individual you choose as agent: _____

Address: _____

_____

Telephone: _____
(home phone) *(work phone)* *(cell/pager)*

OPTIONAL: If I revoke my agent's authority or if my agent is not willing, able, or reasonably available to make a health care decision for me, I designate as my first alternate agent:

Name of individual you choose as first alternate agent: _____

Address: _____

_____

Telephone: _____
(home phone) *(work phone)* *(cell/pager)*

OPTIONAL: If I revoke the authority of my agent and first alternate agent or if neither is willing, able, or reasonably available to make a health care decision for me, I designate as my second alternate agent:

Name of individual you choose as second alternate agent: _____

Address: _____

_____

Telephone: _____
(home phone) *(work phone)* *(cell/pager)*

AGENT'S AUTHORITY: My agent is authorized to make all health care decisions for me, including decisions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care to keep me alive, except as I state here:

_____

_____

_____

_____

(Add additional sheets if needed.)

WHEN AGENT'S AUTHORITY BECOMES EFFECTIVE: My agent's authority becomes effective when my primary physician determines that I am unable to make my own health care decisions. _____
(Initial here)

OR

My agent's authority to make health care decisions for me takes effect immediately. _____
(Initial here)

AGENT'S OBLIGATION: My agent shall make health care decisions for me in accordance with this power of attorney for health care, any instructions I give in Part 2 of this form, and my other wishes to the extent known to my agent. To the extent my wishes are unknown, my agent shall make health care decisions for me in accordance with what my agent determines to be in my best interest. In determining my best interest, my agent shall consider my personal values to the extent known to my agent.

AGENT'S POSTDEATH AUTHORITY: My agent is authorized to make anatomical gifts, authorize an autopsy and direct disposition of my remains, except as I state here or in Part 3 of this form:

_____

_____

_____

(Add additional sheets if needed.)

NOMINATION OF CONSERVATOR: If a conservator of my person needs to be appointed for me by a court, I nominate the agent designated in this form. If that agent is not willing, able or reasonably available to act as conservator, I nominate the alternate agents whom I have named, in the order designated.

PART 2 – INSTRUCTIONS FOR HEALTH CARE

If you fill out this part of the form, you may strike any wording you do not want.

END-OF-LIFE DECISIONS: I direct that my health care providers and others involved in my care provide, withhold, or withdraw treatment in accordance with the choice I have marked below:

Choice *Not To* Prolong Life:

_____ *(Initial here)* I do not want my life to be prolonged if (1) I have an incurable and irreversible condition that will result in my death within a relatively short time, (2) I become unconscious and, to a reasonable degree of medical certainty, I will not regain consciousness, or (3) the likely risks and burdens of treatment would outweigh the expected benefits,

OR

Choice *To* Prolong Life:

_____ *(Initial here)* I want my life to be prolonged as long as possible within the limits of generally accepted health care standards.

RELIEF FROM PAIN: Except as I state in the following space, I direct that treatment for alleviation of pain or discomfort be provided at all times, even if it hastens my death:

_____

_____

(Add additional sheets if needed.)

OTHER WISHES: (If you do not agree with any of the optional choices above and wish to write your own, or if you wish to add to the instructions you have given above, you may do so here.) I direct that:

_____

_____

_____

_____

(Add additional sheets if needed.)

PART 3 – DONATION OF ORGANS AT DEATH (OPTIONAL)

I. Upon my death:

I give any needed organs, tissues, or parts _____
(Initial here)

OR

I give the following organs, tissues, or parts only: _____ _____
(Initial here)

II. If you wish to donate organs, tissues, or parts, you must complete II and III.

My gift is for the following purposes:

Transplant _____ *(Initial here)* Research _____ *(Initial here)*

Therapy _____ *(Initial here)* Education _____ *(Initial here)*

III. I understand that tissue banks work with both nonprofit and for-profit tissue processors and distributors. It is possible that donated skin may be used for cosmetic or reconstructive surgery purposes. It is possible that donated tissue may be used for transplants outside of the United States.

1. My donated skin may be used for cosmetic surgery purposes.

   Yes _____ *(Initial here)* No _____ *(Initial here)*

2. My donated tissue may be used for applications outside of the United States.

   Yes _____ *(Initial here)* No _____ *(Initial here)*

3. My donated tissue may be used by for-profit tissue processors and distributors.

Yes_____ No _____
(Initial here) *(Initial here)*

(Health and Safety Code Section 7158.3)

PART 4 – PRIMARY PHYSICIAN (OPTIONAL)

I designate the following physician as my primary physician:

Name of Physician: _____ Telephone: _____

Address: _____

_____

OPTIONAL: If the physician I have designated above is not willing, able, or reasonably available to act as my primary physician, I designate the following physician as my primary physician:

Name of Physician: _____ Telephone: _____

Address: _____

_____

PART 5 – SIGNATURE

The form must be signed by you and by two qualified witnesses, or acknowledged before a notary public.

***SIGNATURE*:** Sign and date the form here:

Date: _____

Name: _____ _____
(sign your name) *(print your name)*

Address: _____

_____

STATEMENT OF WITNESSES: I declare under penalty of perjury under the laws of California (1) that the individual who signed or acknowledged this advance health care directive is personally known to me, or that the individual's identity was proven to me by convincing evidence (2) that the individual signed or acknowledged this advance directive in my presence, 3) that the individual appears to be of sound mind and under no duress, fraud, or undue influence, (4) that I am not a person appointed as agent by this advance directive, and (5) that I am not the individual's health care provider, an employee of the individual's health care provider, the operator of a community care facility, an employee of an operator of a community care facility,

the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly.

FIRST WITNESS

Name: _____ Telephone: _____

Address: _____

_____

Signature of Witness: _____ Date: _____

SECOND WITNESS

Name: _____ Telephone: _____

Address: _____

_____

Signature of Witness: _____ Date: _____

ADDITIONAL STATEMENT OF WITNESSES: At least one of the above witnesses must also sign the following declaration:

I further declare under penalty of perjury under the laws of California that I am not related to the individual executing this advance health care directive by blood, marriage, or adoption, and to the best of my knowledge, I am not entitled to any part of the individual's estate upon his or her death under a will now existing or by operation of law.

Signature of Witness: _____

YOU MAY USE THIS CERTIFICATE OF ACKNOWLEDGMENT BEFORE A NOTARY PUBLIC INSTEAD OF THE STATEMENT OF WITNESSES.

State of California)
County of _____)
)

On *(date)* _____ before me, *(here insert name and title of the officer)* _____
_____

personally appeared *(name(s) of signer(s))* _____,

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal. [Civil Code Section 1189]

Signature of Notary: _____ (Seal)

PART 6—SPECIAL WITNESS REQUIREMENT

If you are a patient in a skilled nursing facility, the patient advocate or ombudsman must sign the following statement:

STATEMENT OF PATIENT ADVOCATE OR OMBUDSMAN

I declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and that I am serving as a witness as required by Section 4675 of the Probate Code.

Date: _____

Name: _____ _____
(sign your name) *(print your name)*

Address: _____
_____

Comment: This form is a free download either as a pdf or Word document (also available in Spanish) from the

website at http://www.calhealth.org/public/pubs/frmspstrs.html.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/8 Advance Health Care Directives: Complete Forms and Related Documents/§8.7 E. Form: Easily Understood Advance Health Care Directive

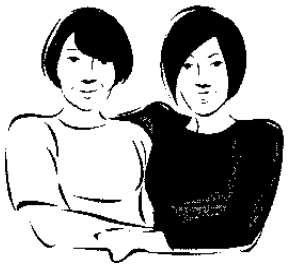
§8.7 E. Form: Easily Understood Advance Health Care Directive



California Advance Health Care Directive

This form lets you have a say about how you want to be treated if you get very sick.

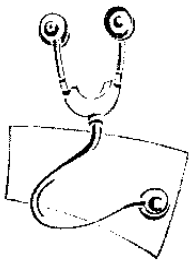




- **This form has 3 parts. It lets you:**

Part 1: Choose a health care agent.

A health care agent is a person who can make medical decisions for you if you are too sick to make them yourself.



Part 2: Make your own health care choices.

This form lets you choose the kind of health care you want.

This way, those who care for you will not have to guess what you want if you are too sick to tell them yourself.



Part 3: Sign the form.

It must be signed before it can be used.

You can fill out Part 1, Part 2, or both.
Fill out only the parts you want.
Always sign the form in Part 3.

Go to the next page

If you only want a health care agent **go to Part 1 on page 3.**

If you only want to make your own health care choices **go to Part 2 on page 6.**

If you want both **then fill out Part 1 and Part 2.**

Always sign the form in Part 3 on page 9.

- **What do I do with the form after I fill it out?**

Share the form with those who care for you:

- doctors
- nurses
- social workers
- family
- friends



- **What if I change my mind?**

- Change the form.
- Tell those that care for you about your changes.



- **What if I have questions about the form?**

- Bring it to your doctors, nurses, social workers, family or friends to answer your questions.



- **What if I want to make health care choices that are not on this form?**

- Write your choices on a piece of paper.
- Keep the paper with this form.
- Share your choices with those who care for you.

Print

PART 1 Choose your health care agent

The person who can make medical decisions for you if you are too sick to make them yourself.

Whom should I choose to be my health care agent?

A family member or friend who:



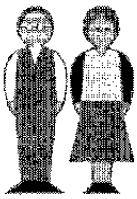


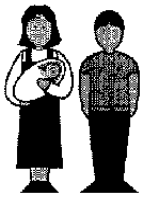
- is at least 18 years old
- knows you well
- can be there for you when you need them
- you trust to do what is best for you
- can tell your doctors about the decisions you made on this form

Your agent **cannot** be your doctor or someone who works at your hospital or clinic, unless they are a family member.

What will happen if I do not choose a health care agent?

If you are too sick to make your own decisions, your doctors will ask your closest family members to make decisions for you.

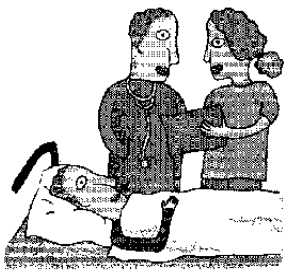




If you want your agent to be someone other than family, you must write his or her name on this form.

What kind of decisions can my health care agent make?

Agree to, say no to, change, stop or choose:



- doctors, nurses, social workers
- hospitals or clinics
- medications or tests
- what happens to your body and organs after you die

Go to the next page

Other decisions your agent can make:

Life support treatments - medical care to try to help you live longer

- **CPR or cardiopulmonary resuscitation**

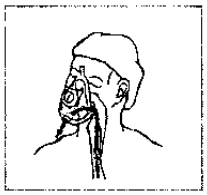
  cardio = heart pulmonary = lungs resuscitation = to bring back



This may involve:

- pressing hard on your chest to keep your blood pumping
- electrical shocks to jump start your heart
- medicines in your veins

- **Breathing machine or ventilator**



The machine pumps air into your lungs and breathes for you.

You are not able to talk when you are on the machine.

- **Dialysis**

  A machine that cleans your blood if your kidneys stop working.

- **Feeding Tube**

  A tube used to feed you if you cannot swallow. The tube is placed down your throat into your stomach. It can also be placed by surgery.

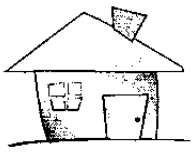


- **Blood transfusions**

  To put blood in your veins.

- **Surgery**
- **Medicines**

End of life care - if you might die soon your health care agent can:



- call in a spiritual leader
- decide if you die at home or in the hospital



Show your health care agent this form.

Tell your agent what kind of medical care you want.

Go to the next page

Your Health Care Agent



I want this person to make my medical decisions.

first name | last name

street address | city | state | zip code

( ) – | ( ) –

home phone number | work phone number

If the first person cannot do it, then I want this person to make my medical decisions.

first name | last name

street address | city | state | zip code

( ) – | ( ) –

home phone number | work phone number

Put an X next to the sentence you agree with.

- ❑ My health care agent can make decisions for me **now.**
- ❑ My health care agent will make decisions for me **only** after I cannot make my own decisions.

To make your own health care choices go to part 2 on the next page.

To sign this form go to part 3 on page 9.

PART 2 Make your own health care choices

Write down your choices so those who care for you will not have to guess.

- **Think about what makes your life worth living.**
  Put an X next to all the sentences you most agree with.

  ❑ **My life is only worth living if I can:**

  - ○ talk to family or friends
  - ○ wake up from a coma
  - ○ feed, bathe, or take care of myself
  - ○ be free from pain
  - ○ live without being hooked up to machines
  - ○ I am not sure

  ❑ **My life is always worth living no matter how sick I am**

- **If I am dying, it is important for me to be:**

  ❑ at home ❑ in the hospital ❑ I am not sure

- **Is religion or spirituality important to you?**

  ❑ yes ❑ no

- **What should your doctors know about your religion or spirituality?**

  _____

  _____

If you are sick, your doctors and nurses will always try to keep you comfortable and free from pain.

Go to the next page

Part 2: Make your own health care choices

Life support treatments are used to try to keep you alive. These can be CPR, a breathing machine, feeding tubes, dialysis, blood transfusions, or medicine.

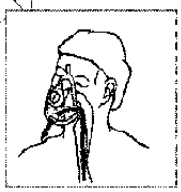
Put an X next to the sentences you most agree with.
Please read this whole page before you make your choices.

If I am so sick that I may die soon:

❑ Try all life support treatments that my doctors think might help.

If the treatments **do not work** and there is little hope of getting better, **I want to stay** on life support machines.





❑ Try all life support treatments that my doctors think might help.

If the treatments **do not work** and there is little hope of getting better, **I do not want to stay** on life support machines.

❑ Try all life support treatments that my doctors think might help **but not** these treatments. Mark what you do not want.

- ❍ CPR
- ❍ feeding tube
- ❍ dialysis
- ❍ blood transfusion
- ❍ breathing machine
- ❍ medicine
- ❍ other treatments _____

❑ I **do not want any** life support treatments.

❑ I want my **health care agent** to decide for me.

❑ I am not sure.

Go to the next page

Print

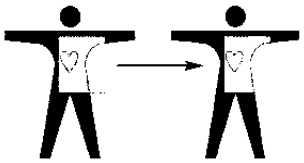
Part 2: Make your own health care choices

Your doctors may ask about organ donation and autopsy after you die. Please tell us your wishes.

Put an X next to the sentences you most agree with

- **Donating (giving) your organs can help save lives.**

  ❑ I **want** to donate my organs.

  Which organs do you want to donate?

  ○ any organs
  ○ only_____

  ❑ I **do not** want to donate my organs.

  ❑ I want my **health care agent** to decide.

  ❑ I am not sure.

- **An autopsy can be done after death to find out why someone died. It is done by surgery. It can take a few days.**

  ❑ I **want** an autopsy.

  ❑ I **do not** want an autopsy.

  ❑ I may want an autopsy if there are questions about my death.

  ❑ I want my **health care agent** to decide.

  ❑ I am not sure.

- **What should your doctors know about how you want your body to be treated after you die?**

Go to Part 3 on the next page to sign this form

Print

PART 3 Sign the form

- **Before this form can be used, you must:**



  - sign this form
  - have two witnesses sign the form

  If you do not have witnesses, you need a notary public.
  A notary public's job is to make sure it is you signing the form.

- **Sign your name and write the date.**

_____ / / _____

sign your name date

_____

print your first name print your last name

_____

address city state zip code

- **Your witnesses must:**



  - be over 18 years of age
  - know you
  - see you sign this form

- **Your witnesses cannot:**

  - be your health care agent
  - be your health care provider
  - work for your health care provider
  - work at the place that you live (if you live in a nursing home go to page 12)

- **Also, one witness cannot:**

  - be related to you in any way
  - benefit financially (get any money or property) after you die

Witnesses need to sign their names on the next page.

If you do not have witnesses, take this form to a notary public and have them sign on page 11.

Print

Part 3: Sign the form

Have your witnesses sign their names and write the date

By signing, I promise that _____, signed this form while I watched. They were thinking clearly and were not forced to sign it.

I also promise that:



- I know them or they could prove who they are
- I am 18 years or older
- I am not their health care agent
- I am not their health care provider
- I do not work for their health care provider
- I do not work where they live

<u>One</u> witness must also promise that:

- I am not related to them by blood, marriage, or adoption
- I will not benefit financially (get any money or property) after they die

Witness #1

_____ / ____ / _____

sign your name date

_____

print your first name print your last name

_____

address city state zip code

Witness #2

_____ / ____ / _____

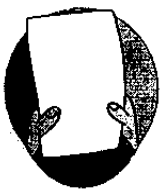
sign your name date

_____

print your first name print your last name

_____

address city state zip code



You are now done with this form.

Share this form with your doctors, nurses, social workers, friends, and your family.

Talk with them about your choices.



Print

NOTARY PUBLIC



- Take this form to a notary public **ONLY** if two witnesses have not signed this form.
- Bring photo I.D. (driver's license, passport, etc.)

CERTIFICATE OF ACKNOWLEDGEMENT OF NOTARY PUBLIC

State of California

County of _____

On _____ before me, _____, personally
Date — Here insert name and title of the officer

appeared _____
Name(s) of Signer(s)

_____,

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____
Signature of Notary Public

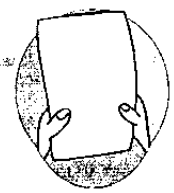
Description of Attached Document
Title or Type of document: _____
Date: _____ Number of pages: _____
Capacity(ies) Claimed by Signer(s)
Signer's Name: _____
☐ Individual
☐ Guardian or conservator
☐ Other _____

RIGHT THUMBPRINT OF SIGNER
Top of thumb here

(Notary Seal)

You are now done with this form.





Share this form with your doctors, nurses, social workers, friends, and your family.

Talk with them about your choices.



For California Nursing Home Residents ONLY

- **Give this form to your nursing home director only if you live in a nursing home.**
- **California law requires nursing home residents to have the nursing home ombudsman as a witness of advance directives.**

STATEMENT OF THE PATIENT ADVOCATE OR OMBUDSMAN

"I declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and that I am serving as a witness as required by Section 4675 of the Probate Code."

_____ / / _____

sign your name date

_____

print your first name print your last name

_____

address city state zip code

This advance directive is in compliance with the California Probate Code, Section 4671-4675. http://www.leginfo.ca.gov/calaw.html

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Designed by Rebecca Sudore, MD & Mahat Papartassee for the San Francisco Department of Public Health

Comment: This form (also available in Spanish, Chinese, and Vietnamese) may be downloaded from the website at

http://www.iha4health.org/index.cfm/MenuItemID/266.htm.

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§8.7A F. Psychiatric Advance Health Care Directive

Psychiatric AHCD's are used to document a person with capacity's specific instructions or preferences regarding future mental health treatment. Psychiatric AHCD can be used much like a typical AHCD in naming an agent to make decisions, agreeing to withhold or request medications, and agreeing or disagreeing with certain treatments. However, the psychiatric AHCD specifies those treatments, medications, facilities, and doctors specific to a mental health diagnosis. These documents will be extremely helpful for someone who has been diagnosed with mental illness such as schizophrenia or bi-polar disorder but while on medication has the capacity to execute an AHCD. For an excellent review of the use and response to frequently asked questions on the subject see http://www.disabilityrightsca.org/pubs/540701.htm. For further discussion on psychiatric AHCD on a national scale see http://www.nrc-pad.org.

For a full psychiatric AHCD form valid in California see http://www.disabilityrightsca.org/Pubs/508801.pdf. For a two-page sample of the full psychiatric AHCD see §8.7B.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/8 Advance Health Care Directives: Complete Forms and Related Documents/§8.7B G. Form: Psychiatric Advance Health Care Directive

§8.7B G. Form: Psychiatric Advance Health Care Directive



Advance Health Care Directive of _____

(Your name)

Instructions Included in My Directive

Put a check mark in the left-hand column for each section you have completed.

#	**PART I** **Appointment of an Agent for Healthcare**
1 ☐	Designation of Health Care Agent Designation of Alternate Health Care Agent
2 ☐	Authority Granted to My Agent
3 ☐	My choice as to a Court Appointed Conservator
#	**PART II(a)** **Statement of Individual Mental Health Care Instructions**
4 ☐	Who, In Addition to My Health Care Agent, Should Be Notified Immediately of My Admission To a Psychiatric Facility?
5 ☐	My Choice of Treatment Facility and Choices for Alternatives to Hospitalization If 24-Hour Care is Deemed Medically Necessary for My Safety and Well-being
6 ☐	My Primary Physician who is to Have Primary Responsibility for my Mental Health Care is:
7 ☐	My Choices about primary Physicians Who Will Treat Me if I Am Hospitalized and my Primary Physician is Unavailable
8 ☐	My Choices Regarding Methods for Avoiding Emergency Situations
9 ☐	My Choices Regarding Emergency Interventions
9(a) ☐	My Choices Regarding **Routine** Medications for Psychiatric Treatment
9(b) ☐	My Choices Regarding **Emergency** Psychiatric Medication
10 ☐	My Choices Regarding Electroconvulsive Therapy
11 ☐	The Following People Are to be Prohibited from Visiting Me
12 ☐	Other Instructions About Mental Health Care

Print

#	PART II(b) Individual Physical Health Care Instructions
13 ☐	My Primary Physician who is to Have Primary Responsibility for my Physical Health Care is:
14 ☐	Statement of Desires, Special Provisions and Limitations
15 ☐	My Choices Regarding Experimental Studies and Drug Trials
16 ☐	My Instructions Regarding Life Sustaining Treatment
17 ☐	My Choices Regarding Contribution of Anatomical Gift
18 ☐	My Instructions Regarding Autopsy
19 ☐	Choices Regarding Disposition of My Remains

Comment: This is only two pages of a 28-page form. Space did not permit a full copy of this form from being

included. For a full copy of the form see http://www.disabilityrightsca.org/Pubs/508801.pdf. This form also comes in Chinese, Korean, Spanish, and Vietnamese.

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§8.8 III. LAWYER-DRAFTED FORM

The attorney-drafted form is best used when there are health issues that require some form of custom drafting. A lawyer-drafted form may be questioned by an inexperienced worker at a hospital and may not be honored when it is needed most. This is the primary reason why many practitioners use the California Medical Association (CMA) form (see §8.4 for a copy of the form); it is recognized by nearly all health care practitioners as a legally binding document. However, even the CMA form can be modified or added to, so the following provisions could be of value to an attorney seeking to modify the CMA form.

For a complete attorney drafted AHCD see §8.33A.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/8 Advance Health Care Directives: Complete Forms and Related Documents/§8.9 A. Form: Designation of Agent and Successor Agents

§8.9 A. Form: Designation of Agent and Successor Agents

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.

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8.9-1 Designation of agent and successor agents

ADVANCE HEALTH CARE DIRECTIVE

1. DESIGNATION OF HEALTH CARE AGENT:

I, _ _[*full name*]_ _, of _ _[*address*]_ _, California, hereby designate and appoint _ _[*full name*]_ _, _ _[*address*]_ _, _ _[*telephone*]_ _, as my agent to make health care decisions authorized in this document.

2. DESIGNATION OF ALTERNATE AGENTS:

If the person I designated as my agent in paragraph 1 is unable or unwilling to act as my agent, or if I revoke that person's appointment as my agent, then I designate the following persons to serve as my agent, in the order listed below, to make health care decisions for me, as authorized in this document:

FIRST ALTERNATE AGENT: _____

ADDRESS: _____

TELEPHONE: _____

SECOND ALTERNATE AGENT: _____

ADDRESS: _____

TELEPHONE: _____

THIRD ALTERNATE AGENT: _____

ADDRESS: _____

TELEPHONE: _____

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/8 Advance Health Care Directives: Complete Forms and Related Documents/§8.10 B. Form: Nomination of Conservator of Person and Estate

§8.10 B. Form: Nomination of Conservator of Person and Estate

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.

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8.10-1 Nomination of conservator of person and estate

3. NOMINATION OF CONSERVATOR OF PERSON _ _[*AND ESTATE*]_ _:

A. If it becomes necessary to appoint a conservator of my person _ _[*and estate*]_ _, I nominate the following persons in the following order to act as the conservator of my person _ _[*and estate*]_ _:

NOMINEE: _____

ADDRESS: _____

TELEPHONE: _____

FIRST ALTERNATE NOMINEE: _____

ADDRESS: _____

TELEPHONE: _____

SECOND ALTERNATE NOMINEE: _____

ADDRESS: _____

TELEPHONE: _____

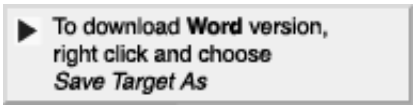
B. I grant to my conservator all the powers specified in the California Probate Code. My conservator shall serve in such capacity without bond, or if a bond is required, I request that a minimum bond be set. I revoke all prior conservatorship nominations.

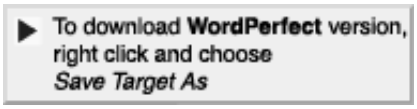
Comment: This clause complies with Prob C §1810, which gives the nominated individuals priority over all other individuals for appointment as conservator of the principal. See §7.47 for a discussion of agent's authority with a conservator of the person. If the nominated conservator of the person is not the same as the person nominated as conservator of the estate, the form should be modified to reflect both nominations. Alternatively, the nomination of conservator of the person and estate may be made in a separate document or in a durable power of attorney for financial management (DPOA) (see §§5.44-5.45). To avoid confusion, the nomination should be placed in only one document.

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§8.11 C. Form: General Statement of Agent's Authority

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.





8.11-1 General statement of agent's authority

4. GENERAL STATEMENT OF AUTHORITY GRANTED:

[*Add one of the following alternatives*]

[*Alternative 1: General authority*]

A. If I become incapable of making informed health care decisions, I grant my agent full power and authority to make health care decisions for me, to the same extent that I could make such decisions for myself if I had the capacity to do so, subject to the limitations set forth in this document.

[*Alternative 2: Broader authority*]

A. If I become incapable of making informed health care decisions, I hereby grant to my agent full power and authority to consent, refuse consent, or withdraw consent to any type of health care procedure (including any procedure to maintain, diagnose, or treat any physical or mental condition), or to make any other health care decision, to the same extent that I could if I had capacity to do so, subject to the terms of this instrument. My agent shall exercise this power and authority in accordance with my expressed desires, known to my agent, whether contained in this document or not. Before acting, my agent shall attempt to communicate with me regarding my desires unless such attempt would be futile. If my desires are unknown, then my agent should decide for me, having my best interests in mind. My agent is further authorized:

To authorize, or refuse to authorize, any health care decision or medical treatment if I shall be physically or mentally incapacitated or otherwise unable to make such authorization for myself, including authorization for emergency care, hospitalization, surgery, therapy, and any other kind of treatment or procedure that, in my agent's sole discretion, my agent thinks necessary for my benefit and well-being.

To consult with and advise any physicians, nurses, therapists, dentists, or any other medical or health care institutions on my behalf, as such consultations relate to my health and welfare. All such personnel and institutions are specifically requested to abide by all decisions and instructions of my agent and to release to my agent all information that my agent may request concerning my health and well-being.

To receive into my agent's sole possession all items of personal property and effects that may be recovered from or about my person by any hospital, police agency, or any other person at the time of my illness, disability, or death; this to specifically include my remains, if applicable.

[*Continue*]

B. "Health care decisions" includes a decision regarding the selection and discharge of health care providers and institutions, approval or disapproval of diagnostic tests, surgical procedures, and programs of medication; the term also includes directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation. It means consent, refusal of consent, or withdrawal of consent for any care, treatment, service, or procedure to affect my physical or mental condition, as well as consent to release of medical information.

C. I trust my agent, who knows and understands my desires and in whose judgment I have absolute faith, to exercise discretion in a manner that would be satisfactory to me if I had the capacity to give or refuse to give consent.

D. Before acting, my agent shall attempt to communicate with me regarding my desires unless such attempt would be futile. If I am unreachable by such communication, and my desires regarding a particular health care decision are unknown, my agent should make the health care decision guided by the following: my personal values, any preferences that I have previously expressed, preferences stated herein, and information received from the attending physician(s) concerning my prognosis, all the while having my best interests in mind. In determining my best interests, my agent shall consider my personal values to the extent known to my agent.

Comment: The alternatives for paragraph A provide a range of authority granted to the agent to make health care decisions for the principal when the principal is unable to make informed health care decisions. Paragraph B combines the language in Prob C §§4615 and 4617 defining health care and health care decisions. If more specific or contrary directions are desired by the principal regarding artificially administered nutrition and hydration, counsel should modify this paragraph. See paragraph A for various alternatives. Paragraph C is used to evidence the trust the principal has in the agent. Paragraph D preserves the principal's autonomy in health care decisions to the greatest extent. It also states the legally required duties of the agent when acting on behalf of the principal.

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§8.12 D. Form: When Agent's Authority Becomes Effective

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.

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8.12-1 When agent's authority becomes effective

5. WHEN AGENT'S AUTHORITY BECOMES EFFECTIVE:

[*Add one of the following alternatives*]

[*Alternative 1: Primary physician's determination*]

A. My agent's authority shall become effective when my primary physician determines that I am unable to make my own health care decisions.

[*Alternative 2: Primary physician co-determination*]

A. My agent's authority shall become effective only when both my primary physician and _ _[*full name*]_ _, in consultation with each other, agree that I am unable to make my own health care decisions.

[*Alternative 3: Immediate authority*]

A. My agent's authority to make health care decisions for me shall take effect immediately on my signing this directive.

NOTE: The first alternative for paragraph A conforms to Prob C §4658, which designates the primary physician as the person who determines capacity. The second alternative for paragraph A allows the patient to control who determines his or her capacity instead of having the decision default to the primary physician as provided in Prob C §4658. Probate Code §4682 states that "unless otherwise provided in the power of attorney," the agent's authority is effective only on a determination that the patient lacks capacity. The third alternative for paragraph A expressly designates the agent's authority to be immediately effective. Individuals from certain cultures who are accustomed to deferring decision making to another person may feel most comfortable with this alternative. If the client wants the agent to have access to medical information and records when the client is ill but not incapacitated, and thus the agent's authority under the advance directive has not yet been triggered, the attorney may wish to insert language similar to that in the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub L 104-191, 110 Stat 1936) form in §§8.34-8.38.

[*If applicable, add the following option*]

[*Option: Capacity determination*]

B. I designate _ _[*name, address, and telephone number of physician*]_ _ to be my primary physician for the purpose of capacity determination. If _ _[*he/she*]_ _ is not willing, able, or reasonably available, I designate _ _[*name, address, and telephone number of alternate physician*]_ _ as my primary physician for the purpose of capacity determination.

Comment: If a client chooses Paragraph B regarding capacity determination, the attorney needs to explore with the client how likely it will be that the physician will be available for this determination. The attorney might also wish to discuss the complications that might arise should the physician no longer be a provider under the managed care plan to which the client belongs.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/8 Advance Health Care Directives: Complete Forms and Related Documents/§8.13 E. Form: Health Care Instruction--Prolong Life or Not Prolong Life

§8.13 E. Form: Health Care Instruction—Prolong Life or Not Prolong Life

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.

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8.13-1 Health care instruction—prolong life or not prolong life

6. INSTRUCTIONS FOR HEALTH CARE:

[*Add one of the following alternatives*]

[*Alternative 1: Prolong life*]

A. I express the desire that my life be prolonged to the greatest possible extent without regard for my physical or mental condition, chance of recovery, likelihood of suffering, or expense, and I authorize my agent to consent to whatever medical procedures are necessary to accomplish this end. I trust my agent, who knows my desires well and in whose judgment I have absolute faith, to exercise _ _[*his/her*]**_ _ discretion in a manner that would be satisfactory to me.**

[*Alternative 2: Do not prolong life*]

A. If I have an incurable or irreversible physical or mental condition, even if I am not in a persistent vegetative state or some other form of permanent unconsciousness, I want care and treatment that will enable me to take part in activities of daily living, to eat and drink, and to communicate meaningfully with others. I want to live my life with dignity and for my loved ones to have pleasant memories of my final days. Thus, I wish to be allowed to die without prolonging my death with medical treatment _ _[*, including artificial nutrition and hydration and cardiopulmonary resuscitation,*]**_ _ that will not benefit me.**

[*Optional addition to Alternative 2 (Do not prolong life)*]

I wish to make my own decisions as long as I am able to do so. If I am incapacitated, then I give my agent full authority and discretion to make decisions about medical treatment for me within the context of the following personal values:

1. I want to die a natural death without having my life prolonged by machines or nonbeneficial treatment.

2. I want my religious beliefs to be honored.

3. I want to die free of unnecessary pain and suffering even if pain medication will shorten my life.

4. I don't want to be a burden to my family.

5. I don't want my life prolonged, by any means, when this life has no more meaning for me.

I trust my agent to make my medical decisions within the context of these values.

[*Continue*]

[*Add one of the following alternatives*]

[*Alternative 1: Continue nutrition and hydration*]

B. Regardless of my condition, it is my desire to receive nutrition and hydration in all ways possible.

[*Optional addition to Alternative 1 (Continue nutrition and hydration)*]

But if _ _[*e.g., I remain in a coma for _ _*[*state number*]**_ _** *days*]**_ _, my agent is instructed not to continue**

nutrition and hydration by any artificial means as long as they are not necessary for comfort or alleviation of pain.

[*Alternative 2: No artificial nutrition and hydration except for treatment of temporary condition*]

B. I do not want artificial nutrition and hydration under any circumstances except for the treatment of a temporary condition in which I am unable to eat or drink and then only for a short time. If, within a short period (as determined by my agent after consultation with my physician), there is no benefit to me, then I instruct that artificial nutrition and hydration be withdrawn.

[*Alternative 3: No artificial nutrition and hydration except for my comfort or to alleviate pain*]

B. I do not want artificial nutrition and hydration unless necessary for my comfort or to alleviate pain.

[*Continue*]

C. It is my desire that my agent consent to and arrange for the administration of any type of pain relief, even though its use may lead to permanent damage, addiction, or even hasten the moment of, but not intentionally cause, my death.

D. Regarding the decision to withhold or withdraw life-sustaining treatment, I desire that my agent act after allowing a reasonable period of time for observation and diagnosis.

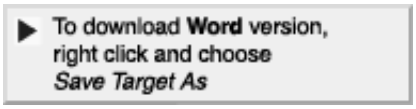
Comment: A statement of desires and special provisions is recommended in a PAHC but not required. The first alternative for paragraph A states the principal's desire that his or her life be prolonged to the greatest extent and allows the agent to object to the withholding or withdrawal of any life-sustaining medical treatment. The second alternative for paragraph A states the principal's intention that life-sustaining treatment be withheld or removed at certain specific times when there is no hope for recovery.

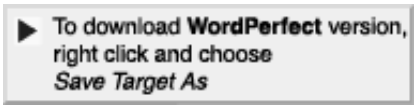
Counsel should be mindful that the definition of health care decisions under the Health Care Decisions Law (HCDL) (Prob C §§4600-4805) specifically includes the withholding or withdrawal of artificial nutrition and hydration as well as cardiopulmonary resuscitation (CPR). If the client does not wish to allow an agent to withhold or withdraw nutrition or hydration as well as CPR, specific limitations should be included.

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§8.14 F. Form: Inspection and Disclosure of Confidential Medical Information

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.





8.14-1 Inspection and disclosure of confidential medical information

7. INSPECTION AND DISCLOSURE OF INFORMATION RELATING TO MY PHYSICAL OR MENTAL HEALTH:

My agent has the power and authority to do all of the following:

(a) Request, review, and receive any information, verbal or written, regarding my physical or mental health, including medical and hospital records;

(b) Execute, on my behalf, any releases or other documents that may be required in order to obtain this information;

(c) Consent to disclosure of this information.

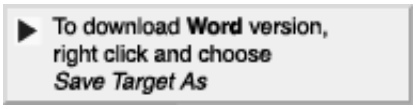
Comment: This clause states the general authority of the agent to inspect and disclose information relating to the principal's physical and mental health. Many clients may wish to limit this power so that it can be exercised only if certain conditions are met. Many others, however, will want to ensure that family or friends have access to medical information and records even before incapacity occurs. For those clients, the attorney may wish either to insert language to deal with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub L 104-191, 110 Stat 1936) privacy rules that is similar to that in the form in §§8.34-8.38 or to use a separate HIPAA/CMIA release form in addition to the health care directive.

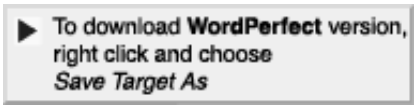
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Source: Estate Planning/California Powers of Attorney and Health Care Directives/8 Advance Health Care Directives: Complete Forms and Related Documents/§8.15 G. Form: Agent's Authority to Sign Documents, Waivers, and Releases

§8.15 G. Form: Agent's Authority to Sign Documents, Waivers, and Releases

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.





8.15-1 Agent's authority to sign documents, waivers, and releases

8. SIGNING DOCUMENTS, WAIVERS, AND RELEASES:

[*Add one of the following alternatives*]

[*Alternative 1: Authority granted (specific language)*]

My agent has the power and authority to execute all documents that relate to my health care decisions, including documents titled or purported to be a "Refusal to Permit Treatment," "Do Not Hospitalize," or "Leaving Hospital Against Medical Advice," and any necessary waiver or release from liability.

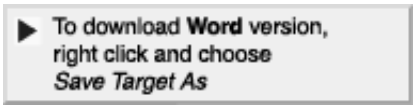
[*Alternative 2: Authority granted (general language)*]

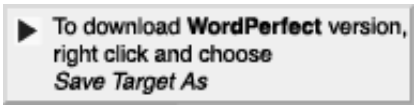
My agent has the power to execute all necessary instruments and perform all necessary acts required for the execution and implementation of all authorizations contained in this document.

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§8.16 H. Form: Agent's and Others' Visitation Rights

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.





8.16-1 Agent's and others' visitation rights

9. VISITATION:

[*Add one of the following alternatives*]

[*Alternative 1: Agent shall restrict visitation*]

I direct that while I am a patient in any hospital or health care facility, including any intensive care or coronary care unit of any medical facility, my agent and those selected by my agent be given preference when it becomes necessary to restrict my visitors. If, in addition, my agent determines that a visitor is distressing me or interfering with my treatment, my agent shall have sole discretion to limit or prevent such visitation.

[*Alternative 2: Visitation restricted by document provisions*]

I direct that while I am a patient in any hospital or health care facility, including any intensive care or coronary care unit of any medical facility, and it becomes necessary to restrict my visitors, _ _[*name*]_ _ not be allowed to visit me despite being my next of kin.

Comment: This type of provision is particularly important for clients in same-sex relationships when the client's immediate family does not approve of the client's lifestyle.

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§8.17 I. Form: Organ Donation

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.

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8.17-1 Organ donation

10. DONATION OF ORGANS AT DEATH:

[*Add one of the following alternatives*]

[*Alternative 1: Any organs*]

On my death, my agent is authorized to donate any of my organs, tissues, or parts.

My gift is for the following purposes [*Delete any choices that you do not want*]**:**

(a) Transplant

(b) Therapy

(c) Research

(d) Education

[*Alternative 2: Specific organs only*]

On my death, my agent is authorized to give the following organs, tissues, or parts only: _ _[*List organs, tissues, or parts*]_ _**.**

My gift is for the following purposes [*delete any choices that you do not want*]**:**

(a) Transplant

(b) Therapy

(c) Research

(d) Education

[*Alternative 3: Refusing to make an anatomical gift*]

On my death, my agent is not authorized to give any of my organs, tissues, or parts.

Comment: For a full discussion of organ donation, see §§7.58-7.63 and 9.44-9.64. Because other individuals are allowed to make an anatomical gift if a person is silent about his or her wishes (see §§9.48-9.49), some persons may wish to make clear that they do not want their body or body parts ever to be donated for any reason. This is called a refusal (Alternative 3). Health & S C §7150.10(a)(26). An individual's unrevoked refusal to make an anatomical gift *bars* all other persons (including agents under a PAHC) from making an anatomical gift of the individual's body or parts. Health & S C §7150.30(d). For additional forms and discussion, see §§8.44-8.47.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/8 Advance Health Care Directives: Complete Forms and Related Documents/§8.18 J. Form: Disposition of Remains

§8.18 J. Form: Disposition of Remains

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.

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8.18-1 Disposition of remains

11. DISPOSITION OF REMAINS:

On my death, my agent is authorized to dispose of my remains as follows: _ _[*Insert instructions for, e.g., burial, funeral*]**_ _.**

Comment: See §§7.53-7.56 on the agent's postmortem authority.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/8 Advance Health Care Directives: Complete Forms and Related Documents/§8.19 K. Form: Autopsy Authorization

§8.19 K. Form: Autopsy Authorization

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8.19-1 Autopsy authorization

12. AUTOPSY:

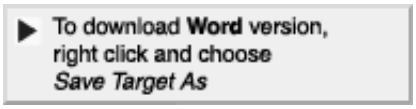
On my death, my agent _ _[*is/is not*]**_ _ granted the power to authorize my autopsy.**

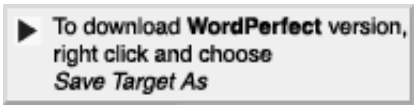
Comment: See §7.57 on the agent's postmortem authority.

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§8.20 L. Form: Administrative Provisions

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.





8.20-1 Administrative provisions

13. EFFECT OF COPY

A copy of this form shall have the same effect as the original.

Executed on _ _[*date*]_ _, at _ _ _ _ _ _, California.

__[*Signature of principal*]__

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

State of California)
)
County of _ _[*name of county*]_ _)
)
)
_____)

On _ _[*date*]_ _ before me, _ _[*name and title of officer*]_ _, personally appeared _ _[*name(s)*]_ _, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal:

__[*Signature of officer*]__ [*Officer's seal*]

STATEMENT OF WITNESSES

I declare under penalty of perjury under the laws of California that (1) the person who signed or acknowledged this advance health care directive is personally known to me, or that the identity of the individual was proved to me by convincing evidence, (2) the individual signed or acknowledged this advance directive in my presence, (3) the individual appears to be of sound mind and under no duress, fraud, or undue influence, (4) I am not the person appointed as agent by this advance health care directive, and (5) I am not the individual's health care provider, an employee of the individual's health care provider, the operator of a community care facility, an employee of an operator of a community care facility, the operator of a residential care facility for the elderly, or an employee of the operator of a residential care facility for the elderly.

__[*Signature*]__ **Residence Address: _ _ _ _ _ _**
Print Name: _ _ _ _ _ _ **Date: _ _ _ _ _ _**

__[*Signature*]__ **Residence Address: _ _ _ _ _ _**
Print Name: _ _ _ _ _ _ **Date: _ _ _ _ _ _**

[*At least one witness must also sign the following*]

I further declare under penalty of perjury under the laws of California that I am not related to the individual executing this advance health care directive by blood, marriage, or adoption, and, to the best of my knowledge, I am not entitled to any part of the individual's estate upon his or her death under a will now existing or by operation of law.

__[*Signature*]__

DECLARATION OF PATIENT ADVOCATE OR OMBUDSMAN

I further declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and that I am serving as a witness as required by Probate Code §4675.

__[*Signature*]__

Comment: See §§7.15-7.20 for acknowledgment or witnessing requirements. See also §8.32 for form regarding agent's acceptance of the agency. The California Legislature amended CC §1189, effective January 1, 2008, to alter the required wording of the certificate of acknowledgment form. See §7.21 for discussion of ombudsman as witness.

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M. Additional or Alternative Statements of Desires

§8.21 1. Form: Withholding and Withdrawing Life-Sustaining Treatment

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.

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8.21-1 Withholding and withdrawing life-sustaining treatment

[*Add one of the following alternatives*]

[*Alternative 1: Withholding or withdrawing life-sustaining treatment*]

If I should have an incurable injury, disease, or illness certified by _ _[*state number*]_ _ physicians to be a terminal condition, and if the application of life-sustaining procedures would serve only to artificially prolong the moment of my death, and if my treating physician determines that my death is imminent whether or not life-sustaining procedures are utilized, then I desire that all life-sustaining treatment be withheld or removed.

[*If applicable, add the following option*]

[*Option: If in a coma*]

If I am in a coma and have been for at least _ _[*state number*]_ _ days and _ _[*state number*]_ _ qualified physicians familiar with my condition have diagnosed it as irreversible (*i.e.,* if there is no reasonable possibility that I will regain consciousness), then I desire that all life-sustaining treatment be removed or withheld.

[*Alternative 2: Withholding or withdrawing life-sustaining treatment—burdens of treatment outweigh benefits*]

If in my agent's judgment the burdens of the proposed treatment outweigh the expected benefits, then I desire that all life-sustaining treatment be withheld or withdrawn. I desire that my agent consider relief from suffering, preservation or restoration of functioning, and the quality as well as the extent of the life being preserved when decisions are made concerning life-sustaining care, treatment, services, and procedures.

[*Alternative 3: Withholding or withdrawing life-sustaining treatment—principal's inability to return to normal cognitive function*]

If the extension of my life would result in a mere biological existence, devoid of cognitive function and with no reasonable hope for normal functioning, then I do not desire any form of life-sustaining procedures _ _[*, including nutrition and hydration unless necessary for my comfort or alleviation of pain,***]_ _ or, if life-sustaining treatment has been instituted, I desire that it be withdrawn. It is my desire that my agent consider relief from suffering, preservation or restoration of functioning, and the quality as well as the extent of the life being preserved when decisions are made concerning life-sustaining care, treatment, services, and procedures. In making the decision to withhold or remove treatment, my agent should ask the question "Is the proposed treatment an aid to recovery or merely a prolongation of inevitable death?" The determination of what is "reasonable," what is "an aid to recovery," and what is "merely a prolongation of inevitable death" shall be made exclusively by my agent.**

Comment: These alternative clauses may be used individually or in conjunction with one another. They may be inserted into the Do Not Prolong Life alternative in the form at §8.13 as paragraph 6. A statement of desires and special provisions is recommended but not required. Alternative 1 states the principal's desire concerning the circumstances under which life-sustaining treatment should be withheld or withdrawn. It limits the discretion of the agent by requiring that physicians certify that the condition is terminal. It also relieves the agent of the burden of being the decision-maker. The agent is merely carrying out the wishes of the principal. The optional addition to Alternative 1 can be used to expand the situations in which the principal desires life-sustaining treatment to be withheld or withdrawn. In addition, it

can be modified to state the principal's desire that his or her life be prolonged unless he or she is in a coma. Alternative 2 gives the agent broad discretion in establishing the health care to be withheld or removed. The clause asks that the agent use the "benefits and burdens" test as set forth in *Barber v Superior Court* (1983) 147 CA3d 1006, 195 CR 484, as discussed in §9.15, and it can be used with the other alternatives in this section. Alternative 3 gives the agent the maximum amount of discretion in deciding whether to withhold or withdraw life-sustaining treatment. It gives the agent the authority to decide what would be appropriate for the principal, knowing the value the principal places on living in a normal cognitive state. The agent is authorized to define what is reasonable and proper, and there is no requirement for a physician's certificate. It may be appropriate to include this clause for those clients who have expressed concerns after reading about the *Wendland* case in the media. See *Conservatorship of Wendland* (2001) 26 C4th 519, 110 CR2d 412, discussed in §9.23.

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§8.22 2. Form: Treatment for Alzheimer's Disease

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.

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8.22-1 Treatment for Alzheimer's disease

If I develop Alzheimer's disease, I would like all noninvasive life-prolonging treatments such as artificial nutrition, fluids, and antibiotics as long as I have the ability to meaningfully interact with my family and friends and am physically independent, but I do not want highly intrusive treatments such as CPR, force feeding, mechanical ventilation, or kidney dialysis. However, if I lose the capacity for meaningful interaction and physical independence, I then want only treatments that would make me more comfortable and free from pain. I would then not want artificial hydration or nutrition or antibiotics.

Comment: This form can be useful for those afraid of being kept in earthly limbo as a result of a debilitating, dementing disease such as Alzheimer's. Some clients will feel uncomfortable using this form. Others will find it tremendously reassuring. It is important that each individual tailor the PAHC to his or her own personal philosophy about the potential loss of capacity in the future.

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§8.23 3. Form: Participation in Medical Research

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.

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8.23-1 Participation in medical research

[*Add one of the following alternatives*]

[*Alternative 1: No participation in research*]

If I am no longer able to make my own decisions, I do not want to participate in *any* medical research.

[*Alternative 2: Participation in research*]

[*If applicable, add one or more of the following options*]

[*Option 1: Personal benefit*]

If I am no longer able to make my own decisions, I am willing to participate in any medical research that may potentially be of benefit to me personally.

[*Option 2: Assistance to others—no risk of personal harm*]

If I am no longer able to make my own decisions, I am willing to participate in medical research that will not help me but might assist others, as long as there is no more than minimal risk of harm to me.

[*Option 3: Assistance to others—risk of personal harm*]

If I am no longer able to make my own decisions, I am willing to participate in medical research that will not help me but might assist others, even if there is a risk of more than minimal harm to me.

Comment: Many clients with Alzheimer's disease participate in clinical research trials after they have been diagnosed with the disease. However, as the disease progresses, the individual loses the ability to give legally effective informed consent. If the individual wishes to authorize future participation in a wider range of potentially beneficial research, he or she should sign an advance directive empowering his or her agent to give consent on the principal's behalf to participate in future research according to the principal's guidelines. For discussion of surrogate decision-makers and their relationship to agents in emergency room situations and with respect to medical experiments relating to cognitive impairment, lack of capacity, or serious or life-threatening diseases and conditions, see §7.48.

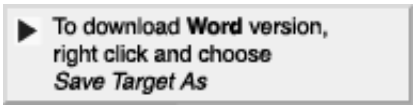
NOTE: Researchers must disclose any material or financial stake they have in the medical experiment's outcome. Health & S C §24173(c)(11). For further requirements regarding informed consent to medical experimentation, see Health & S C §24173.

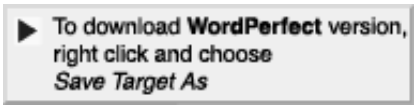
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Source: Estate Planning/California Powers of Attorney and Health Care Directives/8 Advance Health Care Directives: Complete Forms and Related Documents/§8.24 4. Form: Agent's Authority to Act if Provider Fails to Honor Wishes of Principal

§8.24 4. Form: Agent's Authority to Act if Provider Fails to Honor Wishes of Principal

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.





8.24-1 Agent's authority to act if provider fails to honor wishes of principal

[*Add one of the following alternatives*]

[*Alternative 1: Authority to enforce power of attorney*]

If my health care provider fails to honor my wishes as stated in this document, I direct and authorize my agent to take appropriate legal action, if necessary in my agent's judgment, to enforce my right of self-determination as I have intended by executing this document.

[*Alternative 2: Authority to transfer care*]

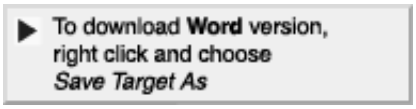
If my health care provider refuses to honor my agent's decisions, I empower my agent to direct my health care provider to transfer my care to another health care provider who will honor my wishes. If my health care provider thwarts, undermines, or does not honor to the fullest extent my decisions regarding power of attorney for health care or my agent's decisions, I further direct and empower my agent to initiate an action for battery against my health care provider.

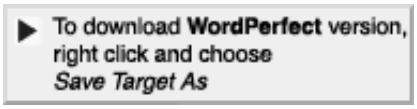
Comment: Alternative 1 can be useful for putting the health care provider on notice that failure to honor the patient's PAHC could result in legal action. Not every client will feel comfortable with the more forceful direction of Alternative 2.

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§8.25 5. Form: Negative Designation of Agent

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8.25-1 Negative designation

I have specifically, intentionally, and willingly appointed _ _[*name*]_ _ to be my agent. _ _[*Name*]_ _ is my sole agent, my only spokesperson, who shall consult with my health care providers and ensure that my health care wishes are honored. Under no circumstances shall my health care provider consider any input from _ _[*name*]_ _, and under no circumstances shall _ _[*name*]_ _ participate in any health care decision making on my behalf.

Comment: In those circumstances in which the client has fears that certain persons will attempt to interfere with health care decisions, this form can be reassuring to the client that such interference will be thwarted.

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§8.26 6. Form: No Premature Withdrawal of Treatment

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.

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8.26-1 No premature withdrawal of treatment

Although I do not wish to have life-sustaining treatment or procedures in the event my life would be a mere biological existence, devoid of cognitive function and with no reasonable hope for normal functioning, I do not wish treatment to be withdrawn prematurely on the basis of economic considerations. Thus, if I am in a managed care environment or if some form of de facto health care rationing is provider policy, I empower my agent to require treatment and procedures near the end of life if my agent, in my agent's sole discretion, determines that such treatment is withheld or withdrawn for financial reasons and not because such treatment would not be in my best interests.

Comment: This is a somewhat controversial form in that most provisions in the past have emphasized the withholding or withdrawing of life-sustaining treatment, not requiring such procedures. However, today's managed care environment, with its focus on costs per capita and financial bottom lines, may force attorneys to change perspective in order to best address their clients' health care needs.

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7. Medical Directives Based on Religious Beliefs

§8.27 a. The Issue

Religious tradition holds an important place in the ethical values of many clients. Thus, religion can be expected to affect decision making and will often be the basis of instructions given to an agent. Some religions, such as Jehovah's Witnesses and Christian Science, have particular concerns in the areas of health care treatment. See forms in §§8.28-8.31 for sample clauses that might be preferred by some Jehovah's Witnesses, Christian Scientist, Jewish, or Catholic clients, respectively.

See Zimring, *DPAHC: A Practical Approach to An Intimate Document,* 8 NAELA Quarterly 22-29, No. 2 (Spring 1995).

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§8.28 b. Form: Medical Directive and Release for Jehovah's Witness Principal

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.

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8.28-1 Medical directive and release for Jehovah's Witness principal

ADVANCE MEDICAL DIRECTIVE AND RELEASE

I, _ _[*name*]_ _, make this advance directive as a formal statement of my wishes. These instructions reflect my resolute decision.

I direct that no blood transfusions (whole blood, red cells, white cells, platelets, or blood plasma) be given to me under any circumstances, even if physicians deem them necessary to preserve my life or health. I will accept nonblood volume expanders (such as dextran, saline or Ringer's solution, or hetastarch) and other nonblood management.

This legal directive is an exercise of my right to accept or refuse medical treatment in accord with my deeply held values and convictions. I am one of Jehovah's Witnesses, and I make this directive out of obedience to commands in the Bible, such as "Keep abstaining … from blood" (Acts 15:28, 29). This is, and has been, my unwavering religious stand for _ _[*number*]_ _ years. I am _ _[*number*]_ _ years old.

I also know that there are various dangers associated with blood transfusions. Therefore, I have decided to avoid such dangers and, instead, to accept whatever risks may seem to be involved in my choice of alternative nonblood management.

I release physicians, anesthesiologists, and hospitals and their personnel from liability for any damages that might be caused by my refusal of blood, despite their otherwise competent care.

I authorize the person(s) named on the reverse to see that my instructions set forth in this directive are upheld and to answer any questions about my absolute refusal of blood.

_____
Signature

_____ _____
Address **Date**

_____ _____
Telephone

_____
Witness

_____
Witness

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§8.29 c. Form: Medical Directive for Christian Scientist Principal

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.

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8.29-1 Medical directive for Christian Scientist principal

I am a Christian Scientist. I am a dedicated and firm adherent to the tenets of The First Church of Christ, Scientist, in Boston, Massachusetts, and a long-time student of the teachings of the founder and discoverer of Christian Science, Mary Baker Eddy. The directions and declarations made within this document should be construed and, when not clear, interpreted with those facts in mind. Certain statements made within this document contain language required by _ _[*name of state*]_ _ law to make this document legally enforceable. References to medicine or medical treatment should not be interpreted as the declarant's recognition of the efficacy of such medicine or medical treatment. Readers of this document, or persons relying on this document to take action (or withhold action, as the case may be), who are not familiar with Christian Science should consult a Christian Science practitioner or teacher for further edification on the principles of Christian Science if necessary to understand the context of the statements made herein or the directions given.

The importance of my faith in and understanding of the tenets of Christian Science and the writings of Mary Baker Eddy in the context of my thoughts and directions with regard to my health care should not be underestimated. Christian Science provides me with my source of health care and maintenance. Christian Science does *not* ignore disease or sickness; rather, it affirmatively addresses it in a positive, efficacious manner. Christian Science is a form of active affirmative treatment. Medical treatment is inconsistent with the application of Christian Science treatment, which is why my decision to avoid medical treatment is important to me. TO THE EXTENT THAT THIS DOCUMENT DISCUSSES THE WITHHOLDING OF MEDICAL TREATMENT, IT SHOULD NOT BE PRESUMED THAT I AM INSTRUCTING THE WITHHOLDING OF ALL TREATMENT. I EXPECT AND AUTHORIZE CHRISTIAN SCIENCE TREATMENT INSTEAD.

If it appears that I need health care administered and am otherwise unable to communicate my desires, I prefer and direct that a Christian Science practitioner be consulted and be asked to render Christian Science treatment for me and that medical treatment *not* be rendered.

If it appears that I need health care administered and am otherwise unable to communicate my desires, and if it would be a burden on my family or otherwise felt to be a benefit to stay somewhere other than my home, then I prefer and direct that I be admitted to a Christian Science sanitarium or other Christian Science facility that renders Christian Science treatment to its residents or patients. I *do not* prefer or desire to be admitted to a medical facility or to any other facility that insists on rendering medical treatment, such as a nursing home or hospital.

Because I do not believe in the probity of such acts and efforts, I *do not* wish to have my tissues or bodily organs used as transplants.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/8 Advance Health Care Directives: Complete Forms and Related Documents/§8.30 d. Form: Medical Directive for Orthodox Jewish Principal

§8.30 d. Form: Medical Directive for Orthodox Jewish Principal

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8.30-1 Medical directive for orthodox Jewish principal

I am Jewish. It is my desire, and I hereby direct, that all health care decisions made for me be made pursuant to Jewish law and custom as determined in accordance with Orthodox interpretation and tradition.

In order to effectuate my wishes, if my agent in his or her sole discretion has any questions regarding the requirements of Jewish law and custom in connection with this declaration, I direct my agent to consult with Rabbi _ _[*name*]_ _.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/8 Advance Health Care Directives: Complete Forms and Related Documents/§8.31 e. Form: Medical Directive for Catholic Principal

§8.31 e. Form: Medical Directive for Catholic Principal

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8.31-1 Medical directive for Catholic principal

I am Catholic. Any decision my agent makes must be consistent with the teachings of the Roman Catholic Church relevant to health care, which are summarized as follows:

(a) Death is neither to be feared and avoided at all costs, nor to be sought and directly procured.

(b) Euthanasia is not permitted. (Euthanasia is defined as the intentional ending of human life by act or omission in order to relieve suffering.)

(c) The use of medicine to treat severe pain is acceptable even if it shortens life.

(d) It is not necessary to use all life-sustaining treatments. One does not have an obligation to use a treatment if its risks or burdens are disproportionate to its expected results or benefits. The concept of "burden" is broad and must be individually assessed; it includes aspects such as pain, costs, risks, and inconvenience of the treatment as perceived by the patient.

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§8.32 N. Form: Agent's Acceptance and Consent to Act

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.

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8.32-1 Agent's acceptance and consent to act

I, the undersigned, accept the appointment and consent to act as agent under the power of attorney for health care executed by _ _[*name*]_ _, the principal, on _ _[*date*]_ _. I have discussed the principal's wishes regarding health care and end-of-life decisions. I understand that if the principal becomes incapacitated, it is my duty to enforce the principal's wishes with regard to _ _[*his/her*]_ _ health care.

Date: _ _ _ _ _ _ __[*Signature*]__

Comment: Some attorneys believe that if the agent is asked to sign such a consent form there is far greater likelihood that the principal and the agent will discuss end-of-life issues and that the agent will take his or her duties more seriously. In addition, the advance directive is then transformed into a contractual document that may enhance its enforceability.

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§8.33 O. Form: Physician's Acknowledgment

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8.33-1 Physician's acknowledgment

I, the undersigned, am the physician of _ _[*name*]_ _. I have read this advance health care directive and have had opportunity to discuss _ _[*his/her*]_ _ wishes in regard to end-of-life issues and preferences for health care treatment. I understand that if _ _[*he/she*]_ _ becomes incapacitated, it is my duty to follow a course of action that will implement the preferences expressed in this document in order to ensure that _ _[*his/her*]_ _ wishes will be honored.

Date: _ _ _ _ _ _ __[*Signature*]__

Comment: Some attorneys believe that presenting such a form to a doctor for his or her signature will guarantee that a discussion regarding health care decisions will take place between physician and patient and that the act of signing the form holds the physician psychologically to some degree of accountability.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/8 Advance Health Care Directives: Complete Forms and Related Documents/§8.33A P. Form: Complete Attorney Drafted AHCD

§8.33A P. Form: Complete Attorney Drafted AHCD

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.

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ADVANCE HEALTH CARE DIRECTIVE

1. DESIGNATION OF HEALTH CARE AGENT:

I, _ _[*full name*]_ _, of _ _[*address*]_ _, California, hereby designate and appoint _ _[*full name*]_ _, _ _[*address*]_ _, _ _[*telephone*]_ _, as my agent to make health care decisions authorized in this document.

2. DESIGNATION OF ALTERNATE AGENTS:

If the person I designated as my agent in paragraph 1 is unable or unwilling to act as my agent, or if I revoke that person's appointment as my agent, then I designate the following persons to serve as my agent, in the order listed below, to make health care decisions for me, as authorized in this document:

FIRST ALTERNATE AGENT: _____

ADDRESS: _____

TELEPHONE: _____

SECOND ALTERNATE AGENT: _____

ADDRESS: _____

TELEPHONE: _____

THIRD ALTERNATE AGENT: _____

ADDRESS: _____

TELEPHONE: _____

3. NOMINATION OF CONSERVATOR OF PERSON _ _[*AND ESTATE*]_ _:

A. If it becomes necessary to appoint a conservator of my person _ _[*and estate*]_ _, I nominate the following persons in the following order to act as the conservator of my person _ _[*and estate*]_ _:

NOMINEE: _____

ADDRESS: _____

TELEPHONE: _____

FIRST ALTERNATE NOMINEE: _____

ADDRESS: _____

TELEPHONE: _____

SECOND ALTERNATE NOMINEE: _____

ADDRESS: _____

TELEPHONE: _____

B. I grant to my conservator all the powers specified in the California Probate Code. My conservator shall serve in such capacity without bond, or if a bond is required, I request that a minimum bond be set. I revoke all prior conservatorship nominations.

4. GENERAL STATEMENT OF AUTHORITY GRANTED:

[*Add one of the following alternatives*]

[*Alternative 1: General authority*]

A. If I become incapable of making informed health care decisions, I grant my agent full power and authority to make health care decisions for me, to the same extent that I could make such decisions for myself if I had the capacity to do so, subject to the limitations set forth in this document.

[*Alternative 2: Broader authority*]

A. If I become incapable of making informed health care decisions, I hereby grant to my agent full power and authority to consent, refuse consent, or withdraw consent to any type of health care procedure (including any procedure to maintain, diagnose, or treat any physical or mental condition), or to make any other health care decision, to the same extent that I could if I had capacity to do so, subject to the terms of this instrument. My agent shall exercise this power and authority in accordance with my expressed desires, known to my agent, whether contained in this document or not. Before acting, my agent shall attempt to communicate with me regarding my desires unless such attempt would be futile. If my desires are unknown, then my agent should decide for me, having my best interests in mind. My agent is further authorized:

To authorize, or refuse to authorize, any health care decision or medical treatment if I shall be physically or mentally incapacitated or otherwise unable to make such authorization for myself, including authorization for emergency care, hospitalization, surgery, therapy, and any other kind of treatment or procedure that, in my agent's sole discretion, my agent thinks necessary for my benefit and well-being.

To consult with and advise any physicians, nurses, therapists, dentists, or any other medical or health care institutions on my behalf, as such consultations relate to my health and welfare. All such personnel and institutions are specifically requested to abide by all decisions and instructions of my agent and to release to my agent all information that my agent may request concerning my health and well-being.

To receive into my agent's sole possession all items of personal property and effects that may be recovered from or about my person by any hospital, police agency, or any other person at the time of my illness, disability, or death; this to specifically include my remains, if applicable.

[*Continue*]

B. "Health care decisions" includes a decision regarding the selection and discharge of health care providers and institutions, approval or disapproval of diagnostic tests, surgical procedures, and programs of medication; the term also includes directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation. It means consent, refusal of consent, or withdrawal of consent for any care, treatment, service, or procedure to affect my physical or mental condition, as well as consent to release of medical information.

C. I trust my agent, who knows and understands my desires and in whose judgment I have absolute faith, to exercise discretion in a manner that would be satisfactory to me if I had the capacity to give or refuse to give consent.

D. Before acting, my agent shall attempt to communicate with me regarding my desires unless such attempt would be futile. If I am unreachable by such communication, and my desires regarding a particular health care

decision are unknown, my agent should make the health care decision guided by the following: my personal values, any preferences that I have previously expressed, preferences stated herein, and information received from the attending physician(s) concerning my prognosis, all the while having my best interests in mind. In determining my best interests, my agent shall consider my personal values to the extent known to my agent.

5. WHEN AGENT'S AUTHORITY BECOMES EFFECTIVE:

[*Add one of the following alternatives*]

[*Alternative 1: Primary physician's determination*]

A. My agent's authority shall become effective when my primary physician determines that I am unable to make my own health care decisions.

[*Alternative 2: Primary physician co-determination*]

A. My agent's authority shall become effective only when both my primary physician and _ _[*full name*]_ _, in consultation with each other, agree that I am unable to make my own health care decisions.

[*Alternative 3: Immediate authority*]

A. My agent's authority to make health care decisions for me shall take effect immediately on my signing this directive.

[*If applicable, add the following option*]

[*Option: Capacity determination*]

B. I designate _ _[*name, address, and telephone number of physician*]_ _ to be my primary physician for the purpose of capacity determination. If _ _[*he/she*]_ _ is not willing, able, or reasonably available, I designate _ _[*name, address, and telephone number of alternate physician*]_ _ as my primary physician for the purpose of capacity determination.

6. INSTRUCTIONS FOR HEALTH CARE:

[*Add one of the following alternatives*]

[*Alternative 1: Prolong life*]

A. I express the desire that my life be prolonged to the greatest possible extent without regard for my physical or mental condition, chance of recovery, likelihood of suffering, or expense, and I authorize my agent to consent to whatever medical procedures are necessary to accomplish this end. I trust my agent, who knows my desires well and in whose judgment I have absolute faith, to exercise _ _[*his/her*]_ _ discretion in a manner that would be satisfactory to me.

[*Alternative 2: Do not prolong life*]

A. If I have an incurable or irreversible physical or mental condition, even if I am not in a persistent vegetative state or some other form of permanent unconsciousness, I want care and treatment that will enable me to take part in activities of daily living, to eat and drink, and to communicate meaningfully with others. I want to live my life with dignity and for my loved ones to have pleasant memories of my final days. Thus, I wish to be allowed to die without prolonging my death with medical treatment _ _[*, including artificial nutrition and hydration and cardiopulmonary resuscitation,*]_ _ that will not benefit me.

[*Optional addition to Alternative 2 (Do not prolong life)*]

I wish to make my own decisions as long as I am able to do so. If I am incapacitated, then I give my agent full authority and discretion to make decisions about medical treatment for me within the context of the following personal values:

1. I want to die a natural death without having my life prolonged by machines or nonbeneficial treatment.

2. I want my religious beliefs to be honored.

3. I want to die free of unnecessary pain and suffering even if pain medication will shorten my life.

4. I don't want to be a burden to my family.

5. I don't want my life prolonged, by any means, when this life has no more meaning for me.

I trust my agent to make my medical decisions within the context of these values.

[*Continue*]

[*Add one of the following alternatives*]

[*Alternative 1: Continue nutrition and hydration*]

B. Regardless of my condition, it is my desire to receive nutrition and hydration in all ways possible.

[*Optional addition to Alternative 1 (Continue nutrition and hydration)*]

But if _ _[*e.g., I remain in a coma for _ _*[*state number*]*_ _ days*]*_ _, my agent is instructed not to continue nutrition and hydration by any artificial means as long as they are not necessary for comfort or alleviation of pain.

[*Alternative 2: No artificial nutrition and hydration except for treatment of temporary condition*]

B. I do not want artificial nutrition and hydration under any circumstances except for the treatment of a temporary condition in which I am unable to eat or drink and then only for a short time. If, within a short period (as determined by my agent after consultation with my physician), there is no benefit to me, then I instruct that artificial nutrition and hydration be withdrawn.

[*Alternative 3: No artificial nutrition and hydration except for my comfort or to alleviate pain*]

B. I do not want artificial nutrition and hydration unless necessary for my comfort or to alleviate pain.

[*Continue*]

C. It is my desire that my agent consent to and arrange for the administration of any type of pain relief, even though its use may lead to permanent damage, addiction, or even hasten the moment of, but not intentionally cause, my death.

D. Regarding the decision to withhold or withdraw life-sustaining treatment, I desire that my agent act after allowing a reasonable period of time for observation and diagnosis.

7. INSPECTION AND DISCLOSURE OF INFORMATION RELATING TO MY PHYSICAL OR MENTAL HEALTH:

My agent has the power and authority to do all of the following:

(a) Request, review, and receive any information, verbal or written, regarding my physical or mental health, including medical and hospital records;

(b) Execute, on my behalf, any releases or other documents that may be required in order to obtain this information;

(c) Consent to disclosure of this information.

8. SIGNING DOCUMENTS, WAIVERS, AND RELEASES:

[*Add one of the following alternatives*]

[*Alternative 1: Authority granted (specific language)*]

My agent has the power and authority to execute all documents that relate to my health care decisions, including documents titled or purported to be a "Refusal to Permit Treatment," "Do Not Hospitalize," or "Leaving Hospital Against Medical Advice," and any necessary waiver or release from liability.

[*Alternative 2: Authority granted (general language)*]

My agent has the power to execute all necessary instruments and perform all necessary acts required for the execution and implementation of all authorizations contained in this document.

9. VISITATION:

[*Add one of the following alternatives*]

[*Alternative 1: Agent shall restrict visitation*]

I direct that while I am a patient in any hospital or health care facility, including any intensive care or coronary care unit of any medical facility, my agent and those selected by my agent be given preference when it becomes necessary to restrict my visitors. If, in addition, my agent determines that a visitor is distressing me or interfering with my treatment, my agent shall have sole discretion to limit or prevent such visitation.

[*Alternative 2: Visitation restricted by document provisions*]

I direct that while I am a patient in any hospital or health care facility, including any intensive care or coronary care unit of any medical facility, and it becomes necessary to restrict my visitors, _ _[*name*]**_ _ not be allowed to visit me despite being my next of kin.**

10. DONATION OF ORGANS AT DEATH:

[*Add one of the following alternatives*]

[*Alternative 1: Any organs*]

On my death, my agent is authorized to donate any of my organs, tissues, or parts.

My gift is for the following purposes [*Delete any choices that you do not want*]**:**

(a) Transplant

(b) Therapy

(c) Research

(d) Education

[*Alternative 2: Specific organs only*]

On my death, my agent is authorized to give the following organs, tissues, or parts only: _ _[*List organs, tissues, or parts*]**_ _.**

My gift is for the following purposes [*delete any choices that you do not want*]**:**

(a) Transplant

(b) Therapy

(c) Research

(d) Education

[*Alternative 3: Refusing to make an anatomical gift*]

On my death, my agent is not authorized to give any of my organs, tissues, or parts.

11. DISPOSITION OF REMAINS:

On my death, my agent is authorized to dispose of my remains as follows: _ _[*Insert instructions for, e.g., burial, funeral*]**_ _.**

12. AUTOPSY:

On my death, my agent _ _[*is/is not*]_ _ granted the power to authorize my autopsy.

13. EFFECT OF COPY

A copy of this form shall have the same effect as the original.

Executed on _ _[*date*]_ _, at _ _ _ _ _ _, California.

__[*Signature of principal*]__

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

State of California)
)
County of _ _[*name of county*]_ _)
)
)
_____)

On _ _[*date*]_ _ before me, _ _[*name and title of officer*]_ _, personally appeared _ _[*name(s)*]_ _, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal:

__[*Signature of officer*]__ [*Officer's seal*]

STATEMENT OF WITNESSES

I declare under penalty of perjury under the laws of California that (1) the person who signed or acknowledged this advance health care directive is personally known to me, or that the identity of the individual was proved to me by convincing evidence, (2) the individual signed or acknowledged this advance directive in my presence, (3) the individual appears to be of sound mind and under no duress, fraud, or undue influence, (4) I am not the person appointed as agent by this advance health care directive, and (5) I am not the individual's health care provider, an employee of the individual's health care provider, the operator of a community care facility, an employee of an operator of a community care facility, the operator of a residential care facility for the elderly, or an employee of the operator of a residential care facility for the elderly.

__[*Signature*]__ **Residence Address: _ _ _ _ _ _**
Print Name: _ _ _ _ _ _ **Date: _ _ _ _ _ _**

__[*Signature*]__ **Residence Address: _ _ _ _ _ _**
Print Name: _ _ _ _ _ _ **Date: _ _ _ _ _ _**

[*At least one witness must also sign the following*]

I further declare under penalty of perjury under the laws of California that I am not related to the individual executing this advance health care directive by blood, marriage, or adoption, and, to the best of my knowledge, I am not entitled to any part of the individual's estate upon his or her death under a will now existing or by operation of law.

__[*Signature*]__

DECLARATION OF PATIENT ADVOCATE OR OMBUDSMAN

I further declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and that I am serving as a witness as required by Probate Code §4675.

__[*Signature*]__

Comment: This is a sample completed attorney drafted form. It does not include some of the specific provisions discussed above such as very specific end-of-life decisions or religious preferences.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/8 Advance Health Care Directives: Complete Forms and Related Documents/ IV. RELATED DOCUMENTS/§8.34 A. Introduction to Health Insurance Portability and Accountability Act (HIPAA) and Confidentiality of Medical Information Act (CMIA) Release Forms

IV. RELATED DOCUMENTS

§8.34 A. Introduction to Health Insurance Portability and Accountability Act (HIPAA) and Confidentiality of Medical Information Act (CMIA) Release Forms

HIPAA and CMIA provide that, with few exceptions, personal health information may not be disclosed by a health care provider to third parties without a valid authorization. Unauthorized disclosure results in severe penalties under federal and California law. Because of the uncertainty of many health care professionals about appropriate health information disclosures, it is prudent for an estate planning attorney to include a HIPAA and CMIA release as part of the estate planning package.

HIPAA and CMIA rules are not equivalent, and any release must be carefully drafted to comply with both sets of rules. The forms below provide appropriate disclosures of confidential health information for the following purposes:

- Assessing the drafting individual's capacity (*e.g.,* a principal under an AHCD or settlor of a trust) (see §8.35);
- Assessing a fiduciary's capacity while serving in that role (*e.g.,* an agent under an AHCD), and meeting a written requirement that a fiduciary execute a valid HIPAA or CMIA release before beginning service (see §§8.36-8.37); and
- Providing an agent under an AHCD or DPOA the principal's confidential health information so the agent can make informed decisions (see §8.38).

For additional discussion of HIPAA and CMIA, see §§7.76-7.85.

NOTE: The forms and clauses are copied (in part) from Soskin, *How to Be a HIPAA Lawyer,* 26 CEB Est Plan Rep 125 (Apr. 2005).

PRACTICE TIP: Authorizations should be separate and stand-alone documents, not provisions integrated into trusts and powers of attorney. CC §56.11; 45 CFR §164.508(b)(3).

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§8.35 1. Form: Authorization to Release Health Information by Settlor, Principal, or Others

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.

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8.35-1 Authorization to release health information by settlor, principal, or others

AUTHORIZATION TO RELEASE HEALTH INFORMATION BY SETTLOR, PRINCIPAL, OR OTHERS

AUTHORIZATION FOR USE AND DISCLOSURE OF PROTECTED HEALTH INFORMATION

1. Pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 USC §1320d and 45 CFR parts 160, 164) and the California Confidentiality of Medical Information Act (Civil Code §§56-56.37), I authorize all health care providers and covered entities to disclose my protected health information and medical information as follows:

A. To an agent appointed under a durable power of attorney or advance health care directive signed by me, at the request of such agent, in the form of a written and signed opinion that I do or do not have capacity as defined in the power of attorney or advance health care directive _ _[*, along with a statement containing the minimum health information sufficient to support and explain the opinion*]_ _**;**

B. To a co-trustee or designated successor trustee of any trust of which I am the trustee _ _[*or a beneficiary of such trust*]_ _**, at the request of such person, in the form of a written opinion that I do or do not have capacity to serve as trustee as defined in the trust** _ _[*, along with a statement containing the health information sufficient to explain and support the opinion*]_ _**;**

C. To the trustee of any revocable trust of which I am a trustor, at the request of such person, in the form of a written opinion that I do or do not have capacity to revoke or amend the trust _ _[*, along with a statement containing the health information sufficient to explain and support the opinion*]_ _**;**

D. To a general partner, or other person authorized to cause my removal as a general partner or managing general partner, at the request of such person, in the form of a written opinion that I do or do not have capacity to serve as general partner or managing general partner, as defined in the partnership agreement dated _ _[*date*]_ _**, of which I am a partner,** _ _[*along with a statement containing health information sufficient to support and explain the opinion*]_ _**;**

E. To my attorney, _ _[*name*]_ _**, at my attorney's request, for the purpose of determining my capacity in making inter vivos gifts and in executing estate planning documents, and I authorize my attorney to redisclose such information in the minimum amount required to implement or not implement such actions, as the case may be; and**

F. To a person nominated by me as a conservator of my person or estate, if any, for the purpose of determining whether a conservatorship or other protective proceeding is necessary or desirable, and such person is authorized to redisclose the information in the minimum amount necessary to accomplish that purpose.

2. Any person authorized above to receive my protected health information may bring a legal action against any covered entity or health care provider that refuses to provide my protected health information for the purposes described above and shall be reimbursed from the trust for all costs pertaining to such legal action.

3. I understand that

A. I have a right to receive a copy of this authorization, as described in CC §56.11(i) and 45 CFR §164.508(c)(4).

B. I may revoke or modify this authorization at any time by written notice delivered to and received by the health care provider, as described in CC §56.15 and 45 CFR §164.508(c)(2)(i).

[*Add one of the following alternatives*]

[*Alternative 1: Expiration on death*]

C. This authorization shall expire on the date of my death unless validly revoked before that date, as described in CC §56.11(h) and 45 CFR §164.508(c)(1)(v).

[*Alternative 2: Expiration to last past death*]

C. This authorization shall expire _ _[*number of years*]_ _ years after the date of my death unless validly revoked before that date, as described in CC §56.11(h) and 45 CFR §164.508(c)(1)(v).

[*Continue*]

D. Under California law, all recipients of protected health care information may not redisclose it except as required or permitted by law.

E. The covered entity may not condition treatment, payment, enrollment, or eligibility for benefits on whether I sign an authorization, unless the law allows conditions, as described in 45 CFR §164.508(c)(2)(ii)(A).

F. There is the potential for information disclosed pursuant to this authorization to be subject to redisclosure by the recipient and no longer protected by HIPAA regulations, as described in 45 CFR §164.508(c)(2)(iii).

G. All requests for information from my agent to health care providers and covered entities shall include a statement that it is "at the request of _ _[*name of principal*]_ _," as described in 45 CFR §164.508(c)(1)(iv).

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

State of California)
)
County of _ _[*name of county*]_ _)
)
)
_____)

On _ _[*date*]_ _ **before me,** _ _[*name and title of officer*]_ _**, personally appeared** _ _[*name(s)*]_ _**, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.**

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal:

__[*Signature of officer*]__ [*Officer's seal*]

Comment: This form is to be produced in a typeface not smaller than 14-point type pursuant to CC §56.11(a). While not required by law, an acknowledgment may provide more comfort for the health care provider that the form was signed by the principal while having capacity.

It is critical that the durable power of attorney or advance health care directive be coordinated with this document when used with this form. All of the documents should refer to "capacity" and then define it in a consistent way.

Alternatively, if a document does not refer to "capacity" but sets out a standard such as "substantially unable to manage my financial affairs," then the same language should be included in the authorization document.

In paragraph 1(D), a variation would be for a manager of a limited liability company of which the principal has managerial authority. A similar paragraph can also be included when the principal can be removed from decision-making capacity or bought out in a corporate buy-sell agreement. Again, the language in the authorization document has to be closely coordinated with the "capacity" language in the partnership agreement, if any.

In paragraph 1(E), HIPAA regulates the initial disclosure but not subsequent redisclosure. Federal regulations require a warning on the authorization form about the risk of redisclosure. 45 CFR §164.508(c)(2)(ii). California, however, goes further and prohibits the subsequent use of health information. CC §§56.13, 56.36(c)(2)(A). Thus, this form specifically authorizes appropriate redisclosure.

In paragraph 3(C), even though 45 CFR §164.502(g)(4) authorizes disclosures to the personal representative, some attorneys recommend extending the expiration date to 1 or 2 years after death to facilitate obtaining medical information after death.

In paragraph 3(D), the language is not required to be in the form, but it is helpful to remind the recipient of such information that redisclosure is limited. See CC §56.13.

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§8.36 2. Form: Authorization to Release Health Information by Trustees, Co-Trustees, Successor Trustees, and Agents

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8.36-1 Authorization to release health information by trustees, co-trustees, successor trustees, and agents

AUTHORIZATION BY TRUSTEES, CO-TRUSTEES, SUCCESSOR TRUSTEES, AND AGENTS TO RELEASE HEALTH INFORMATION

AUTHORIZATION FOR USE AND DISCLOSURE OF PROTECTED HEALTH INFORMATION

1. Pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 USC §1320d and 45 CFR parts 160, 164) and the California Confidentiality of Medical Information Act (Civil Code §§56-56.37), I authorize all health care providers and covered entities to disclose my protected health information and medical information as follows:

A. To a successor agent or co-agent nominated under a durable power of attorney or advance health care directive signed by _ _[*name of principal*]**_ _ of which I am then acting or then eligible to act as an agent, at the request of a successor agent or co-agent, in the form of a written and signed opinion that I do or do not have capacity as defined in the power of attorney or advance health care directive _ _**[, *along with a statement containing the minimum health information necessary to support and explain the opinion*]**_ _.**

B. To a successor trustee or co-trustee _ _[*or beneficiary*]**_ _ of any Trust of which _ _**[*name of settlor*]**_ _ is the Settlor and of which I am nominated as a trustee _ _**[*or a beneficiary of such trust*]**_ _, at the request of such co-trustee or successor trustee, in the form of a written opinion that I do or do not have capacity to serve as trustee as defined in the trust _ _**[, *along with a statement containing the minimum health information necessary to explain and support the opinion*]**_ _.**

C. To the attorney for _ _[*name of settlor*]**_ _, at the attorney's request, for the purpose of determining my capacity to serve as trustee, and I authorize _ _**[*name of attorney*]**_ _ to redisclose such information in the minimum amount required to implement or not implement such actions, as the case may be.**

2. Any person authorized above to receive my protected health information may bring a legal action against any covered entity or health care provider that refuses to provide my protected health information for the purposes described above and shall be reimbursed from the trust for all costs pertaining to such legal action.

3. I understand that

[*Use paragraphs 3(A)-(G) and acknowledgment from §8.35*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Comment: This form is to be produced in a typeface not smaller than 14-point type pursuant to CC §56.11(a).

In paragraph 1(A), what the health care provider can state is quite restricted under this provision. The language could permit the health care provider to prepare a written opinion encompassing far more information generally related to the agent's capacity or lack of capacity. It is critical that the durable power of attorney and advance health care directive be coordinated with this document. These documents must refer to "capacity" and then define it. Alternatively, if the documents do not refer to "capacity" but set out a standard such as "substantially able to manage my financial

affairs," then that same phrase must be included in all documents.

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§8.37 3. Form: Requirement to Have Agent Under Power of Attorney Execute HIPAA and CMIA Release

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8.37-1 Requirement to have agent under power of attorney execute HIPAA and CMIA release

AGENT'S AGREEMENT FOR RELEASE OF PROTECTED HEALTH INFORMATION

1. Agreement to Execute Authorization. A specific condition precedent to the appointment and acceptance of, or continuation in, the position of agent or attorney-in-fact is the execution of the Authorization for Use and Disclosure of Protected Health Information in the form set forth in Exhibit "A" (except for such changes as may be required to comply with subsequent changes in the law and regulations), attached hereto and incorporated herein by this reference, for purposes of determining whether the agent or attorney-in-fact is capable of managing the affairs of the principal.

2. Revocation of Authorization. Any agent or attorney-in-fact may revoke an authorization for disclosure of health information previously executed by such person, but revocation shall be deemed to constitute the immediate resignation of the agent or attorney-in-fact.

3. Determination of Capacity. Any individual holding or accepting the office of agent or attorney-in-fact agrees to be examined by a physician selected by the individual to determine whether he or she has the capacity to serve or continue serving as agent or attorney-in-fact, as defined in the power of attorney _ _[*, to determine whether such person is substantially incapable or capable of managing the duties and responsibilities as set forth in the power of attorney***]_ _. The individual must agree within thirty (30) days of being reasonably requested to do so by a successor agent, successor attorney-in-fact, co-agent, or co-attorney-in-fact, if any, and otherwise by the next successor agent, successor attorney-in-fact, co-agent, or co-attorney-in-fact, or if there is none, by any beneficiary of the principal's estate. An agent, attorney-in-fact, co-agent, or co-attorney-in-fact who refuses to be examined within thirty (30) days after being requested to do so in writing, as provided above, shall be deemed to have immediately resigned.**

Comment: There is a risk of harassment and abuse by the person who can compel an examination, but there is no easy solution to the problem. A clause can be added limiting the right to compel an examination to once every specified number of months, but what if there is a precipitous decline in capacity before the next examination period commences? It should also be kept in mind that in many cases in which an agent's capacity is questioned, a resignation is the desired result. A clause compelling examination by a physician may help achieve that result because the agent may not want to be examined.

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§8.38 4. Form: Authorization to Release Health Information to Health Care Agent

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.

▶ To download **Word** version, right click and choose *Save Target As*

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8.38-1 Authorization to release health information to health care agent

AUTHORIZATION TO RELEASE HEALTH INFORMATION TO HEALTH CARE AGENT

I, _ _[*name*]_ _, grant to my agent(s) under my advance health care directive the authority to advocate for my health care needs if I have been determined to lack capacity to make my own health care decisions.

1. Pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 USC §1320d and 45 CFR parts 160, 164) and the California Confidentiality of Medical Information Act (Civil Code §§56-56.37), I authorize all health care providers and covered entities to disclose to my agent under my advance health care directive, at my agent's request, all of my individually identifiable health and medical information and medical records regarding any past, present, or future medical or mental health condition in the minimum amount necessary to advocate for my health care needs.

2. I intend my agent to be dealt with by all my health care providers and covered entities, as required by HIPAA and California law, in the exact same way as I would be treated with respect to my rights regarding the use and disclosure of my identifiable protected health information or other medical records.

3. I understand that

[*Use paragraphs 3(A)-(G) and acknowledgment from §8.35*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Comment: This form is to be produced in a typeface not smaller than 14-point type pursuant to CC §56.11(a).

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B. Request Regarding Resuscitative Measures

§8.39 1. Statutory Authority

"Request regarding resuscitative measures" means a written document, signed by (1) an individual with capacity, or a legally recognized health care decision-maker, and (2) the individual's physician, that directs a health care provider regarding resuscitative measures. A request regarding resuscitative measures is not an advance health care directive. Prob C §4780(a)(1).

NOTE: Effective January 1, 2009, a "request regarding resuscitative measures" also includes a Physician Orders for Life-Sustaining Treatment. Prob C §§4780(a)(2)(B), 4781.2. See discussion in §7.66 and form in §7.67.

The request must contain a prehospital "do not resuscitate" form as developed by the Emergency Medical Services (EMS) Authority or other substantially similar form. The request may also be evidenced by a medallion engraved with the words "do not resuscitate" or the letters "DNR," a patient identification number, and a 24-hour toll-free telephone number, issued by a person under an agreement with the EMS Authority. Prob C §4780(a)(2), (b). Forms printed after January 1, 1995, must contain the following language (Prob C §4783(a)):

> By signing this form, the surrogate acknowledges that this request to forgo resuscitative measures is consistent with the known desires of, and with the best interest of, the individual who is the subject of the form.

A DNR bracelet, watch, or medallion may be obtained from the MedicAlert Foundation at (888) 633-4298; http://www.medicalert.org. Their application form is reproduced at §8.43. Most EMS agencies honor the Prehospital Do Not Resuscitate (DNR) Form issued by the California Medical Association and the California Emergency Services Authority, or an approved bracelet or medallion.

A Prob C §4780 DNR order and the POLST are the only forms that permit a surrogate to authorize a DNR order or other life-sustaining treatment without any authorization by the principal that also requires a physician's consent. They are not considered to be advance directives. It is the responsibility of the attending physician to determine informed consent of the principal or the surrogate or both.

The law governing requests regarding resuscitative measures states that "this part [Prob C §§4780-4786] does not repeal or narrow laws relating to health care decisionmaking." Prob C §4786. Thus, a PAHC provision authorizing the agent to direct or consent to a DNR order will remain effective.

PRACTICE TIP: If the client feels strongly about not being resuscitated in the event of cardiac or pulmonary arrest while suffering from a terminal condition or persistent vegetative state, the cautious attorney should include a DNR provision in the client's PAHC and also have the client ask his or her physician to execute a request to forgo resuscitative measures in the form specified in Prob C §4780. Either the request to forgo resuscitative measures or a DNR order should be placed in the patient's medical records.

For discussion of the medical issues involved in cardiopulmonary resuscitation (CPR) and DNR orders, see §§9.66-9.68.

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§8.40 2. Reliance by Health Care Providers

The request regarding resuscitative measures may be relied on by health care providers if it meets the requirements under the statute. The request applies whether the individual is within or outside a hospital or other health care facility. Prob C §4785. "Health care provider" expressly includes emergency response employees, including paramedics. See Prob C §4781(b).

In the absence of knowledge to the contrary, a health care provider may presume that a request regarding resuscitative measures is valid and has not been revoked. Prob C §4784. A health care provider who honors a request regarding resuscitative measures is protected from civil and criminal liability or professional discipline under Prob C §4782.

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§8.41 3. Practical Issues

When someone is dying, there is a natural tendency by both medical and trained lay personnel to do everything possible to save that person because it is presumed that everyone would want to be saved if at all possible. In fact, the law supports this presumption by providing "Good Samaritan" civil protection to certain trained persons rendering emergency care of this type. CC §1714.2; Bus & P C §2395.

The patient, however, may not want everything to be done, particularly if "everything" includes an excruciating process like CPR. In this situation, the patient may direct that CPR not be started in case of cardiac or pulmonary failure. Unless the patient wears the DNR medallion at all times, emergency health care providers may not know of the patient's wishes. Thus, even if the patient has signed a prehospital DNR form, that request may not be honored if the provider is unaware of its existence. The form should be kept in a location known to family and friends so that it can be made available immediately if emergency personnel are called. A client who feels very strongly about not undergoing CPR should be advised that wearing a DNR medallion is probably his or her best option.

For discussion of the medical issues regarding cardiopulmonary resuscitation, see §§9.66-9.68.

The prehospital DNR form was developed for emergency response personnel, not for hospitals or long-term care facilities. Although some hospitals now honor the prehospital DNR forms, many other hospitals require use of their own consent forms. Policies to honor DNR requests can be established by residential care facilities for the elderly. However, such policies must be in writing, and a copy of the policy must be provided to the physician and the patient if the patient makes a request to forgo resuscitative measures. Health & S C §1569.74. In the absence of a signed hospital-created form, patients will have an attempt at resuscitation made if they no longer have capacity to execute the hospital's consent form. The State Department of Social Services has developed regulations to deal with this issue for residential care facilities for the elderly or mentally incapacitated. 22 Cal Code Regs §87469.

PRACTICE TIP: Usual hospital policy calls for a "code," directing available personnel to rush to the bedside to perform their revival tasks unless a DNR order is in effect. It is important to ascertain whether a hospital's DNR policy will affect your client. On admission to an acute care hospital or long-term care facility, the patient should be sure the DNR request and AHCD are placed in the file and that any physician-written DNR orders required by the facility are executed. Standard practice in these settings usually requires a dated, signed physician's order stating "DNR" or "No Code" to be in the patient's chart. A conscientious physician should include any relevant medical, social, or personal information about the patient in the patient's progress notes. All family members who have been informed of the decision should be listed. If the AHCD expressly authorizes a DNR order, its existence should also be acknowledged in the progress notes. All such inclusions should be dated and signed by the physician.

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§8.42 4. Form: Agent Authorized to Direct or Consent to DNR Orders

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

8.42-1 Agent authorized to direct or consent to DNR orders

"Life-sustaining" treatment includes emergency CPR. My agent, therefore, is authorized to direct and consent to the writing of a request regarding resuscitative measures or a "no code" order by my health care provider.

Comment: This clause would be used only in those situations in which the client does not wish to be resuscitated in the event of cardiac or pulmonary failure. Including this provision in the PAHC and having a request to forgo resuscitative measures provide double reinforcement of the client's wishes.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/8 Advance Health Care Directives: Complete Forms and Related Documents/§8.43 5. Form: MedicAlert Enrollment Form

§8.43 5. Form: MedicAlert Enrollment Form



MedicAlert® Standard Member Order Form

Ordering is as easy as 1-2-3!

Step 1 Personal Information

(Please print clearly)

☐Mr. ☐Ms. ☐Mrs. First Name _____ MI _____ Last Name _____

Mailing Address _____ City _____ State _____ Zip _____
List street address if ordering 24K Gold product, for FedEx purposes

Phone ( ) _____ Alternate Phone ( ) _____

Email _____ Date of Birth _____ Member Number _____
month/day/year

Step 2 Personal Health Record (PHR) Information

Please list any changes or additions to your MedicAlert® Personal Health Record (PHR) below. *If you need more room, please attach a separate sheet of paper.*

? **Standard Member PHR Update Fee is $25**
OR
? **Upgrade to Advantage Membership and receive unlimited free updates to your PHR, free Member Cards, discounts on select MedicAlert products, and free issues of the MedicAlert Magazine.** See "Upgrade Me to Advantage Membership" in Step 3 below."

Medical Information

Medical Conditions _____

_____

Medications _____

_____

Allergies _____

_____

Other (Please Specify) _____

_____

_____

Please list your implant manufacturer model number and serial number, or attach a copy of your implant card.

Defibrillator _____

_____

Pacemaker _____

_____

Heart Valve Replacement and Location _____

_____

Other Implanted Medical Devices (Please Specify) _____

_____

Emergency Contact Information

*Primary Contact to Notify _____ Relationship _____ Phone ( ) _____

*Secondary Contact to Notify _____ Relationship _____ Phone ( ) _____

Primary Physician _____ Specialty _____ Phone ( ) _____

Health Insurer _____ Group Plan No. _____ Insurer Member No. _____

*Only contacts listed can update Member's record.

Step 3 Payment Information

List your Product Selection(s)

Item No. _____ Qty. _____ Price _____ Total $ _____

Item No. _____ Qty. _____ Price _____ Total $ _____

Item No. _____ Qty. _____ Price _____ Total $ _____

Shipping and Handling $4.95

Subtotal ..... $ _____

PHR Update Fee ($25) ..... $ _____

Member Cards ($5 each) ..... $ _____

Upgrade Me to Advantage Membership ($25 annually)
(Includes PHR Update Fee, Member Card and more) ..... $ _____

Grand Total ..... $ _____

Bracelet Size: Measure your wrist snugly and add 1/2" to allow room for emergency personnel to turn the bracelet over.

5" ☐ 5 1/2" ☐ 6" ☐ 6 1/2" ☐ 7" ☐ 7 1/2" ☐ 8" ☐ 8 1/2" ☐ 9" ☐

Method of Payment:

☐ Check Visa ☐ AMEX ☐ Discover MasterCard ☐ Money Order

Credit Card #: _____

Expiration Date: (MM/YY) _____ Signature for Authorization: _____

No other cards accepted. No CODs. Payment must accompany order.

IMPORTANT

Please Note: Once your emblem has been engraved and shipped, there will be an additional charge for any changes requested. Emblem engraving is personalized to individual members and cannot be transferred to another individual, altered, sold or returned.

1-800-ID-ALERT (1-800-432-5378) • website www.medicalert.org

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Print

MedicAlert® Advantage Member Order Form

Ordering is as easy as 1-2-3!

Step 1 Personal Information

☐Mr. ☐Ms. ☐Mrs. First Name _____ MI _____ Last Name _____

Mailing Address _____ City _____ State _____ Zip _____
List street address if ordering 14K Gold product, for FedEx purposes

Phone ( ) _____ Alternate Phone ( ) _____

Email _____ Date of Birth _____ Member Number _____
month/day/year

Step 2 Personal Health Record (PHR) Information

Please list any changes or additions to your MedicAlert® Personal Health Record (PHR) below. *If you need more room, please attach a separate sheet of paper.*

Medical Information

Medical Conditions _____

_____

Medications _____

_____

Allergies _____

_____

Other (Please Specify) _____

_____

_____

Please list your implant manufacturer model number and serial number, or attach a copy of your implant card.

Defibrillator _____

_____

Pacemaker _____

_____

Heart Valve Replacement and Location _____

_____

Other Implanted Medical Devices (Please Specify) _____

_____

Emergency Contact Information

*Primary Contact to Notify _____ Relationship _____ Phone ( ) _____

*Secondary Contact to Notify _____ Relationship _____ Phone ( ) _____

Primary Physician _____ Specialty _____ Phone ( ) _____

Health Insurer _____ Group Plan No. _____ Insurer Member No. _____

*Only contacts listed can update Member's record.

Step 3 Payment Information

List your Product Selection(s)

Item No. _____ Qty. _____ Price _____ Total $ _____

Item No. _____ Qty. _____ Price _____ Total $ _____

Item No. _____ Qty. _____ Price _____ Total $ _____

Shipping and Handling $4.95

Subtotal ..... $ _____

PHR Update Fee (No charge for Advantage Members) $0

I need to renew my annual membership ($25) ..... $ _____

Grand Total ..... $ _____

Bracelet Size: Measure your wrist snugly and add 1/2" to allow room for emergency personnel to turn the bracelet over.

☐ 5" ☐ 5 1/2" ☐ 6" ☐ 6 1/2" ☐ 7" ☐ 7 1/2" ☐ 8" ☐ 8 1/2" ☐ 9"

Method of Payment:

☐ Check ☐ Visa ☐ AMEX ☐ Discover ☐ MasterCard

☐ Money Order ☐ Each year please charge my credit card $25 to continue my annual Advantage Membership.

Credit Card #:

Expiration Date: (MM/YY) Signature for Authorization:

No other cards accepted. No CODs. Payment must accompany order.

IMPORTANT

Please Note: Once your emblem has been engraved and shipped, there will be an additional charge for any changes requested. Emblem engraving is personalized to individual members and cannot be transferred to another individual, altered, sold or returned.

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C. Anatomical Gifts

§8.44 1. Issues to Discuss With Clients

Organ and tissue donation should be discussed with each client as a relevant issue in end-of-life planning. Many clients would be willing to let their organs and tissue benefit others, but they often fail to make their intents known. By including such provisions in the AHCD document, there is greater likelihood that the client's donation wishes will be honored because these wishes are likely to be noted on the client's medical chart. The attorney also may wish to suggest that the client register on http://www.donatelifecalifornia.org. For further discussion of the Uniform Anatomical Gift Act, see §§7.58-7.63 and 9.44-9.64.

A Uniform Anatomical Gift Act registration form is reproduced in §8.46.

NOTE: It might be helpful for clients to be made aware that one person can donate tissue (bone, skin, bone marrow, corneas, and heart valves) as well as up to eight organs (for example, heart, liver, pancreas, kidney, lungs, and small intestine). One donor may benefit three or more recipients on the average. Advanced age is usually not a barrier to donations, particularly corneas and skin tissue. English, *Gift of Life: The Lawyer's Role in Organ and Tissue Donation,* Prob and Prop J (March/April 1994).

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§8.45 2. Relevant Statutory Provisions

Under Health & S C §7150.35(a), the rights of a donee created by an anatomical gift are superior to rights of others except with respect to autopsies under Health & S C §§7151.20(d) and 7155.5. Legislation addresses the rights of organ donors and is designed to prevent unethical activities associated with anatomical gifts. Health and Safety Code §§7150.75(a), 7150.50(i), and Govt C §27491.45, for example, require a coroner to release body parts to a donee only with the consent of the decedent or authorized person as specified in Health & S C §7150.40, or if, after reasonable efforts have been made to find a representative or next of kin, he or she is informed of the option to make, or object to making, an anatomical gift and the representative or next of kin consents. These statutes also define "reasonable effort."

NOTE: Government Code §27491.45 makes several cross-references to the Health and Safety Code that are not valid. It appears that it was intended to cross-reference to certain portions of the Anatomical Gift Act. It is expected that these cross-references will be fixed during the next legislative session.

Following the final disposition of the remains of the donor, cremated remains must be returned free of charge to the donor's family or attorney, unless the donor has previously designated another disposition in the document of gift. Health & S C §7151.40(b).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/8 Advance Health Care Directives: Complete Forms and Related Documents/§8.46 3. Form: Uniform Anatomical Gift Act Donor Registration Form (The Living Bank)

§8.46 3. Form: Uniform Anatomical Gift Act Donor Registration Form (The Living Bank)





The Living Bank International

P.O. Box 6725, Houston, TX 77265 – 1-800-528-2971
www.livingbank.org
E-mail: info@livingbank.org



Uniform Anatomical Gift Act

DONOR REGISTRATION FORM

Instructions: When this form is completed and mailed to the address below, a donor card will be sent to you to be carried with you at all times. **The form and the card are legal documents in all 50 states under the Uniform Anatomical Gift Act and similar laws. You must sign the form and have it witnessed by two persons of legal age. Your next of kin is preferred as a witness, to make sure he/she knows of your decision. If you are under 18, a parent or guardian must sign. Federal law prohibits any payment or charge to you for signing this form, and any payment or charge to you or any other entity for your donated organs.**

PLEASE TYPE OR PRINT. COMPLETE LINES 1 THROUGH 17.

1. Social Security # _____ **2. Date of Birth** _____
(Optional)

3. Donor's Full Name: _____ **Phone: ( )** _____

4. Mailing Address: _____ **E-mail:** _____

5. City: _____ **6. State:** _____ **7. Zip:** _____-_____

8. Driver's License or I.D. #: _____ **9. State Issued:** _____

10. Name of Donor's Next of Kin: _____ **11. Relationship:** _____

12. Full Address: _____ **Phone: ( )** _____

13. In the hope that I may help others, I hereby make this anatomical gift, if medically acceptable, to take effect upon my death. The words and marks below indicate my desires.

I give ☐ **Any needed organs and tissues.** ☐ **Only the organs and tissues listed below:**

---

14. Donor's Signature: _____ **15. Date Signed:** _____

16. Witnessed: _____ **17. Witnessed:** _____

Critical Facts About Organ and Tissue Donation

Currently, the National Waiting List exceeds 83,000 patients.
Every 13 minutes another name is added to the list.
In 2001 over 6,000 people died because an organ was not available in time.
Even though 2.1 million died in the U.S. last year, there were only 24,076 organ transplants.

Thank you for your decision to become an Organ/Tissue Donor.
Please share this decision with your family.

Return this page to:
The Living Bank International
P.O. Box 6725
Houston, TX 77265-6725

Upon receipt your data will be entered in a national database of Organ/Tissue Donors.

To find out how to implement this program in your community, call 800-528-2971.

Internet Donor Form

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§8.47 4. Form: Anatomical Gifts

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§8.9-8.47.

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

8.47-1 Anatomical gifts

[*Choose one of the following alternatives*]

[*Alternative 1: Anatomical gifts when agent is named*]

My agent _ _[*has/does not have*]**_ _ the power and authority to make a disposition of a part of my body under the Uniform Anatomical Gift Act (Chapter 3.5, commencing with Section 7150 of Part 1 of Division 7 of the California Health and Safety Code).**

[*If appropriate, add*]

My agent shall have no authority or power to donate my body for educational purposes. My agent may donate parts of my body for transplant, therapeutic, or scientific purposes.

[*Alternative 2: Anatomical gifts when no agent is named*]

In the hope that I may help others, I give any needed organs or tissues for the purpose of transplantation, therapy, medical research, or education.

Comment: This form, which can be included in a PAHC, requires a choice to be made between allowing or disallowing this power. The additional clause is appropriate for those who wish to be helpful by donating anatomical gifts for therapeutic reasons but feel squeamish about the possibility of ending up as a cadaver to be dissected in a medical school anatomy laboratory. Alternative 2 might be appropriate for those wishing to document their desires regarding anatomical gifts but who have not named an agent.

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§8.48 D. Living Will

A living will is a more all-encompassing document than a request regarding resuscitative measures. In a living will, a person requests to be allowed to die a natural death, free of intervention by anyone who would keep him or her alive on machines or through other artificial means. The document may contain a detailed list of the measures that the individual intends not be used. Many elderly or seriously ill clients execute living wills because they realize that a time may come when they cannot respond to questions about their health care. They want to ensure that heroic measures and artificial devices will not be used to prolong their lives when there is little or no prognosis for full recovery.

The major drawback with a living will, if it goes beyond a validly executed request to forgo resuscitative measures as provided in Prob C §4780, is that it has no agent to enforce its provisions. However, a living will can be advisory and may be used by surrogates and health care providers as evidence of the legally incapacitated patient's known desires.

The estate planner may encounter numerous forms of living wills prepared by various agencies throughout the country and should be extremely cautious in advising a client to use such forms.

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9

Health Care Decisions: The Legal and Medical Environments

Fay Blix

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I. OVERVIEW

§9.1 A. Introduction

Planning for property management in the event of the client's incapacity and for distribution of assets after the client's death is no longer the only responsibility of the estate planning attorney. Modern medical technology has created perplexing and excruciating end-of-life decisions for clients. This ever-changing world of bioethics assigns the estate planning attorney new responsibilities: to discover the client's attitudes about life-sustaining medical interventions and to determine mechanisms to ensure that the client's wishes regarding these health care decisions are honored.

To guide the health care decision-making discussion with skill, the attorney must learn the language of health care decision making, understand the most common medical life-sustaining interventions and treatments, understand the alternatives to those interventions, and recognize the care providers' perspective in these matters.

This chapter discusses California law regarding health care decision making and explores the legal rights of individuals both with and without legal capacity. It also provides a brief overview of the most common problematic medical issues that clients may confront in their attempts to make meaningful decisions.

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§9.2 B. Problems Presented by Medical Technology

Advances in medical technology have allowed many people who would have been diagnosed as terminally ill or permanently disabled only a few decades ago to lead productive lives today. This good news is not without shadows, however. While life expectancy has increased and many diseases can now be held at bay or possibly eradicated by technological breakthroughs, the technology to do so is increasingly costly, complex, and intrusive. Often, technology merely prolongs the process of dying without enhancing the quality of living. This happens when medical technology merely neutralizes the effects of certain diseases without actually healing the patient and puts the person into a sort of human limbo—kept from dying *and* living. Clients are therefore increasingly concerned about their right to bypass some of these technological advances.

When faced with the possibility that recovery is virtually nonexistent, clients typically experience these concerns or fears:

- Losing control and having medical decisions made by strangers;
- Becoming a burden and being dependent on others;
- Experiencing pain;
- Spending his or her last years alone in a cold, impersonal institutional setting;
- Losing personal dignity;
- Undergoing unwanted, futile treatment;
- Having emotional and financial impact on his or her family;
- Not having religious concerns honored; and
- Being denied a comfortable, dignified death.

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§9.3 C. Role of Attorneys

As the aging population increases and more deaths occur in institutional settings, attorneys will more frequently be called on to assist families who face crucial health care decisions. Of those who die in institutional settings, 70 percent die after a decision is made to forgo life-sustaining treatment. Miller, Dignified Departure, p 15 (1993). For attorneys to be truly "counselors at law," they must be well informed regarding the nuances of choices in both their personally drafted powers of attorney for health care or the more common nuances in preprinted health care power of attorney forms. See chap 8 for a copy of various health care directive forms. The power of attorney for health care should not be simply treated as an "add-on" document, and these health care decisions should not be discussed cavalierly.

Clients must understand that they have a right to plan how they wish to be treated when illness or incapacity strikes. Furthermore, the ability to make choices is meaningless unless clients understand the ramifications of each choice and alternative. Attorneys must be able to advise clients on how to maintain control of their health care decisions. Attorneys must therefore be intimately familiar with the rapidly evolving law on medical decision making.

However, legal understanding is not enough. When clients are forced to think about life-and-death decisions, the experience can be highly emotional. Attorneys must therefore hone their counseling skills to lead their clients through the delicate discussion of their future health care issues in relation to their social, cultural, and religious values.

Initially, many clients will not express their health care decision-making concerns. They may consider it an inappropriate area of legal discussion, or they may believe it to be the attorney's responsibility to introduce the subject. It is therefore vital that the attorney include the topic of health care decisions in every estate planning discussion, whether or not the client has expressed concerns in this area.

Attorneys must also be aware of cultural and religious differences. In our multiethnic society, the attorney must be sensitive to cultural and religious differences to minimize misunderstandings and avoid unnecessary conflict and distrust. For example, American culture greatly emphasizes autonomy and the patient's "right to know." In many other cultures, men may serve as spokespersons for their wives, eldest sons may make decisions for elderly parents, or decisions may be made by family consensus. Additionally, families from other cultures may try to shield the patient from knowledge of the seriousness of his or her condition. Others may feel that any discussion of death and dying is bad luck and that the discussion itself may actually bring on the dying process. Attorneys must therefore reassure clients that religious and cultural concerns will be respected and honored, and they must ensure that discussions do not unintentionally hurt clients.

The discussion regarding mortality and incapacity requires empathy. The attorney should demonstrate genuine care about the client's anxieties over health care issues. Once the subject is broached, clients are usually eager to share their health care concerns. Elderly clients, especially, often have strong feelings about their treatment options. The attorney should emphasize the importance of planning ahead in order to preserve personal dignity and control. A skilled attorney can do much to transform the discussion regarding preparation for death from a morbid activity to a caring one.

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II. LEGAL ENVIRONMENT

§9.4 A. Right to Refuse Medical Treatment

The issue of withdrawing medical care first gained public attention in 1975, in *In re Quinlan* (NJ 1976) 355 A2d 647. In that case, Joseph Quinlan sought a court order to have his daughter, Karen, who had long been in a persistent vegetative state (PVS), removed from a respirator. The New Jersey Supreme Court held that, under both the United States and New Jersey constitutions, Karen had the right to decline medical treatment because such right was incorporated into an individual's right of privacy. The court stated that "the state's interest … weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the State interest." 355 A2d at 664.

For the next 15 years, various state courts struggled in approximately 130 cases with the "right-to-die" issue, arriving at various conflicting decisions. Each case has contributed its own special nuance to the debate.

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§9.5 1. *Cruzan,* First Supreme Court Case

Cruzan v Missouri Dep't of Health (1990) 497 US 261, 111 L Ed 2d 224, 110 S Ct 2841, was the first "right-to-die" case brought before the United States Supreme Court. The case, decided in 1990, first articulated the existence on a national level of a constitutionally protected liberty interest to refuse treatment. Additionally, the *Cruzan* Court stated that "the common law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment." 111 L Ed 2d at 241. The case strongly implied that an appointed surrogate decision-maker would have the same right to refuse treatment on behalf of an incapacitated individual. The *Cruzan* Court also considered artificial nutrition and hydration as one form of life-sustaining treatment that can be refused by individuals.

Although the *Cruzan* Court upheld the constitutional right to die, the Court's ruling strangely simultaneously contradicted that right by leaving to the individual states the task of establishing their own guidelines on life-or-death treatment decisions for incapacitated individuals. It found Missouri's standard, requiring "clear and convincing" evidence to authorize withdrawal of life support systems, acceptable but not constitutionally required. The Court made it painfully clear that patients' rights are jeopardized if they fail to leave explicit instructions. For an illustration of the possible consequences of failure to leave explicit instructions, see the Terri Schiavo case discussion in §§9.19-9.22.

A book by the Cruzans' attorney, William H. Colby, Long Good-bye: The Deaths of Nancy Cruzan (2002), provides excellent insight into the inner workings of the *Cruzan* case.

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§9.6 2. Federal Law

The *Cruzan* decision served as a springboard for new legislation. To strengthen patients' awareness of their right to prepare advance directives, the Patient Self-Determination Act (PSDA) (42 USC §1395cc(f)) was passed in 1991 with bipartisan support. The PSDA amended the Social Security Act to require all hospitals, nursing homes, home health agencies, hospices, and HMOs accepting Medicare and Medicaid to inform patients, on admission, of their rights to execute an advance health care directive. The hope was that, by informing patients of their "medical Miranda rights," they would take action to ensure that their advance directives were in place.

In addition to the PSDA, the Nursing Home Reform Act (a part of the Omnibus Budget Reconciliation Act of 1987) (Pub L 100-203, 101 Stat 1330 (1987)) and the Resident Bill of Rights (in OBRA 1990) (Pub L 101-508, 104 Stat 1388 (1990)) mandate notice of an individual's right to participate in his or her own medical care planning. Thus, federal legislation lays a firm foundation that acknowledges the importance of the individual's involvement in health care planning.

The law seems to be only mildly successful thus far. In many cases, hospitals have done little more than add another piece of paper to the patient's records at the time of admission. Little attention has been given to improving doctor-patient communication. In fact, studies indicate that public understanding and doctor-patient communication about advance directives and end-of-life medical decision making have not improved significantly since the passage of the PSDA. See Larson & Eaton, *The Limits of Advance Directives: A History and Assessment of the Patient Self-Determination Act,* 32 Wake Forest L Rev 284 (1997).

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§9.7 3. Common Law Rights

The common law right to be free from nonconsensual physical contact and bodily invasion has long been articulated. In 1914, New York Court of Appeals Justice Cardozo wrote: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Schloendorff v Society of N.Y. Hosp.* (NY 1914) 105 NE 92, 93, overruled on other grounds in *Bing v Thunig* (1957) 163 NYS2d 3, 143 NE2d 3.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/9 Health Care Decisions: The Legal and Medical Environments/§9.8 4. Health Care Decisions Law

§9.8 4. Health Care Decisions Law

The California Health Care Decisions Law (HCDL) (Prob C §§4600-4806) includes a legislative finding that adults have the fundamental right to control their health care decisions, including the decision to have life-sustaining treatment withheld or withdrawn. Prob C §4650(a).

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§9.9 5. California Constitution

The California Constitution, in Cal Const art I, §1, expressly protects the right of privacy. Implicit in this right is the right to refuse medical treatment. The right of privacy has also long been recognized as part of the "penumbra" of constitutional rights protected by the Fifth and Ninth Amendments of the United States Constitution. *Griswold v Connecticut* (1965) 381 US 479, 14 L Ed 2d 510, 85 S Ct 1678.

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§9.10 B. Right of Competent Persons to Refuse Medical Treatment

NOTE: The courts generally use the term "competent" in discussing case law. For that reason, this term is used in §§9.10-9.23. In general, the statutes and the authors of this book describe a person who is able to make decisions for himself or herself as a person "with capacity."

In *Thor v Superior Court* (1993) 5 C4th 725, 21 CR2d 357, the first right-to-die case heard by the California Supreme Court, the court ruled that mentally competent adults have a "fundamental right" to refuse life-saving assistance. While serving a life term in prison, Howard Andrews jumped or fell from a wall, causing injuries that rendered him a quadriplegic. Medical personnel were required to assist him with all bodily functions. Andrews began refusing to be fed from time to time and refusing necessary medication and treatment for his general care. As a result, he was at risk of death because of possible pulmonary emboli, malnutrition, infection, and renal failure. Staff psychiatrists, however, found him competent to understand his circumstances, even though he was depressed.

His attending physician, Dr. Daniel Thor, sought an ex parte order in superior court that would allow him to use certain medical procedures to feed and medicate Andrews against his will. The supreme court denied the physician's petition for a writ of mandate.

The court wrote, "After due deliberation, we hold that under California law a competent, informed adult has a fundamental right of self-determination to refuse or demand the withdrawal of medical treatment of any form, irrespective of the personal consequences." 5 C4th at 732.

The state argued that Andrews was not suffering chronic pain or enduring "unending agony" like the patients in previous right-to-die cases. The court was not swayed by this distinction. Instead, the court noted, "For self-determination to have any meaning, it cannot be subject to the scrutiny of anyone else's conscience or sensibilities. It is the individual who must live or die with the course of treatment chosen or rejected, not the state." 5 C4th at 741. The court also stated, "Particularly when the restoration of normal health and vitality is impossible, only the person whose moment-to-moment existence lies in the balance can resolve the difficult and uniquely subjective questions involved." 5 C4th at 728.

However, the court carefully recognized that the right to refuse medical treatment is not absolute. Four state interests must be considered in determining the scope of the patient's autonomy: (1) preserving life, (2) preventing suicide, (3) maintaining the integrity of the medical profession, and (4) protecting innocent third parties. The court addressed each of these interests but found that either the interest did not override the individual's right of self-determination and bodily integrity or it was not a concern in this case.

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§9.11 1. Right to Refuse Treatment; Informed Consent

As early as 1972, California courts recognized the right to control one's own medical treatment. *Cobbs v Grant* (1972) 8 C3d 229, 104 CR 505, held that when a doctor performs treatment in the absence of informed consent, there is an actionable battery. The court stated that a "person of adult years and in sound mind … in the exercise of control over his own body, [*has the right*] to determine whether or not to submit to lawful medical treatment." 8 C3d at 242. The court in *Cobbs* clearly articulated that the patient's consent to medical treatment is legally effective only if the consent is "informed" consent.

Under Prob C §813(a), for purposes of a judicial determination, a person has the capacity to give informed consent to a proposed medical treatment if the person is able to do the following:

> (1) Respond knowingly and intelligently to queries about that medical treatment.
> (2) Participate in that treatment decision by means of a rational thought process.
> (3) Understand all of the following items of minimum basic medical treatment information with respect to that treatment:
> (A) The nature and seriousness of the illness, disorder, or defect that the person has.
> (B) The nature of the medical treatment that is being recommended by the person's health care providers.
> (C) The probable degree and duration of any benefits and risks of any medical intervention that is being recommended by the person's health care providers, and the consequences of lack of treatment.
> (D) The nature, risks, and benefits of any reasonable alternatives.

A person who has the capacity to give informed consent to a proposed medical treatment also has the capacity to refuse consent to that treatment. Prob C §813(b).

A special standard is thus provided for determining whether a person has the capacity to give informed consent to medical treatment, including the ability to communicate regarding the medical treatment and to understand the nature and seriousness of the illness. The standard that determines capacity is the same standard applied to determine capacity to refuse consent. The law protects a person's right to make the decision to accept or reject treatment, whether the decision is wise or unwise, as long as the requisite capacity exists.

Although the Health Care Decisions Law (HCDL) (Prob C §§4600-48066) does not specifically refer to "informed consent," it defines "capacity" as a

> person's ability to understand the nature and consequences of a decision and to make and communicate a decision, and includes in the case of proposed health care, the ability to understand its significant benefits, risks, and alternatives.

Prob C §4609. In addition, the doctrine of informed consent is still applicable. See Comment to Prob C §4617. Probate Code §1881 specifies the necessary court determinations when a conservator seeks power to consent to medical treatment for the conservatee. See President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment, p 51 (1983), in which the Commission concludes that the doctrine of informed consent requires that the patient be given the following information:

(1) A thorough description of the patient's present condition and the potential risks of nontreatment;

(2) A description of the procedures involved in the recommended treatment as well as the potential risks and benefits; and

(3) Any available alternatives to the recommended treatment.

See also the American Hospital Association's "Patient's Bill of Rights," a copy of which can be found at http://www.mesotheliomaweb.org/billofrights.htm.

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§9.12 2. Right to Refuse Mechanical Respiration

In *Bartling v Superior Court* (1984) 163 CA3d 186, 209 CR 220 (*Bartling I*), the court viewed a patient's decision to refuse medical treatment as a part of a person's right to control one's own medical treatment. William Bartling was a 70-year-old patient at Glendale Adventist Medical Center and suffered from a variety of illnesses. After being diagnosed with a lung tumor, his lung collapsed on biopsy and failed to reinflate because of an advanced stage of emphysema. To save his life, it was necessary to perform a tracheotomy and place him on a ventilator.

Bartling requested that the ventilator be disconnected, and he executed a living will and durable power of attorney for health care reiterating this wish. The hospital refused to withdraw the ventilator. Bartling applied for an injunction against further treatment, which the court denied because, despite his serious condition, Bartling's death was not imminent. Bartling appealed, but he died one day before his appeal was heard. On appeal, the court ruled that Bartling's expressed wishes should have been honored. "The right of a competent adult patient to refuse medical treatment is a constitutionally guaranteed right which must not be abridged." 163 CA3d at 195. The court noted that, "if the right of the patient to self-determination as to his own medical treatment is to have any meaning at all, it must be paramount to the interests of the patient's hospital and doctors." 163 CA3d at 195.

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§9.13 3. Right to Refuse Artificial Nutrition and Hydration

In the most widely cited California case regarding refusal of nutrition and hydration, a competent patient's right to refuse treatment was resoundingly affirmed. In *Bouvia v Superior Court* (1986) 179 CA3d 1127, 225 CR 297, Elizabeth Bouvia, a 28-year-old patient with severe cerebral palsy, was totally dependent on others for all her basic needs, including feeding, washing, and toileting. She was fed with a nasogastric feeding tube, and another tube, which automatically injected periodic doses of morphine, was permanently attached to her chest. She requested a court order to allow her to have her feeding tube removed. The California Court of Appeal held that a competent patient has the right to remove a feeding tube, even though she might be kept alive for 15 or 20 years if it were left in place.

The *Bouvia* court expressed this right as almost absolute: "Petitioner sought to enforce only a right which was exclusively hers and over which neither the medical profession nor the judiciary have any veto power." 179 CA3d at 1135. In addition, the court suggested that quality of life must be given at least equal consideration to quantity of life. "If her right to choose may not be exercised because there remains to her, in the opinion of a court, a physician, or some committee, a certain arbitrary number of years, months, or days, her right will have lost its value and meaning." 179 CA3d at 1143. The court concluded that the patient's "decision to allow nature to take its course is not equivalent to an election to commit suicide." 179 CA3d at 1144. A concurring opinion states that the majority opinion "dances" around the suicide issue. 179 CA3d at 1147.

The court in *Thor v Superior Court* (1993) 5 C4th 725, 21 CR2d 357, did not directly address whether nutrition and hydration is included in the definition of "life-sustaining treatment" over which the patient has the right of refusal. However, it did affirm a patient's right to refuse medical procedures involving food and medication. See discussion of *Thor* in §9.10.

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§9.14 C. Right of Incompetent Persons to Refuse Medical Treatment

The right to self-determination regarding medical decisions remains the same when one becomes incapacitated. The principles governing medical decision making for incompetent individuals parallel those for competent individuals.

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§9.15 1. Proportionate-Treatment Test

In *Barber v Superior Court* (1983) 147 CA3d 1006, 195 CR 484, Clarence Herbert underwent surgery and suffered cardiorespiratory arrest while in the recovery room. He was revived and placed on life support; within 3 days he was in a deeply comatose state from which he was not likely to recover. Herbert's family drafted a written request to hospital personnel that life-support systems be removed. His attending surgeon and internist removed both Herbert's respirator and the intravenous tubes providing hydration and nourishment. The doctors were subsequently charged with murder and conspiracy to commit murder.

While Herbert had not executed an advance directive under California's former Natural Death Act, the appellate court held that the Act (see former Health & S C §§7185-7194.5) is not the exclusive basis for terminating life-sustaining treatment. 147 CA3d at 1015. The Act, by its own terms, does not supersede any legal right a person may have to withhold or withdraw life-sustaining treatment. See former Health & S C §7193.

The *Barber* court held that the physicians' conduct was not unlawful. The court established a proportionate-treatment test to determine when a treatment may be withheld or withdrawn: "the determination of whether the proposed treatment is proportionate or disproportionate in terms of the benefits to be gained versus the burdens caused." 147 CA3d at 1018. The court further found no distinction between the withdrawal of mechanical breathing devices (respirators) and the withdrawal of mechanical feeding devices (IV feeding).

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§9.16 2. Surrogate Decision-Maker's Rights

The court in *Barber v Superior Court* (1983) 147 CA3d 1006, 195 CR 484, stated that if the patient is personally unable to make the decision to withhold or withdraw medical treatment, a surrogate is authorized to make this decision on the patient's behalf. In that case, the proper surrogate was Mrs. Herbert. The determining factors the court enumerated in deciding whether to remove life-sustaining treatment were as follows: (1) what the patient would have decided if he were able to make the decision; (2) if the evidence does not clearly indicate what the patient would have desired, what course of action would be in the patient's best interests; and (3) the impact each course of action would have on those closest to him. 147 CA3d at 1021. The court indicated that the surrogate should consider such factors as the relief of suffering, the preservation or restoration of functioning, and the quality and extent of life sustained in determining the patient's best interest. 147 CA3d at 1021.

The Health Care Decisions Law (HCDL) (Prob C §§4600-48066) allows for the written or oral designation of a surrogate to make health care decisions for the principal. Prob C §4711. An oral designation of a surrogate must be promptly recorded in the patient's health care record, and unless the patient specifies a shorter period, the surrogate designation is effective only during the course of treatment or illness or during the stay in the health care institution when the designation is made, or for 60 days, whichever period is shorter. Prob C §4711. The surrogate must make health care decisions according to the patient's instructions or wishes, if known, or in the patient's best interest as determined by the patient's personal values if the patient's wishes are not known. Prob C §4714.

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3. Conservator's Broad Discretion

a. Conservatee in Persistent Vegetative State

§9.17 (1) California Law

In *Conservatorship of Drabick* (1988) 200 CA3d 185, 245 CR 840, the court addressed the issue of withdrawal of life-support systems and reaffirmed the power of a legally appointed surrogate to make such decisions. In *Drabick,* David Drabick, conservator of the person for his brother, William J. Drabick III, petitioned the court for authority to remove his brother's nasogastric feeding tube. William Drabick had been comatose in a persistent vegetative state for 3 years with no hope of recovery. The conservatee's family agreed without any opposition that removal of the tube was in his best interests. His physician was also willing to cooperate. The trial court denied the petition, and the appellate court reversed.

In reversing the trial court's decision, the court of appeal held that the conservator's powers as defined in Prob C §2355(a) include the "power to withhold or withdraw consent to medical treatment under appropriate circumstances." 200 CA3d at 200. The court further stated that it is "common sense [that] a statute that requires a person to make a decision contemplates a decision either way." 200 CA3d at 202. Thus, *Drabick* permits a conservator to decide, without judicial approval, to remove life support, including nutrition and hydration, from a conservatee in a permanent vegetative state, taking into consideration the conservatee's best interests, his or her known expressed preferences, and medical advice indicating that there is no hope that the conservatee will regain meaningful consciousness, as long as there is no disagreement among family members about terminating life support.

The *Drabick* decision indicates that the decision to terminate life support can be made even if the conservatee did *not* express opinions about life support and did not execute an advance directive. 200 CA3d at 212, 216. The court stated: "There is no necessity or authority for adopting a rule to the effect that the conservatee's desire to have medical treatment withdrawn must be proved by clear and convincing evidence or another standard. Acknowledging that the patient's expressed preferences are relevant, it is enough for the conservator, who must act in the conservatee's best interests, to consider them in good faith." 200 CA3d at 212.

Both the California Supreme Court and the United States Supreme Court declined to review the *Drabick* case.

In *Conservatorship of Morrison* (1988) 206 CA3d 304, 253 CR 530, the court in dicta agreed with the *Drabick* court's reasoning in allowing the conservator of the person of an elderly mother in a persistent vegetative state to remove a nasogastric tube, despite the objections of the hospital and the conservatee's physicians. Citing *Drabick,* the *Morrison* court stated in dicta that the question of whether a conservator can authorize the removal of a nasogastric tube from a conservatee has been "resolved." 206 CA3d at 308.

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§9.18 (2) Limitations on Broad Discretion and Practice Considerations for California Attorneys

Practitioners are cautioned that courts in at least one county still require court intervention to withhold or withdraw life-sustaining treatment from a conservatee. This is the case despite the strong contrary language in *Conservatorship of Drabick* (1988) 200 CA3d 185, 245 CR 840, as well as the broadened definition of health care decisions found in Prob C §4617. Thus, the attorney filing for a conservatorship should learn the local rules in this regard.

Practitioners are further cautioned that the California Supreme Court noted in *Conservatorship of Wendland* (2001) 26 C4th 519, 110 CR2d 412, that the *Drabick* "best interests" standard applies only when the conservatee's wishes are not known. This is codified in Prob C §2355(a). The court further compared Prob C §2355(a) to *Drabick* and noted that Prob C §2355(a) assigns "dispositive weight to the conservatee's informally expressed wishes, when known." 26 C4th at 541. See *Wendland* discussion in §9.23.

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§9.19 (3) Terri Schiavo Case

The case of Terri Schiavo presents an excellent summary of the legal, medical, and political issues involved with the withdrawal of artificial hydration and nutrition from someone who has not indicated a preference in a written format such as an advance health care directive. In 1990, Terri Schiavo, then 26 years old, suffered a cardiac arrest that deprived her brain of oxygen for 5 minutes before she was resuscitated. The resulting brain damage left Terri in a persistent vegetative state, unable to move, communicate, swallow, feed herself, make choices, think, or feel pain or emotion. She never regained consciousness. Experimental surgery and several years of therapy produced no signs of recovery.

In the years following *In re Quinlan* (NJ 1976) 355 A2d 647 (see §9.4), case law throughout the nation had confirmed the individual's right to decide whether to withhold or withdraw life-sustaining treatment, clarified that artificial feeding and hydration are considered life support rather than basic sustenance, and confirmed the right of a surrogate decision-maker to decide on behalf of an incapacitated individual on the basis of the individual's known wishes and values. However, Terri's case highlights the uncertain ground a surrogate decision-maker stands on when the patient fails to leave a written health care directive indicating his or her preference for end-of-life treatment.

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§9.20 (a) Litigation

In May 1998, Terri's husband and legal guardian, Michael, giving up hope of recovery for Terri, filed a petition for guardianship and for the court to determine whether Terri's feeding tube should be removed. He presented evidence that Terri would not wish to be kept alive in this condition. Terri's parents, the Schindlers, opposed Michael's petition. The trial court ruled in February 2000 that there was clear and convincing evidence that Terri would have chosen not to continue life support under the circumstances. The state court of appeal affirmed (*Schindler v Schiavo* (Fla Dist Ct App 2001) 780 So 2d 176) and the Florida Supreme Court denied the Schindlers' petition for review.

On April 24, 2001, Terri Schiavo's feeding tube was removed for the first time. Two days later, the Schindlers filed a motion, which was denied as untimely, claiming that new evidence of Terri's wishes had been discovered. That same day, the Schindlers requested an injunction ordering reinsertion of the feeding tube. The new judge assigned to the case issued the injunction and the tube was reinserted.

Extensive litigation ensued. On October 15, 2003, Terri's feeding tube was disconnected for the second time. Under normal circumstances, this heart-wrenching saga would have ended in a few days. Instead, Terri's case exploded into a national spectacle involving the media, the courts, the Florida Legislature, the Florida Department of Children and Family, Florida Governor Jeb Bush, the United States Congress, President George W. Bush, and the Vatican.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/9 Health Care Decisions: The Legal and Medical Environments/§9.21 (b) Legislation and Further Litigation

§9.21 (b) Legislation and Further Litigation

The Florida Legislature passed an extraordinary law that applied only to Terri Schiavo, granting Governor Jeb Bush the unprecedented ability to overrule a judicial order. The new "Terri's Law" gave the governor authority to issue a stay within 15 days of its passage to prevent the withholding of nutrition and hydration from a patient in a persistent vegetative state if the patient had no written advance directive and a member of the family objected to removal of life support. Fla Pub L 03-418. On October 21, 2003, Governor Bush signed the law and issued an executive order that Terri Schiavo's feeding tube be restored (Fla Exec Order 201 (2003)). She was rushed to the hospital for surgical reinsertion of the tube.

After Michael Schiavo's request for an immediate injunction, the trial court allowed the feeding tube to be reinserted until arguments could be heard. Ultimately, the state court of appeal issued an indefinite stay of the removal of Terri's feeding tube.

In 2004, the Florida Supreme Court held the law unconstitutional because it violated the doctrine of separation of powers, *i.e.,* no branch of government may encroach on the powers of another, but one branch may delegate to another any of its constitutionally assigned powers. The court held that for the Florida Legislature to pass a law allowing the executive branch to "interfere with the final judicial determination in a case" is "without question an invasion of the authority of the judicial branch." *Bush v Schiavo* (Fla 2004) 885 So2d 321. Governor Bush appealed to the United States Supreme Court, but the Court refused to hear the appeal. *Bush v Schiavo* (Fla 2004) 885 So2d 321, cert denied (2005) 543 US 1121. The trial court then ordered that Terri's feeding tube be removed in 30 days.

A flurry of legal and political activity ensued. Several motions were filed by the Schindlers concerning such issues as whether Terri was improperly denied her own attorney in the original proceedings, whether the case should be reopened on the basis of new evidence (including the 2004 statement of Pope John Paul II concerning artificial nutrition and hydration), whether the court had improperly applied Florida statutory law retroactively to Terri's case, whether relief should be granted on the basis of an error in the February 2000 judgment order stating that Karen Ann Quinlan had died in 1992 instead of her actual date of death in 1995, and whether the court had violated the doctrine of separation of powers by determining Terri's wishes instead of having them determined by an administrative agency. Judge Greer determined that these arguments lacked merit.

The Florida State Legislature considered new legislation aimed at restoring Terri Schiavo's feeding tube once again. The bill was ultimately defeated. On March 18, 2005, Terri Schiavo's feeding tube was removed for the third time.

Congress met in a special emergency session on Sunday, March 20, 2005, for the first time in the history of the United States, to pass legislation concerned with the medical care of one person—Terri Schiavo. The measure passed by an overwhelming margin. The new law (Pub L 109-3, 119 Stat 15) provided that "the United States District Court for the Middle District of Florida shall have jurisdiction" to hear suit "for the alleged violation of any right of Theresa Marie Schiavo under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids or medical treatment necessary to sustain her life." The law gave the Schindlers standing to bring the lawsuit and instructed the court to "determine de novo any claim of a violation of any right of Theresa Marie Schiavo … notwithstanding any prior State court determination." The law also indicated that it was to provide "no precedent with respect to future legislation."

NOTE: On March 21, 2005, the California Medical Association (CMA) adopted a resolution stating that "CMA expresses its outrage at Congress' interference in medical decisions." Resolution 521-05 (available at http://www.calphys.org/assets/hod_2005/emergency_resolution.pdf).

The Schindlers immediately filed a new petition along with a request for a temporary restraining order to require the reinsertion of Terri's feeding tube. Judge James D. Whittemore of the U.S. District Court denied their request because they had failed to demonstrate a "substantial likelihood of success on the merits," the standard required to issue a temporary restraining order. Judge Whittemore also concluded that the Schindlers had identified no violation of Terri's constitutional rights. As to the allegation that Terri's First Amendment rights to practice her religion had been violated

because the removal of a feeding tube is alleged to be contrary to the teachings of the Catholic Church and Terri was a Catholic, the court concluded that there was no state action because neither Michael Schiavo nor the hospice was a state actor. *Schiavo ex rel Schindler v Schiavo* (MD Fla 2005) 357 F Supp 2d 1378.

On March 23, 2005, the Eleventh Circuit Court of Appeals affirmed Judge Whittemore's decision not to reinsert Terri's feeding tube in a 2-to-1 decision. Later, the Eleventh Circuit Court of Appeals ruled against granting a rehearing en banc. The Schindlers appealed to the United States Supreme Court for the fifth time. On the same day, the Florida State Senate defeated a bill that would have prevented any patient in a similar condition from being denied nutrition and hydration if the patient had not previously put his or her wishes in writing. The Schindlers also filed an amended complaint with the district court, alleging four additional claims.

On March 24, 2005, the United States Supreme Court issued a simple statement: "The application for injunctive relief presented to Justice Kennedy and by him to the court is denied."

On March 25, 2005, Judge Whittemore once again denied the Schindlers' request for reinsertion of Terri's feeding tube pending the outcome of their claims before the federal court. He also ordered that their amended complaint again failed to show a substantial likelihood of success on the additional claims. The Schindlers immediately appealed that decision to the Eleventh Circuit, which in turn immediately and unanimously affirmed the decision. In one last desperate legal effort, the Schindlers filed a new motion with the trial court, requesting that the court's original decision on Terri's wishes be vacated, alleging that Barbara Weller, one of the Schindlers' attorneys, witnessed Terri trying to say she wanted to be kept alive. Judge Greer conducted a hearing on the motion that evening and issued an order denying the motion the following day, indicating that Barbara Weller's testimony was consistent with prior evidence and findings about persons in a persistent vegetative state and thus was not sufficient to undermine the final judgment.

On March 30, 2005, the entire Eleventh Circuit Court considered the Schindlers' appeal from Judge Whittemore's second decision rejecting their request to have Terri's feeding tube reinserted, and the court once again affirmed the decision. Judge Whittemore had examined each of the claims the Schindlers had asserted but found that a substantial likelihood of success could not be seen in any of the claims. *Schiavo ex rel Schindler v Schiavo* (11th Cir 2005) 404 F3d 1270. A subsequent appeal of this decision to the United States Supreme Court was rejected, thus ending all legal recourse available to the Schindlers. *Schiavo ex rel Schindler v Schiavo* (2005) 544 US 957, 161 L Ed 2d 541, 125 S Ct 1722.

After years of medical assessments and court hearings, Terri's feeding tube was removed by court order for the third and final time on March 18, 2005, and she died on March 31, 2005. An autopsy revealed that her brain was severely atrophied and that no treatment could have reversed the damage. Goodnough, *Schiavo Autopsy Says Brain, Withered, Was Untreatable,* New York Times, June 15, 2005, p A1, col 1, http://www.nytimes.com/2005/06/16/national/16schiavo.html?_r=1&oref=slogin. However, it is clear that the debate about these issues did not die with Terri Schiavo. Several states have introduced legislation to correct what each perceives as the "Schiavo problem," including measures prohibiting the withholding of food and water for persons in a persistent vegetative state or prohibiting the withholding or withdrawal of food and water unless a written power of attorney specifically grants the agent authority to do so; a bill banning any husband and wife from making medical decisions for a spouse if the deciding spouse had had an affair; and a bill providing that no health care provider would be required to honor a surrogate's health care decision if such decision is contrary to the provider's religious beliefs or institutional policy. Regardless of the various legislative solutions proposed, clients are best served by having a well-drafted advance written directive and a frank and open discussion with their nominated agents.

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§9.22 (c) Lesson of Schiavo Case

Although the Schiavo case (see §§9.19-9.21) did not take place in California, the case is instructive to California attorneys and their clients. Estate planning and elder law attorneys must inform themselves about the law and medical facts in this area and educate their clients accordingly. The key lesson is to encourage all clients, young or old, not only to execute advance directives but also to talk about their wishes to everyone close to them so that if such decisions need to be made, there will be no doubt in anyone's mind about what the person would have wanted.

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§9.23 b. Conservatee Conscious but Unable to Understand or Speak

The California Supreme Court decision in *Conservatorship of Wendland* (2001) 26 C4th 519, 110 CR2d 412, clarified the law in relation to how a conservator may proceed when the patient is conscious but unable to express his or her desires. *Wendland* demonstrates the vital importance of encouraging clients to execute advance directives concerning health care decisions.

In 1993, Robert Wendland was seriously injured in an automobile accident. Emerging from a coma, paralyzed and brain-damaged, he lived on a feeding tube for 2 years before his wife of 15 years, Rose Wendland, requested permission from California courts to be named his conservator and to remove his feeding tube. Robert's physicians indicated that he would likely never recover significantly and that he failed to interact with his environment or attempt to communicate with his family and caregivers. Rose Wendland testified that he had told her before the accident that he would never want to live in a state in which he was completely dependent on others for his care. Before involving the courts, Rose Wendland had submitted the case to the ethics committee of Lodi Memorial Hospital West. This ethics committee voted unanimously that Robert Wendland should be allowed to die.

However, Wendland's mother and sister objected to Rose Wendland's petition and argued that Wendland should be kept alive. The trial court ruled in favor of the mother and the sister but allowed Rose to be Robert's conservator. The case was appealed by both Rose and the court-appointed attorney representing Robert, and the court of appeal held that the conservator requesting court approval to withdraw life-sustaining medical treatment from the conservatee was not required to prove that the conservatee, while competent, expressed a desire to die in such circumstances. The court stated that the trial court did not have the authority to independently examine the conservatee's best interests because that task was delegated to the conservator as long as the conservator was acting in good faith, applying the *Drabick* standard.

The California Supreme Court returned to the trial court position by unanimously ruling that Rose Wendland had failed to present "clear and convincing evidence" that Wendland would have wanted to end his life in the circumstances following his auto accident. The court ruled that the conservator must show clear and convincing evidence of the patient's wishes or, failing that, clear and convincing evidence that withdrawal of treatment would be in the conservatee's best interests.

The supreme court emphasized that this decision affected only those cases involving conserved patients who were conscious but unable to understand and speak for themselves, who would die without life support, who had not left formal directions for health care decisions, and who had not legally appointed someone to make such decisions in the event of incapacity. Nevertheless, the setting of such a high evidentiary standard for those who are minimally conscious essentially deprives patients of individual decisions if they have failed to make their wishes known in writing. Thus, the case highlights more clearly than ever that those who fail to prepare advance directives risk their own personal autonomy and raise the possibility of fractured family relationships.

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§9.24 4. Independent Counsel for Proposed Conservatee

It is clear that a conservator has the authority to withhold or withdraw treatment (see §9.23). However, a problem arises when a conservatorship is sought for a person who has not executed an advance directive by someone who seeks to make a specific medical decision that is opposed by other parties.

In *Wendland v Superior Court* (1996) 49 CA4th 44, 56 CR2d 595, the wife of Robert Wendland, who was severely brain-injured though not in a persistent vegetative state, decided to withhold life-sustaining treatment with the support of his physician and hospital and assertedly on the basis of his previous statements. She sought to be appointed his conservator, with specific authority to withdraw treatment. Wendland's mother and sister, opposing the withdrawal of treatment, petitioned for the appointment of independent counsel to represent him in the conservatorship proceedings.

The court held that the appointment of independent counsel was warranted under Prob C §1471(b) because the court investigator had recommended such appointment, the appointment of Wendland's wife as conservator could have led to his death, and his mother and sister could not adequately represent his interests. Although the proposed conservatee was incapable of communicating with counsel, the court held that communication skills are not a prerequisite to appointment of counsel under §1471(b).

NOTE: *Conservatorship of Wendland* (2001) 26 C4th 519, 110 CR2d 412, discussed in §9.23, is a later, different appeal regarding the same individual but it does not reverse or supersede *Wendland v Superior Court;* rather, it deals with an entirely different legal issue. The court's reasoning in *Wendland v Superior Court* regarding the appointment of independent counsel is still the law.

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§9.25 5. Protection Under Health Care Decisions Law

Incorporating the tenets of several important California cases such as *Conservatorship of Drabick* (1988) 200 CA3d 185, 245 CR 840, discussed in §9.17, core aspects of the Uniform Health-Care Decisions Act of 1993, and developments in other states, the Health Care Decisions Law (HCDL) (Prob C §§4600-4806) codifies the rights of patients without capacity in regard to health care decision making.

The legislative findings specifically note that "the law recognizes that an adult has the fundamental right to control the decisions relating to his or her own health care, including the decision to have life-sustaining treatment withheld or withdrawn." Prob C §4650(a). The law, except as otherwise provided, applies to health care decisions for adults who lack capacity to make health care decisions for themselves. Prob C §4651(a). "Health care decisions" are defined to include withholding or withdrawing artificial nutrition and hydration as well as other forms of health care. Prob C §4617(c).

The HCDL establishes a uniform standard of decision making for all adults lacking capacity so that the same rules apply whether the decision-maker is an agent under a power of attorney for health care, a surrogate appointed by the patient, a conservator appointed by the court, or, presumably, the court itself. Health care decisions are to be made in accordance with the patient's instructions or wishes, if known. Otherwise, these decisions are to be made according to the principal's best interest, determined within the context of the patient's personal values. Prob C §§4684, 4714. See also Prob C §2355(a).

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§9.26 D. Right to Demand Medical Treatment

In general, the right to consent to or refuse medical treatment involves those medical options presented to the patient. There are limits to what care can be demanded. However, in this climate of treatment rationing and managed care, society is uncertain about what constitutes inappropriate or "futile" care.

In *In re Baby K* (4th Cir 1994) 16 F3d 590, Baby K was born with anencephaly, a condition in which most of the brain is missing. Anencephalic babies are generally treated only with comfort measures and die within a few days of birth. Baby K's mother, however, sought aggressive treatment, including mechanical breathing assistance. The hospital asserted that aggressive treatment was medically futile and petitioned for a declaratory judgment. The court ruled against the hospital, holding that the Emergency Medical Treatment and Active Labor Act (EMTALA) (42 USC §1395dd) requires hospitals to provide stabilizing treatment for any individual admitted to a hospital in an emergency situation (42 USC §1395dd(b)). This treatment is required even if it exceeds the prevailing standard of medical care. The standard of care is therefore higher than the standard for medical malpractice.

In a footnote, the Sixth Circuit specifically rejected the *Baby K* approach in *Roberts v Galen of Virginia* (6th Cir 1997) 111 F3d 405, 410 n4, rev'd (1999) 525 US 249, 142 L Ed 2d 648, 119 S Ct 685, stating that in order to prevail under 42 USC §1395dd(b) for failure to provide stabilizing treatment, the plaintiff had to show proof of improper motives on the part of the hospital. The Sixth Circuit apparently concluded that the *Baby K* interpretation of the EMTALA standard is synonymous with medical malpractice. In January 1999, the Supreme Court reversed the Sixth Circuit, holding that §1395dd(b) contains no express or implied improper-motive requirement.

The Hastings Center's ethical guidelines provide that if a patient or surrogate requests a treatment that the responsible health care professional regards as clearly futile in achieving its physiological objective, the professional has no obligation to provide it. The patient or surrogate should be at liberty to engage another health care professional. The Hastings Center, Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying, p 32 (1987).

For discussion of the controversies that arise when a physician states that a medical treatment is futile, see Rubin, *If We Think It's Futile, Can't We Just Say No?,* 19 HEC Forum 45-65 (March 2007); Rubin, When Doctors Say No: The Battleground of Medical Futility (1998).

The Health Care Decisions Law (HCDL) (Prob C §§4600-4806) explicitly "does not authorize or require a health care provider … to provide health care contrary to generally accepted health care standards." Prob C §4654. A health care provider may legitimately decline to comply with a health care instruction or decision that "requires medically ineffective health care or health care contrary to generally accepted health care standards." Prob C §4735.

As concerns mount about rising health care costs, economics are likely to play a greater role in the definition of "futility," and procedures will need to be implemented to ensure fair allocation of resources. In the future, the key argument will address the definition of "medically ineffective health care" or "health care contrary to generally accepted health care standards."

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/9 Health Care Decisions: The Legal and Medical Environments/§9.27 E. Protection From Criminal or Civil Liability of Health Care Providers

§9.27 E. Protection From Criminal or Civil Liability of Health Care Providers

One reason cases involving termination of life-sustaining treatment reach the courts is that health care providers hesitate to participate in the removal of such treatment because of the potential exposure to civil or criminal liability.

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1. Case Law

§9.28 a. Liability for Following Direction Regarding Care

Although the case did not involve criminal or civil proceedings against a medical provider, the court in *Thor v Superior Court* (1993) 5 C4th 725, 21 CR2d 357, allayed Dr. Thor's apprehension about liability with these reassuring words: "When a competent, informed adult directs the withholding or withdrawal of medical treatment, even at the risk of hastening or causing death, medical professionals who respect that determination will not incur criminal or civil liability: the patient's decision discharges the physician's duty." 5 C4th at 743.

One of the earliest California right-to-die cases dealing with physician liability is *Barber v Superior Court* (1983) 147 CA3d 1006, 195 CR 484. Drs. Nejdl and Barber were charged with murder and conspiracy to commit murder for honoring a request by a patient's family to terminate life-sustaining treatment. The *Barber* case largely resolved the issue of criminal culpability. The court of appeal held that because every patient has the legal right to refuse medical treatment, the physicians' conduct was not an unlawful failure to perform a legal duty. 147 CA3d at 1022. A physician has no duty to continue medically futile treatment.

Unlike *Barber, Bartling v Superior Court* (1984) 163 CA3d 186, 209 CR 220 (Bartling I), was a civil action involving a patient who was not comatose. In *Bartling,* the patient's family brought a civil action against the hospital for failing to honor Mr. Bartling's right to refuse medical treatment. The court held that Bartling had the right to direct his physicians to disconnect his ventilator. The case illustrates the immunity granted to physicians who comply with patients' directives. The court stated that "we are now satisfied the law as outlined is clear and if Mr. Bartling had lived, real parties could not have been criminally or civilly liable for carrying out his instructions." 163 CA3d at 197.

The exercise of constitutional rights is protected from criminal prosecution. Because the courts have held that a patient's removal of life-support systems is a constitutional right, any provider assisting the patient in honoring these personal health care decisions is free of liability.

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§9.29 b. Liability for Failing to Follow Direction Regarding Care

The flip side of the liability issue is when health care providers do not respect the patient's right to refuse unwanted medical treatment. In *Duarte v Chino Community Hosp*. (1999) 72 CA4th 849, 85 CR2d 521, Martha Duarte was comatose and immediately placed on a respirator when she was admitted to the hospital. She had no living will or power of attorney for health care but had told family members that they should just "let her go" if she ever needed a respirator to stay alive. Her family sued her attending physician and hospital for damages for alleged negligent failure to comply with the family's request to remove her respirator or transfer her care to a provider who would comply. The court held that the defendants were not liable for money damages for any refusal to comply with the family's instructions and that the family's sole remedy would have been a court order forcing them to comply.

The court held that former Prob C §4750(c) immunizes a health care provider from liability for damages when the provider refuses to comply with an instruction to withdraw life support, whether the instruction comes from the agent under the patient's power of attorney for health care or from the patient's family members. The court also held that the immunity under former Prob C §4750(c) is not limited to refusals to withdraw treatment to which the patient or family had expressly consented and that the immunity is not contrary to the provisions of the former Natural Death Act (Health & S C §§7185-7194.5, repealed operative through July 1, 2000).

NOTE: The immunity of health care providers and institutions is now governed by Prob C §4740. The current law delineates more clearly the standards and proactive procedures that a health care provider must follow when declining to comply with a health care decision. See Prob C §§4734-4736. See also §9.30. The blanket absolution of former Prob C §4750(c) is absent. *Duarte* might have had a different outcome had it been heard under the current law.

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§9.30 2. Statutes

Health care providers are not subject to civil liability, criminal prosecution, or professional discipline for honoring health care decisions made by an agent named in the principal's PAHC. Prob C §4740. The health care provider must have the good faith belief that the person making the health care decision is the person who has the authority to make that decision for a patient. A health care provider is also not liable for declining to comply with a health care decision based on a belief that the person *lacked* authority. Before acting on the decision to withhold or withdraw life-sustaining treatment, however, the provider must first promptly communicate the decision made and the identity of the person making the decision to the patient, if possible. Prob C §4730. The health care provider must record the existence or revocation of an advance health care directive and the designation or disqualification of a surrogate in the patient's medical record. Prob C §4731(a).

A health care provider is not liable for declining to comply with a health care decision for reasons of conscience if the decision is contrary to the provider's conscience-based and timely communicated policy or if the required care is medically ineffective or contrary to generally accepted health care standards. Prob C §§4740(d), 4734-4736. Probate Code §4736 mandates that a provider who declines to comply with a health care decision must (1) promptly inform the patient, if possible, and the patient's representative; (2) immediately make "all reasonable efforts" to assist the patient in transferring to another health care provider who is willing to comply with the health care instruction; and (3) provide continuing care until the transfer can be accomplished.

The Health Care Decisions Law (HCDL) (Prob C §§4600-4806) further states that any provider who intentionally violates the duties mandated by the new law is subject to liability for damages of $2500 or actual damages, whichever is greater, plus attorney fees. Prob C §4742(a). Criminal liability is removed from the new law except in the event of homicide. Prob C §4743. See §§7.64-7.65.

If the health care provider acts on an advance health care directive that has been revoked because the provider was not informed of the revocation, or if the provider takes actions consistent with generally accepted health care standards in the good faith belief that those actions comply with the patient's desires expressed in the advance health care directive and the requirements of the HCDL, then the provider may not be subject to civil or criminal liability or professional discipline. Prob C §4740.

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§9.31 F. Assisted Suicide

In a national survey of physicians specializing in the care of the seriously ill, one in five reported that he or she had received at least one request for assistance in hastening death, and 3 to 18 percent had assented to these requests even though the act was illegal in every state except Oregon. The patients requesting assistance were seriously ill, near death, and experiencing extreme physical pain and suffering. Nearly half were depressed. Physicians were almost 2½ times more likely to honor the requests of those in severe pain and more than 4 times more likely to honor the request if the patient had less than 1 month to live. Meier, Emmons, Litke, Wallenstein, & Morrison, *Characteristics of Patients Requesting and Receiving Physician-Assisted Death,* 163 Arch Intern Med 1537 (July 14, 2003).

The major finding of the survey is that patients requesting physician-assisted death have a high level of physical pain and a very short life expectancy. These factors could have been addressed with appropriate palliative care, and therefore the study underscores the need for more physician education in pain relief and palliative care.

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§9.32 1. California Cases

Assisting someone to commit suicide is a crime in California. Pen C §401. In *Donaldson v Lungren* (1992) 2 CA4th 1614, 4 CR2d 59, Mr. Donaldson sought a declaration that he had a constitutional right to assisted suicide so that he could have his body cryogenically preserved. The court of appeal held that a terminally ill individual does not have a constitutional right to assisted suicide or to receive advice and encouragement concerning suicide. The court stated that it could not "expand the nature of Donaldson's right of privacy to provide a protective shield for third persons who end his life." 2 CA4th at 1622. Further, the state has "an important interest to ensure that people are not influenced to kill themselves. The state's interest must prevail over the individual because of the difficulty, if not the impossibility, of evaluating the motives of the assister or determining the presence of undue influence." 2 CA4th at 1623.

In *People v Cleaves* (1991) 229 CA3d 367, 280 CR 146, the defendant was convicted of second-degree murder for actively assisting his HIV-positive friend to commit suicide. Penal Code §401 provides that anyone "who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony." The defendant appealed, asking the court to find him guilty of manslaughter on the basis of absence of malice because the killing was done at the victim's request. The appellate court affirmed the lower court's refusal of a manslaughter instruction. The *Cleaves* court did not address whether it would be appropriate to examine the issue of malice if a killing occurs at a victim's request. 229 CA3d at 377.

NOTE: The University of Pittsburgh School of Law and Center for Bioethics and Health Law conducted a survey of district attorneys' offices nationwide to examine the personal beliefs and professional behavior of state criminal prosecutors toward end-of-life decisions. A large majority of the responding prosecutors were unwilling to prosecute physicians in cases that clearly fell within currently accepted legal and professional boundaries. Even in the case of physician-assisted suicide, the results reflected a surprisingly large professional unwillingness to prosecute and an even greater personal acceptance of physician-assisted suicide. See Meisel, Jernigan & Youngner, *Prosecutors and End-of-Life Decision Making,* 159 Arch Intern Med (10) 1089 (May 24, 1999).

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§9.33 2. Federal Cases

Before 1997, the United States Supreme Court ruled in only one "right-to-die" case. In *Cruzan v Missouri Dep't of Health* (1990) 497 US 261, 111 L Ed 2d 224, 110 S Ct 2841, a 1990 5-to-4 decision, the court held that patients capable of making decisions have a constitutional right to refuse unwanted medical treatment. See discussion in §9.5.

In 1997, in a unanimous decision, the Supreme Court upheld both the New York and the Washington statutes outlawing assisted suicide. *Washington v Glucksberg* (1997) 521 US 702, 138 L Ed 2d 772, 117 S Ct 2258. In *Glucksberg,* the Court rejected the claim that a "liberty interest" protected by the Fourteenth Amendment to the Constitution extended to a competent terminally ill patient's right to physician-assisted suicide. The Court also rejected the argument that the New York law prohibiting assisted suicide violated the equal protection clause of the Fourteenth Amendment. The Court declared that refusing life-sustaining care and assisted suicide were distinctly different issues and that the differences were logical, rational, and well established.

The Supreme Court's decision shed little light on this hotly debated emotional issue. Rather, the decision shifted the discussion from the courts to the individual state legislatures. The Court identified state interests as prohibiting intentional killing and preserving life, preventing suicide, maintaining a doctor's role as patient healer, protecting the vulnerable, and avoiding the "slippery slope" toward euthanasia. For anyone interested in gaining a more in-depth view of both sides of the issue, the plethora of amicus curiae briefs filed provide a wide range of positions taken. In the years ahead, there will undoubtedly be a flurry of state legislation on the issue.

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§9.34 3. California Statutes

Suicide or attempted suicide is not a crime in California, but assisting someone to commit suicide is a crime. Pen C §401. Probate Code §4653 of the Health Care Decisions Law (HCDL) (Prob C §§4600-4806) provides that nothing in the HCDL shall be construed to condone, authorize, or approve mercy killing, assisted suicide, or euthanasia. According to the HCDL, it is not intended to permit any affirmative or deliberate act or omission to end life other than withholding or withdrawing health care under an advance health care directive, by a surrogate, or as otherwise provided, so as to permit the natural process of dying.

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§9.35 4. Laws of Other States

Oregon, Washington, and Montana are currently the only states to have enacted a law permitting physician-assisted suicide. See §§9.36-9.37, 9.40. Vermont has introduced a similar bill as S.144 on April 30, 2009. See http://www.leg.state.vt.us/docs/service2.cfm.

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§9.36 a. Oregon Law

In 1994, Oregon passed the Oregon Death With Dignity Act and became the first state to legalize physician-assisted suicide. Court challenges to the law ultimately failed. See *Lee v Oregon* (9th Cir 1997) 107 F3d 1382, cert denied sub nom *Lee v Harcleroad* (1997) 522 US 927, 139 L Ed 2d 254, 118 S Ct 328. A measure to repeal the Act in 1997 also failed.

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§9.37 b. Oregon's Experience Under the Law

In 1998, Oregon's first year of experience with legalized physician-assisted suicide, of the 23 people who received prescriptions for lethal medications, 15 died after taking the medications; 6 died from their underlying illnesses; and 2 were still alive as of January 1, 1999. The median age of the 15 who died was 69 years; 8 were male; 13 had cancer; and all 15 were white. The choice of physician-assisted suicide was not associated with either education level or health insurance coverage. The decision to request lethal medication was associated with concern about loss of autonomy or control of bodily function, not fear of intractable pain or concern about financial loss. Chin, Hedberg, Higginson & Fleming, *Legalized Physician-Assisted Suicide in Oregon—The First Year's Experience,* 340 N Eng J Med (7) 577 (Feb. 18, 1999).

Physicians eligible to prescribe lethal medications under the Oregon Death With Dignity Act were mailed a questionnaire in 1999. Of the 65 percent of physicians who returned the survey, it was found that 5 percent had received 221 requests for lethal medications since October 1997. In gathering information on the outcome in 165 patients, researchers discovered that the mean age was 68 years; 76 percent had an estimated life expectancy of less than 6 months; 35 percent had requested a prescription from another physician; 18 percent received prescriptions; and 10 percent died from taking the prescribed medication. Twenty percent of the patients had symptoms of depression, but none of these received prescriptions for lethal medications.

In 68 cases, including 11 who received prescriptions and 8 who died from taking the prescribed medication, the physician implemented at least one substantive palliative intervention. Of the patients for whom these interventions were made, 46 percent changed their minds about assisted suicide, compared with 15 percent of those for whom no interventions were offered.

The investigators summarized that physicians grant about 1 in 6 requests for lethal medication prescriptions and that 1 in 10 requests actually results in suicide. Ganzani, Nelson, & Schmidt, *Physician's Experience With the Oregon Death With Dignity Act,* 342 N Eng J Med (8) 557 (Feb. 24, 2000).

In 2008, 88 prescriptions for lethal medications were written by 59 physicians. Fifty-four people took the lethal medication plus six people who had a prescription from the previous year for a total of 60 deaths from physician-assisted suicide in 2008. The most frequent end-of-life concerns expressed were loss of autonomy, decreasing ability to participate in enjoyable life activities, and loss of dignity. The annual reports for 1998-2008 are available online at http://egov.oregon.gov/DHS/ph/pas.

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§9.37A c. Washington's Law

In November of 2008, Washington voters passed ballot initiative 1000 by a majority of 59 percent to 41 percent, making Washington the second state to legalize assisted suicide by initiative. The law went into effect on March 5, 2009 and the first woman to take advantage of the law was Linda Fleming, a woman dying of pancreatic cancer, who took a lethal prescription and died on May 21, 2009. See http://www.nytimes.com/2009/05/23/us/23suicide.html.

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§9.37B d. Montana's Law

In December of 2008, Montana became the first state to legalize assisted suicide by a court ruling as opposed to legislative initiative. In *Baxter v State of Montana* (2008) 2008 Lexis Mont Dist 482, Case No. ADV-2007-787, Judge Dorothy McCarter of the First Judicial District of Montana ruled that state homicide laws unconstitutionally restrict terminally ill patients' right to a death with dignity. The Attorney General brought a motion to stay the judgment on the case, but the stay was denied. No legislation was brought forward in the 2009 session. Thus, Montana became the third state to legalize assisted suicide. For further discussion see http://www.bozemandailychronicle.com/articles/2009/02/22/news/10assisted%20suicide.txt.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/9 Health Care Decisions: The Legal and Medical Environments/§9.38 5. Federal Legislation

§9.38 5. Federal Legislation

Under the Assisted Suicide Funding Restriction Act (42 USC §§14401-14408), funds appropriated by Congress cannot be used to pay directly or indirectly for health care to provide any item or service to assist in euthanasia. The Act does not apply to the refusal or termination of medical care or treatment or to the refusal of hydration or nutrition. 42 USC §14402.

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§9.39 6. Laws of Other Countries

In 2002, the Netherlands became the first country in the world to legalize euthanasia. Under the Netherlands law, the patient must be experiencing unbearable, irremediable suffering and have sought a second professional opinion. The patient must make the request voluntarily, persistently, and independently while of sound mind. Osborn, *Mercy Killing Now Legal in Netherlands,* The Guardian (Apr. 1, 2002), available at http://www.guardian.co.uk/world/2002/apr/01/andrewosborn.

In 2002, Belgium became the second country in the world to legalize euthanasia when the Belgian Parliament passed a law allowing physicians to assist terminally ill patients in ending their lives. *Belgium Legalises Euthanasia,* BBC News Online (May 16, 2002), http://news.bbc.co.uk/2/hi/europe/1992018.stm.

In 2008, Luxembourg became the third country in the world to legalize euthanasia. See http://www.dailymail.co.uk/news/article-516819/Luxembourg-says-yes-euthanasia.html.

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§9.40 7. Physician-Assisted Suicide

Throughout the 1990s, Dr. Jack Kevorkian and his "suicide machine" dominated national news headlines. The article *It's Over, Debbie,* 259 JAMA 272 (1988), and the story of Dr. Timothy Quill's cancer patient "Diane" in Quill, *Death and Dignity: A Case of Individualized Decision Making,* 324 New Eng J Med 691 (1991), also captured wide public and professional attention. Final Exit (1991) by Derek Humphry, a how-to suicide manual for the terminally ill, hit the bestseller list in 1992 and stayed there for 18 weeks. See Shavelson, A Chosen Death, p 11 (1995). On the legal issues of assisted suicide, see §§9.31-9.40.

When the Supreme Court reviewed *Compassion in Dying v Washington* (9th Cir 1996) 79 F3d 790, rev'd sub nom *Washington v Glucksberg* (1997) 521 US 702, 138 L Ed 2d 772, 117 S Ct 2258, and *Quill v Vacco* (2d Cir 1996) 80 F3d 716, rev'd (1997) 521 US 793, 138 L Ed 2d 834, 117 S Ct 2293, the issue of assisted suicide was catapulted into the nation's consciousness. The Court's failure to make a decision in these cases did little to defuse the ongoing national debate concerning assisted suicide, leaving the door open for continuing debate on the issue.

Thomas Youk suffered from amyotrophic lateral sclerosis ("Lou Gehrig's disease"). On September 17, 1998, just 3 weeks after Michigan had enacted its new law making assisted suicide a felony punishable by up to 5 years in prison, Dr. Kevorkian assisted his death. On November 23, 1998, a national audience watched Dr. Kevorkian challenge prosecutors to charge him for Youk's death, which he televised on the CBS television program *60 Minutes.* On November 25, 1998, Michigan prosecutors indicted Dr. Kevorkian on a felony murder charge after viewing the *60 Minutes* broadcast. The jury deliberated for 12½ hours, and Dr. Kevorkian was convicted of second-degree murder and was sentenced to 10 to 25 years in prison.

Dr. Kevorkian appealed, but the appeal was rejected in November 2001. Bell & Brasier, *Kevorkian's Appeal Is Rejected,* Detroit Free Press, Nov. 22, 2001, http://www.freep.com/apps/pbcs.dll/article?AID=/20070527/NEWS05/70529073/1007/NEWS05. Kevorkian then appealed to the United States Supreme Court, but the Court declined to hear it. Masson, *Supreme Court Rejects Kevorkian,* Detroit Free Press, Oct. 8, 2002, available at http://www.accessmylibrary.com/coms2/summary_0286-8773519_ITM.

In 2002, Kevorkian's request for a new trial, based on alleged ineffective legal counsel at trial, was rejected by the Michigan Court of Appeals, and the Michigan Supreme Court refused to review the lower court's ruling. In October 2003, after serving 4½ years of his sentence, the 75-year-old Kevorkian filed a request for early release. On December 2, 2003, an Oakland County circuit judge denied Kevorkian's request, stating that the "defendant does not supply any law supporting his position that poor health entitles him to some form of relief." Low, *Ill Health Not Enough to Free Kevorkian,* Detroit Free Press, Dec. 3, 2003. Governor Jennifer Granholm denied a commutation of his sentence. However, on June 1, 2007, Dr. Kevorkian was released from prison on parole after agreeing not to assist anyone in physician-assisted suicide. Davey, *Kevorkian Freed After Years in Prison for Aiding Suicide,* New York Times, June 2, 2007, http://www.nytimes.com/2007/06/02/us/02kevorkian.html.

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§9.41 8. Federal Directive to Pursue Disciplinary Action Against Physicians Who Act Under Oregon's Assisted Suicide Law

In 2001, Attorney General John Ashcroft directed the Drug Enforcement Administration (DEA) to pursue disciplinary actions against physicians who prescribed lethal dosages of drugs to patients under Oregon's assisted-suicide law. Criminal prosecution of such physicians was not included, and it was suggested that the use of controlled substances to manage pain is a legitimate medical purpose. AG Order No. 2534-2001, 66 Fed Reg 55607 (2001).

After a lengthy battle within the lower courts, the United States Supreme Court granted certiorari in February 2005. *Oregon v Ashcroft* (9th Cir 2004) 368 F3d 1118, cert granted sub nom *Gonzales v Oregon* (2005) 543 US 1145. In a 6-to-3 decision, the Court invalidated Ashcroft's interpretive rule and upheld the Oregon right-to-die law. The Court concluded that the Attorney General did not have authority under the Controlled Substances Act (CSA) (21 USC §§801-904) to declare illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law. *Gonzalez v Oregon* (2006) 546 US 243, 163 L Ed 2d 748, 126 S Ct 904.

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III. MEDICAL ENVIRONMENT

§9.42 A. Introduction

Technology has transformed the medical landscape. In the past, when someone's heart stopped beating, he or she was truly dead. This is not necessarily so today. Tremendous progress has been made in treating many diseases previously considered untreatable, easing suffering, and extending life. Yet the same amazing technology has also made it possible to prolong a life that may not be worth living to the individual. To understand the context in which the right to refuse medical treatment will arise, how the health care power of attorney might be used, and how to help clients participate in their own medical decisions and control their own medical care, attorneys must become familiar with common medical situations that present the most problematic issues. The discussion in §§9.43-9.73 provides a brief overview of the medical environment as well as some suggestions designed to enhance clients' ability to ensure that their wishes and values are respected at these crucial moments in their lives.

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B. Problem Areas

§9.43 1. Brain Death

In the past, for both the legal and medical community, Black's definition of death, "the ending of life; the cessation of all vital functions and signs" (Black's Law Dictionary (8th ed 2004)) was the recognized universal standard.

Once cardiac and pulmonary functions could be artificially maintained by technology, a redefinition of "death" was necessary. In addition, the possibility of organ transplants forced reexamination of the question. To permit organs to be salvaged to help others, life-support systems can keep organs relatively intact until a transplant can occur, even when the donor's massive brain damage has made his or her own life irretrievable. Without these support systems, organs can degenerate so quickly as to be rendered useless for transplants. With the concept of brain death and the recognition that a mere heartbeat or breathing with mechanical assistance does not represent life, precious organs can be ethically removed without fear of having "killed" the person. "Brain death," also termed "legal death," is defined by Black's as the "bodily condition of showing no response to external stimuli, no spontaneous movements, no breathing, no reflexes, and a flat reading (usually for a full day) on a machine that measures the brain's electrical activity."

California's definition of "brain death," or "legal death," is as follows (Health & S C §7180(a)):

> An individual who has sustained either 1) irreversible cessation of circulatory and respiratory functions, or 2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/9 Health Care Decisions: The Legal and Medical Environments/§9.44 2. Organ Donation

§9.44 2. Organ Donation

A great need for organs currently exists in the United States. As of June 14, 2009, over 101,920 individuals were on the national organ transplantation waiting list. Waiting List Candidates, UNOS News Bureau, http://www.unos.org. In an attempt to enhance the availability of organ transplantation, Health and Human Services (HHS) launched the "Gift of Life Donation Initiative" in 2001. The initiative includes such features as the implementation of a model donor card, donor education as part of driver education curriculum, the establishment of a national forum on donor registry options and guidelines, and a Gift of Life medal program for donor families. http://organdonor.gov.

A new national record in organ donations was achieved in 2004, when almost 27,000 U.S. residents received transplanted organs, representing an increase of 6 percent in the number of organ transplants from 2003. Transplants of organs from living donors also increased by 2 percent in 2004.

NOTE: Attorneys may want to inform their clients that one person can donate tissue (bone, skin, bone marrow, corneas, and heart valves) as well as up to eight organs (heart, liver, pancreas, kidneys, lungs, and small intestine). Advanced age is usually not a barrier to donations, particularly corneas and skin tissue.

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§9.45 a. Uniform Anatomical Gift Act

In 2007, the National Conference of Commissioners on Uniform State Laws drafted the revised Uniform Anatomical Gift Act and sent it to the states to help address organ donor shortages. The draft legislation expands the list of family members authorized to give consent, makes it more difficult for family members to object to a patient's expressed desire to become an organ donor, and recommends computerized registries to make the donor process more efficient. Under the legislation, the donor card would trump a power of attorney for health care decisions or a living will. It is likely that state legislatures will consider adopting the revised Uniform Anatomical Gift Act, or portions of the Act, in the coming years. See http://www.anatomicalgiftact.org/DesktopDefault.aspx?tabindex=2&tabid=72 for a list of states that have enacted the Act or are in the process of enacting it.

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§9.46 b. California's Passage of Anatomical Gift Act

California became the 20th state to adopt the revised Uniform Anatomical Gift Act promulgated by the NCCUSL when Governor Arnold Schwarzenegger signed the revised Uniform Anatomical Gift Act (UAGA) into law in 2007. The UAGA repeals and adds Chapter 3.5 (§§7150-7151.40) of Part 1 of Division 7 of the Health and Safety Code and amends §§12811 and 13005 of the Vehicle Code.

The UAGA does the following (among other things):

- Allows agents under a power of attorney for health care to make an anatomical gift during the principal's incapacity. See §9.48.
- Widens the authority for the agent under a power of attorney for health care (and others) for making anatomical gifts after the donor's death. See §9.49.
- Describes the various ways a person or his or her agent under a power of attorney may make an anatomical gift. See §§7.58-7.63.
- Specifies who has the authority to amend or revoke an anatomical gift. See §§9.53-9.55.
- Provides a clear procedure for a person to refuse to make an anatomical gift. See §§9.56-9.58.
- Better prevents others from overriding a donor's decision in making an anatomical gift or refusing to make such a gift. See §9.59.
- Describes to which agencies, hospitals, schools, or individuals an anatomical gift can be made. See §9.52.
- Requires emergency personnel to reasonably search for documents concerning a gift made or a refusal to make a gift if someone is found dead or near death. See §9.60.
- Provides authority for examination of agents under a power of attorney or of others to inspect records of the donor to search for documents for an anatomical gift. See §9.61.
- Allows a hospital to keep a patient alive to determine viability of organs for procurement.

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§9.47 c. Definition of Anatomical Gift

An anatomical gift is defined as "a donation of all or part of a human body to take effect after the donor's death for the purpose of transplantation, therapy, research or education." Health & S C §7150.10(a)(3).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/9 Health Care Decisions: The Legal and Medical Environments/ d. Persons Authorized to Make Anatomical Gift/§9.48 (1) During Lifetime

d. Persons Authorized to Make Anatomical Gift

§9.48 (1) During Lifetime

An adult with capacity may make an anatomical gift during his or her lifetime. Health & S C §7150.15(a). Minors may make a gift if they are emancipated or with the written consent of a parent or guardian if they are between 15 and 18 years of age. Health & S C §7150.15(a)(1)(2). An agent of the donor may make an anatomical gift if expressly provided for by the power of attorney for health care or other record. Health & S C §7150.15(b).

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§9.49 (2) After Death

When the decedent has left no instructions (and if not violative of Health & S C §7150.30 (see §§9.56-9.58 for a discussion of a person's written or oral refusal to make an anatomical gift) or §7150.35), others may authorize an anatomical gift in the following order of priority (Health & S C §7150.40(a)):

(1) An agent under a power of attorney for health care or other record that expressly permits the agent to make an anatomical gift;

(2) The spouse or domestic partner of the decedent;

(3) The adult children of the decedent;

(4) The parents of the decedent;

(5) The adult siblings of the decedent;

(6) The adult grandchildren of the decedent;

(7) The grandparents of the decedent;

(8) An adult who "exhibited special care and concern for the decedent during the decedent's lifetime";

(9) The guardians or conservators of the person of the decedent at the time of the decedent's death;

(10) Any other person having "the authority to dispose of the decedent's body," such as the coroner, medical examiner, or hospital administrator, providing "reasonable effort has been made to locate and inform" persons in higher priority.

"Reasonable effort" for purposes of Health & S C §7150.40(a)(10)(B) is defined as a search for at least 12 hours. The search is mandated to include a "check of local police missing persons records, examination of personal effects, and the questioning of any persons visiting the decedent before his or her death or in the hospital, accompanying the decedent's body, or reporting the death, in order to obtain information that might lead to the location of any persons listed" except in cases "where the useful life of the part does not permit."

If there is more than one member of a class listed in Health & S C §7150.40(a) paragraphs (1), (3), (4), (5), (6), (7), or (9) (as stated above) entitled to make an anatomical gift, an anatomical gift may be made by a member of the class, unless that member or a person to which the gift may pass knows of an objection by another member of the class. If an objection is known, the gift may be made only by a majority of the members of the class who are reasonably available. Health & S C §7150.40(b).

Further, a person shall not make an anatomical gift if, at the time of the decedent's death, a person in a prior class under subdivision (a) is reasonably available to make, or to object to the making of, an anatomical gift. Health & S C §7150.40(c).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/9 Health Care Decisions: The Legal and Medical Environments/§9.50 e. Making Anatomical Gift

§9.50 e. Making Anatomical Gift

The UAGA provides several ways to make an anatomical gift by a donor (Health & S C §7150.20(a)(1)-(5)):

(1) By authorizing a statement or symbol indicating that the donor has made an anatomical gift to be imprinted on the donor's driver's license or identification card and included on a donor database registry.
(2) Directly through the Donate Life California Organ and Tissue Donor Registry Internet Web site. [See http://www.donatelifecalifornia.org.]
(3) In a will.
(4) During a terminal illness or injury of the donor, by any form of communication that clearly expresses the donor's wish, addressed to at least two adults, at least one of whom is a disinterested witness. The witnesses shall memorialize this communication in a writing and sign and date the writing.
(5) As provided in subdivision (b).

Subdivision (b) states that an anatomical gift may be made by a donor card or some other record signed by the donor or the donor's representative or by authorizing that the donor be included on a donor registry. Health & S C §7150.20(b). If the donor or the donor's representative is for some reason unable to physically sign a record, another person can sign on the donor's behalf at the donor's direction as long as the signing is witnessed by at least two adults, one of whom is a disinterested witness, and accompanied by a statement that it has been signed and witnessed at the request of the donor or the donor's representative. Health & S C §7150.20(b)(1)(2).

NOTE: "Disinterested witness" means a witness other than the spouse, child, parent, sibling, grandchild, grandparent, or guardian of the individual who makes, amends, revokes, or refuses to make an anatomical gift, or another adult who exhibited special care and concern for the individual. The term does not include a person to which an anatomical gift could pass under Health & S C §7150.50. Health & S C §7150(a)(5).

In addition to the above ways of making a gift, the California Department of Motor Vehicles (DMV) is required to present a donor form for enrollment in the California Organ and Tissue Donor Registry on the front of each application for an original or renewed driver's license or state identification card. If the applicant gives consent, then he or she must read a statement on the back of the application that informs the applicant that "your consent shall serve as a legally binding document as outlined under the California Uniform Anatomical Gift Act." In addition, the statement indicates that in order to change or limit the consent to donation, the applicant must contact Donate Life California by mail or online. Veh C §12811(b)(1). In addition to printing the donor designation on each donor's license or identification card, the DMV is required to electronically transmit the donor data to the registry on a weekly basis. Veh C §12811(b)(4)(5). Provision is made for individuals to voluntarily contribute two dollars ($2.00) to Donate Life California for the purpose of promoting and supporting organ and tissue donation. Veh C §12811(b)(6).

NOTE: The expiration, suspension, or revocation of a driver's license or identification card does not render the anatomical gift invalid. Health & S C §7150.20(c). In addition, if the anatomical gift was made by will, even if the will is later invalidated, such invalidation will not invalidate the anatomical gift. Health & S C §7150.20(d).

Because time is critical in the organ donation process, it is essential for the agent to be aware of the principal's wishes. By registering to be an organ and tissue donor on the Donate Life California website (http://www.donatelifecalifornia.org), prospective donors have the option of sending a notification form to inform family members of their decision to be a donor. If the client wishes to donate his or her body for research, it is vital to have the client sign up directly with the medical school in question. The client may also wish to register with the Living Bank or the California Transplant Donor Network. See form in §8.46.

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§9.51 f. California's Organ and Tissue Registry

In 2005, the Donate Life California Organ and Tissue Donor Registry was introduced. The registry allows Californians to sign up to become potential organ donors. The new site, http://www.donatelifecalifornia.org (in Spanish at http://www.donevidacalifornia.org), hosts an online database where interested organ donors can register. When a patient is dying, medical providers can notify the organ and tissue registries, which will then check the database to verify whether the patient is a registered, willing donor. Only registry employees are authorized users of the database information. Registrants have the option of notifying their families and friends by e-mail of their decision to register as an organ donor.

Before the website was created, unless they had an advance written directive, potential organ donors had to place a pink dot sticker on their driver's licenses. Beginning July 1, 2006, the Department of Motor Vehicles (DMV) is required to collect donor information on all original and renewal license applications and transmit this information to the California Organ and Tissue Donor Registry weekly. The word "donor" is printed on the front of the driver's license of each registered donor. Individuals under the age of 18 are allowed to designate themselves as organ donors with the consent of the minor's legal guardian. Veh C §12811.

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§9.52 g. Where Gifts Can Be Made

An anatomical gift can be made to any hospital, accredited medical educational institution, or organ procurement organization named in the document of the gift for research or education. Health & S C §7150.50(a)(1). An individual can also be named as a recipient of a part. Health & S C §7150.50(a)(2). However, if an anatomical gift to a named individual cannot be transplanted into that particular individual, and there is no contingent arrangement outlined in the gift document, then the part passes under Health & S C §7150.50(g) to the appropriate eye bank, tissue bank, or appropriate organ procurement organization. Health & S C §7150.50(b).

If the purpose of an anatomical gift is specified in the donation document but no individual recipient of the gift is named, the result depends on the purpose of the gift. If the gift is for the purpose of therapy or transplantation and the part is an eye, the gift passes to the appropriate eye bank. If the gift is a tissue, then it passes to the appropriate tissue bank. If the gift is an organ, then it passes to the appropriate organ procurement agency. If the gift is for the purpose of research or education, then all parts pass to the appropriate organ procurement agency. If for some reason a part cannot be used for its stated purpose of therapy or transplantation, then it may be used for research or education. Health & S C §7150.50(c)-(h). If a part cannot be used for therapy, transplantation, education, or research, then the body or part passes to the individual with the responsibility to dispose of the body. Health & S C §7150.50(i).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/9 Health Care Decisions: The Legal and Medical Environments/ h. Revoking or Amending Anatomical Gift/§9.53 (1) By Donor or Agent Under Power of Attorney

h. Revoking or Amending Anatomical Gift

§9.53 (1) By Donor or Agent Under Power of Attorney

A donor or other person authorized to make an anatomical gift (including an agent under a power of attorney for health care (PAHC) (see §9.47) may amend or revoke an anatomical gift by either of the following (Health & S C §7150.25(a)(1)-(2)):

> (1) A record signed by any of the following and recorded in a donor registry database:
> (A) The donor.
> (B) The other person.
> (C) Subject to subdivision (b), another individual acting at the direction of the donor or of the other person, if the donor or other person is physically unable to sign.
> (2) A later-executed document of gift that amends or revokes a previous anatomical gift or portion of an anatomical gift, either expressly or by inconsistency.

If the person wishes to revoke or amend his or her anatomical gift but is physically unable to sign under Health & S C §7150.25(a)(1)(C), the revocation or amendment must comply with both of the following (Health & S C §7150.25(b)(1)-(2)):

> (1) It shall be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the individual.
> (2) It shall state that it has been signed and witnessed as provided in paragraph (1).

NOTE: A definition of a "disinterested witness" is found in the Note in §9.50.

A donor or other person authorized to make an anatomical gift (including an agent under a PAHC) (see §9.47) may also revoke an anatomical gift by (Health & S C §7150.25(c))

- destroying the document including the anatomical gift;
- canceling the gift on a donor database registry; or
- canceling the portion of the document of gift used to make the gift, with the intent to revoke the gift.

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§9.54 (2) By Donor Alone

A donor may also amend or revoke an anatomical gift in the following ways:

- *If the anatomical gift was not made by a will:* by communicating in any way (during a terminal illness or injury) his or her amendment or revocation to at least two adults, at least one of whom is a disinterested witness. The witnesses shall memorialize this communication in a writing and sign and date the writing. See Health & S C §7150.25(d).
- *If the anatomical gift was made by a will:* by amending or revoking the will in the manner provided for amendment or revocation of wills or as provided in Health & S C §7150.25(a) as described in §9.53. See Health & S C §7150.25(e).

NOTE: A donor's revocation of an anatomical gift under Health & S C §7150.25 as described above does not bar another person specified under Health & S C §7150.15 or §7150.40 from still making an anatomical gift of the donor's body or part under §7150.20 or §7150.45. Health & S C §7150.35(b). If the donor wishes to forever bar anyone from making an anatomical gift, he or she should complete a refusal as described in §§9.56-9.58.

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§9.55 (3) By Other Third Parties

An anatomical gift authorized by one of the persons authorized under Health & S C §7150.40(a) (see §9.49) may be amended or revoked either orally or in a record by any member of a prior class who is reasonably available. However, if there is more than one member of a prior class reasonably available, then the gift can only be amended or revoked if a majority of the members of the class agree to the amending or if the members are equally divided about whether to revoke the gift. Health & S C §7150.45(b). Additionally, such revocation is effective only if it has been conveyed to the procurement organization, the transplant hospital, or physician before an incision is made to remove the part or before invasive procedures have been made to prepare the recipient. Health & S C §7150.45(c).

NOTE: If the individual was known to be a member of a religion that relies solely on prayer for healing or had a religious creed that would be violated by the disposition of organs, then only the donor individual can authorize donation. Health & S C §7150.30(e).

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§9.56 i. Refusing to Make Anatomical Gift

Because other individuals are allowed to make an anatomical gift if a person is silent about his or her wishes (see §9.49), an individual may wish to make clear that he or she does not want his or her body or body parts ever to be donated for any reason. This is called a refusal. Health & S C §7150.10(a)(26). An individual's unrevoked refusal to make an anatomical gift *bars* all other persons (including agents under a power of attorney for health care) from making an anatomical gift of the individual's body or part. Health & S C §7150.30(d).

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§9.57 (1) Making Refusal

An individual may refuse to make an anatomical gift of his or her body or part by any of the following (Health & S C §7150.30(a)(1)-(3)):

(1) A record signed by either of the following:
(A) The individual.
(B) Subject to subdivision (b), another individual acting at the direction of the individual if the individual is physically unable to sign.
(2) The individual's will, whether or not the will is admitted to probate or invalidated after the individual's death.
(3) Any form of communication made by the individual during the individual's terminal illness or injury addressed to at least two adults, at least one of whom is a disinterested witness. The witnesses shall memorialize this communication in a writing and sign and date the writing.

NOTE: A definition of a "disinterested witness" is found in the Note in §9.50.

If the person wishes to make a refusal because he or she is physically unable to sign under Health & S C §7150.30(a)(1)(B), the refusal must comply with both of the following (Health & S C §7150.30(b)(1)-(2)):

(1) It shall be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the individual.
(2) It shall state that it has been signed and witnessed as provided in paragraph (1).

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§9.58 (2) Amending or Revoking Refusal

If the person later changes his or her mind and wishes to amend or revoke the refusal, he or she may do so by any of the following (Health & S C §7150.30(c)(1)-(3)):

(1) In the manner provided in subdivision (a) for making a refusal. [See §9.57.]

(2) By subsequently making an anatomical gift pursuant to Section 7150.20 that is inconsistent with the refusal.

(3) By destroying or canceling the record evidencing the refusal, or the portion of the record used to make the refusal, with the intent to revoke the refusal.

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§9.59 j. Preclusive Effect of Anatomical Gift

The Uniform Anatomical Gift Act (UAGA) substantially strengthens the donor's wishes when making or revoking an anatomical gift. Under prior law, many doctors or hospitals would seek affirmation from family of the donor's wishes to donate organs. This sometimes led to a family's revoking an anatomical gift when it was the donor's clear intent to make one. The UAGA does not authorize or allow a family or other third party to interfere when the donor's intent is clear. See Health & S C §7150.35(a).

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§9.60 k. Emergency Personnel Must Reasonably Search for Documents Concerning Anatomical Gift

Any law enforcement officer, paramedic, firefighter, or other emergency personnel who finds an individual dead or near death is now required to make a reasonable search to find a document of gift or refusal to gift or any other information identifying the individual as a donor. Health & S C §7150.55(a). This "reasonable search" is also required of a hospital as soon as is practical after the person arrives at the hospital. Failure to do so may subject emergency and hospital personnel to administrative sanctions. Health & S C §7150.55(c).

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§9.61 I. Authorized Examination by Agents or Others

On an individual's death, any person possessing a document of gift or refusal to gift is required to allow examination and copying of the document by any person authorized to make the gift or refusal of gift. Health & S C §7150.60. When a hospital refers an individual to an organ procurement organization, that organization is mandated to make a reasonable search of the records of the Donate Life California Organ and Tissue Donor Registry and any other known local donor registry to determine whether the individual has made an anatomical gift. Health & S C §7150.65.

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§9.62 m. Medical Viability and Other Concerns With UAGA

One of the more controversial measures of the revised Uniform Anatomical Gift Act (UAGA) allows the procurement agency to conduct a reasonable examination to ensure the medical viability of the donation. The statute provides that during the time of the examination period, "measures necessary to ensure the medical suitability of the part may not be withdrawn unless the hospital or procurement organization knows that the individual has expressed a contrary intent." Health & S C §7150.65(c). This perhaps implies that an individual could be kept alive on life support for the distinct purpose of maintaining the viability of the organ or part unless there is specific wording in the advance directive to prevent such an intervention.

When the decedent dies under suspicious circumstances requiring an inquest, the county coroner must decide whether to release the organs on request from a qualified procurement organization. If the coroner denies removal of the organs, therefore rendering them unviable, an explanation must be given to the organ procurement organization and included in the investigative report. Health & S C §7151.20.

Concerns with the UAGA's priority push for organ donation include (1) the possibility that an individual can become a donor or kept on life support against his or her (or his or her family's) wishes; (2) the possibility that physicians may be reluctant to administer drugs to make the dying process more comfortable, fearing that such drugs may affect the viability of the organ; and (3) conversely, the possibility that physicians may administer drugs to rush the dying process for the donor patient.

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§9.63 n. Case Highlighting Concerns With Anatomical Gifting

A recent San Luis Obispo case highlights concerns expressed about anatomical gifts. In 2006, Ruben Navarro, a 25-year-old brain-damaged and disabled man, was rushed to the nearby hospital after being found unresponsive. He was placed on life support and the decision was made to remove his ventilator. His mother consented to the donation of his organs. Dr. Hootan Roozrokh, a San Francisco transplant surgeon, allegedly told the respiratory therapist to remove Navarro's breathing tube and instructed a nurse to give Navarro 100 milligrams of morphine and 40 milligrams of Ativan, a sedative. Eighteen minutes later, he apparently ordered the dosages repeated, saying the staff needed to use more "candy" when Navarro did not die immediately after the removal of the ventilator. In fact, despite the increased dosages, Navarro did not die for more than 7 hours.

After more than 30 minutes had passed, the organs were no longer suitable for transplant, so Dr. Roozrokh left the hospital. In 2007, the San Luis Obispo County district attorney's office filed felony criminal charges against Dr. Roozrokh for prescribing excessive amounts of drugs to hasten Navarro's death to harvest his organs, abusing a dependent adult, and prescribing controlled substances without a legitimate medical purpose. After two-and-one-half days of deliberation, the jury found Hootan Roozrokh not guilty. See http://articles.latimes.com/2008/dec/19/local/me-transplant19. However, the jury prepared an unusual statement as part of their verdict: "We the jury… would like to thank the family of Ruben Navarro, and especially Ruben, for bringing to light the issues brought forth in this matter… Refining the nationwide protocol of organ procurements will be an important part of Ruben's legacy, and for that we pay him our respect and owe him our thanks."

The United Network for Organ Sharing has already adopted new bylaws in response to this case. McNichol, *Cutting It Close*, California Lawyer, June 2009. In May of 2009, the medical board of California withdrew its complaint against Dr. Roozrokh, but the civil case is still pending. See http://www.sanluisobispo.com/183/story/738681.html.

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§9.64 o. Attorney Considerations in Advising Clients About Organ Donation

If a client is seriously dedicated to making anatomical gifts, it is important to provide specific instructions in the power of attorney for health care (PAHC) that authorizes the agent to maintain the client on life support after a declaration of brain death in order to facilitate the transplant process. As discussed in §9.62, the organ donation process requires at least 6 to 8 hours of artificial support while tests for compatibility and condition (viability) are performed.

The attorney should encourage the client to discuss the organ donation process in some detail with his or her family because the experience is often disconcerting for the family. A brain-dead person often looks completely intact, rosy-cheeked and breathing. It can be hard to believe this person is actually dead, which can create a tremendous amount of intellectual and emotional turmoil.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/9 Health Care Decisions: The Legal and Medical Environments/§9.65 3. Persistent Vegetative State (Irreversible Coma)

§9.65 3. Persistent Vegetative State (Irreversible Coma)

A person in a coma is in an extremely lowered state of consciousness. The only signs of life may be a heartbeat and regular respiration, which continue unaided. The patient in a profound coma may be unresponsive to even the most painful external stimulus, whereas the patient in a light coma may respond to external stimuli without really awakening. A person who is in an irreversible coma, a chronic or persistent vegetative state (PVS), does not meet the definition of "brain death" because some brainstem activity continues. (See §9.43 for a definition of "brain death.") Nevertheless, thought, feeling, and emotion are absent in this state of permanent unconsciousness. The American Academy of Neurology defines "persistent vegetative state" as "a form of eyes-open permanent unconsciousness in which the patient has periods of wakefulness and physiologic sleep/wake cycles, but at no time is the patient aware of himself or his environment." The difficulty lies in knowing whether the patient is truly in an irreversible coma, a PVS.

A precise diagnosis of the cause of the coma is crucial in determining the prognosis of a patient in a comatose state. Acute alcoholism, drug intoxication, renal failure, or diabetes can sometimes result in a coma. Such underlying medical conditions can often be treated so that the patient regains consciousness. There is no reliably accurate method of predicting which patients will awaken from a coma and which will not. The prognosis depends on several factors, including the cause and the severity of the coma, the age and baseline health of the patient, and how long the patient has been comatose. A coma of more than 48 hours is usually a bad sign, because the longer the coma persists, the less likely the recovery.

When the underlying disease or a direct brain injury (trauma, stroke, or infection) has destroyed sufficient brain tissue and irreparably disrupted the brain's electrical activity, the comatose state, a PVS, may be permanent. Artificial nutrition and hydration often become issues in PVS cases. Because patients with a PVS diagnosis can be kept alive for years with artificial nourishment, most of the court cases in which withdrawing tube feeding has been an issue have involved patients with a PVS diagnosis.

Although PVS is not defined as "brain death," the American Academy of Neurology permits the withdrawal of nutrition and hydration from PVS patients when this step meets with the patient's wishes and when there is no possibility of cure (treatment is of no benefit to the individual). The standard of "best interests" is generally used when a now-incapacitated patient never expressed a personal preference about life-sustaining measures. However, because the PVS patient purportedly lacks the capacity to experience pleasure or pain, it can be argued that terminating life support may not necessarily be in the patient's best interests.

On the other hand, if "best interests" includes dignity, then removal of life support might seem most consistent with the best interests of that particular patient. It may be that the time will come when society views preservation in a PVS as so inhumane as to be beyond acceptable medical practice. But until then, the best course of action is to document expressions of the patient's wishes.

The California Supreme Court decision in *Conservatorship of Wendland* (2001) 26 C4th 519, 110 CR2d 412 (see §9.23), definitely underscores the need to document the patient's wishes when a patient has the misfortune of being caught in the limbo of "minimal" consciousness rather than a persistent vegetative state.

The American Academy of Neurology has attempted to develop a consensus among health care providers for defining and diagnosing those in a minimally conscious state in order to avoid harm that may be caused by indiscriminate use of the diagnosis. Giacino, Ashwal, Childs, Cranford, Jennett, Katz, Kelly, Rosenberg, Whyte, Zafonte, & Zasler, *The Minimally Conscious State Definition and Diagnostic Criteria,* 58 Neurology 349 (2002).

It may be helpful for the attorney to read the two-part article on PVS by the Multi-Society Task Force on PVS, *Medical Aspects of the Persistent Vegetative State,* 330 N Eng J Med (21) 1499 (May 26, 1994) and 330 N Eng J Med (22) 1572 (June 2, 1994). The better informed the attorney is regarding these issues, the better able the attorney will be at guiding clients when a loved one is in a PVS.

PRACTICE TIP: The attorney may wish to draft decision-making guidelines for the agent under the PAHC that clearly state that considerations of dignity are deemed an integral part of the principal's best interests. In addition, the client might consider not limiting instructions on withholding or withdrawing life support only to a "terminal"

condition. The guidelines might give the agent the discretion to withhold or withdraw support, including artificial sustenance, if the principal lapses into a PVS (which is not always terminal). See §8.21. Another position might be to state an objective without mentioning specific diagnoses, such as "to avoid prolonged lingering in a severely deteriorated or debilitated state." In fact, following the *Wendland* decision, it has been suggested that the advance directive might specifically refer to "never wanting to be trapped in a condition similar to that of Robert Wendland."

The client should also be counseled that the experience of withdrawing life support from a PVS patient could be very emotionally difficult for an agent because PVS patients appear to show signs of conscious life. They seem to have sleep-wake cycles. Their eyes open and close and seem to follow people across a room. There can be repetitive involuntary movement of the arms and legs. Seeing these signs of purported life, it can be difficult to believe that the patient has lost all upper-brain function and is totally unaware of anything or anyone around him or her.

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§9.66 4. Cardiopulmonary Resuscitation (CPR)

Cardiopulmonary resuscitation (CPR) is one of medicine's modern miracles. It is used most often to restore heartbeat and breathing in severe trauma or emergency situations. In sudden cardiac or pulmonary failure, CPR through chest massage and mouth-to-mouth ventilation can provide sufficient temporary circulatory and respiratory function to preserve life. The brain can be permanently damaged if the heart or breathing stops for even a few minutes: Cardiopulmonary function keeps the brain supplied with the oxygen necessary to function. Approximately 1 in 20 CPR attempts causes severe and irreversible brain damage. Van Allen, You Decide, 39 (1994). Thus, CPR may not be the answer to every emergency, because it is not always a benign procedure.

CPR has become an automatic response in hospitals for anyone whose heart or breathing has stopped, for whatever reason. CPR has brought patients back to life, but sometimes at great cost to the quality of their lives. Particularly for the old and frail, CPR often results in cracked ribs or sternum, internal hemorrhaging or bruising, or irreversible brain damage. In addition, a failing heart may initially respond to a "restart" by CPR but may continue the failing process, requiring repeated resuscitations to maintain cardiac functioning, thus taking a continuing toll on the victim's general physical condition. For most people with an advanced cancer or chronic disease, CPR serves as an ineffective intervention. Some physicians have suggested that DNR (Do Not Resuscitate) orders should actually be called "DNAR" (Do Not Attempt to Resuscitate) orders because CPR results among the frail elderly and the chronically ill are almost universally unsuccessful.

In a study of 459 people who received out-of-hospital CPR, 61 percent regained consciousness; of the 61 percent, one-third exhibited "significant" permanent neurological deficits. See Longstreth, *The Neurologic Sequelae of Cardiac Arrest,* 147 W J Med 175 (1987). Thus, it is important that patients be given the choice of being resuscitated, as long as that choice is given with full disclosure of the burdens, benefits, and other potential outcomes of the procedure.

Current CPR guidelines mandate that, once CPR has been initiated by a lay rescuer, it must be continued until either medical assistance has arrived to assume the care of the victim or the rescuer is too exhausted to continue. American Heart Association, Heartsaver Manual (1987). If CPR is initiated in a hospital setting, the decision to discontinue will be a medical one, based on certain factors such as the type of medical problem causing the arrest, the response to the resuscitative efforts, and the presence of other medical problems that might have a deleterious impact on the success of the CPR.

The attorney's task is to ensure that clients have the right to be consulted about the CPR choice. A DNR order can allow a client to choose how he or she is going to die. The client should question whether, in the presence of a chronic debilitating disease, irreversible coma, or incurable life-threatening illness, CPR should be instituted in the event of an arrest, regardless of the quality of life preserved or predicted.

PRACTICE TIP: The attorney should advise the client to talk to his or her physician specifically about CPR. Physicians are reluctant to initiate such discussions for fear their motives might be misunderstood. Thus, the attorney should encourage the client to be assertive in bringing up the subject.

For further discussion of Do Not Resuscitate orders, see §§9.67-9.68.

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§9.67 a. Do Not Resuscitate (DNR) Policy During and After Surgery

A hospital's DNR policy can become rather complicated in the operating room. Some hospitals do not honor DNR orders during and immediately after major surgery. These hospitals recognize that surgical or anesthetic stress may precipitate an arrest that is not necessarily a natural part of the dying process. The underlying presumption is that, if the patient was willing to undergo surgery, he or she wishes to survive, and therefore aggressive resuscitative measures are justified. Clients who have a DNR order and are preparing for surgery should learn whether the DNR order will be honored during and immediately after surgery. Some hospitals require a patient to sign a release covering the possibility that if he or she arrests in the operating room, resuscitation is not desired. Clients should be aware that operating room CPR is often quite successful because the best expertise and equipment is on hand, the arrest is detected immediately, and intervention can occur within seconds after the arrest. As a result, a patient may choose to lift the DNR status during surgery.

The attorney should advise a client preparing for the possibility of surgery to ask about the hospital's DNR policy even before consenting to the surgery. Both the surgeon and the personal physician should be consulted. Suggested questions include the following:

- If I have a DNR order and have surgery, will the order be honored during the surgery and recovery?
- What are the benefits and risks of my surgery?
- What are the benefits and risks of CPR in the operating room in my case?

A concern clients sometime have is the possibility of receiving less attention after being transferred out of intensive care to a regular medical floor when there is a DNR order. In intensive care, the nurse-to-patient ratio is often one-to-one. The patient is carefully monitored, and every technological resource is available. When the patient is transferred to a regular medical floor, the emergency has passed, the pace of action slows, and the nurse-to-patient ratio increases. The nurses may drop by once an hour, and the call button may go unanswered for significant periods of time. The contrast between intensive care and the regular medical floor can be so striking that the patient may become concerned that he or she is not receiving adequate care because of the DNR order in his or her chart. In actuality, he or she is probably simply experiencing the difference in care that anyone receives when medical status improves and less intensive care is required.

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§9.68 b. Do Not Resuscitate (DNR) Policy in Residential Care Facilities

DNR policy is often misunderstood in residential care facilities for the elderly. Families often do not understand why the PAHC or DNR orders are not always honored. Because residential care facilities for the elderly are primarily licensed to provide assisted-living services, they are not authorized or staffed to provide medical care. Regardless of the principal's express wishes, residential care facilities for the elderly are required to call for emergency assistance in the event of an arrest, or they may face citation. There are exceptions, however.

Residential care facilities may have policies honoring a resident's request regarding resuscitative measures. These policies must be in writing and must meet other specified conditions. See Health & S C §1569.74. However, any action by a facility that has established such policies may be taken only by a licensed health care provider who is employed by the facility and is on the premises at the time of the life-threatening emergency. Health & S C §1569.74(c). If the facility has not established such policies, it may present the resident's executed DNR request to an emergency medical technician or paramedic when authorized to do so in writing by the resident or by his or her legally recognized surrogate decision-maker. The request may be honored by an emergency medical technician or by any health care provider who, in the course of professional or volunteer duties, responds to emergencies. Health & S C §1569.74(d). See also 22 Cal Code Regs §87649.

PRACTICE TIP: The attorney may wish to write a letter to the residential care facility for the elderly where his or her client resides, enclosing a copy of the health care power of attorney and the DNR order, explaining the procedure to be followed if an arrest occurs. Instructions on legal stationery may help the provider feel more secure in honoring the client's wishes.

Some clients are afraid that a DNR order may result in being abandoned and left to die alone. The attorney can reassure clients that a DNR order is *never* a license to neglect a patient. It simply applies to one specific procedure; there should be no difference in the amount of nursing care and attention provided. Nothing in the DNR order permits withdrawing pain medications, ignoring other medical problems, or ceasing other treatment. The attorney must allay clients' fears that patients are simply being warehoused to die.

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§9.69 5. Do-Not-Transfer and Do-Not-Hospitalize Orders

While a DNR order specifically addresses resuscitation, Do Not Transfer (DNT) and Do Not Hospitalize (DNH) orders specifically address transferring the patient to the hospital. The DNT and the DNH orders are becoming more prevalent in nursing home and home health care settings. These documents allow the client to express personal choice on health care. For a discussion of DNT and DNH orders, see Rozovsky, Consent to Treatment: A Practical Guide (3d ed 2000).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/9 Health Care Decisions: The Legal and Medical Environments/§9.70 6. Mechanically Assisted Respiration

§9.70 6. Mechanically Assisted Respiration

Often, a patient's condition will include complications that impair his or her breathing and pulmonary functions. In these cases, the patient is often helped by the use of a respirator.

Respirators, sometimes called ventilators, are electromechanical devices that introduce air into the patient's lungs at a controlled rate and volume, assisting or replacing ineffectual attempts to breathe. A respirator can be used to help a person breathe for a short period of time until the patient is able to breathe independently. However, a respirator can also prolong the dying process.

Respirators can be very uncomfortable, especially over a long period of time. Oral intubation can make simple tasks like brushing teeth and talking difficult. Respirators can also pose serious risks to patients. Patients who are nasally intubated often develop sinusitis. The surgical procedure of tracheotomy carries the risk of infection, and if the endotracheal tube moves too much, it can cause bleeding. Ventilator patients are more susceptible to pneumonia and other infections. These critically ill patients must often have other devices such as urinary catheters, IV lines, and nasogastric tubes, which increase the risk of infection and other complications. Catheters can increase the risk of bladder infections, and tubes and intravenous lines can trigger complications. For these reasons, it can also be very difficult to find nursing home placement for a patient with a tracheotomy or on a respirator. Few nursing homes are willing to take on the extra liability that accompanies these types of patients.

The emotional effects of a respirator can be more disconcerting, however. A patient may become agitated and attempt to pull out the tube. To ease this agitation, the patient is often sedated to some degree. In addition, the patient's hands are often restrained with soft restraints. It can be a terrifying experience for an older person to awaken in an intensive care unit with his or her hands tied and a tube placed through his or her nose or throat and unable to speak.

Since *In re Quinlan* (NJ 1976) 355 A2d 647, mechanical ventilation has been viewed as the type of life-sustaining medical treatment that can be refused or halted if the unconscious patient had previously expressed the desire to withdraw it or if it is found to be in that patient's best interests. When conscious, competent adults want their respirators withdrawn because they prefer death to a life on a respirator, family and friends face agonizing ethical dilemmas. For example, is the termination of mechanical ventilation assisting a conscious, competent person to commit suicide?

In *McKay v Bergstedt* (Nev 1990) 801 P2d 617, the plaintiff was a 31-year-old quadriplegic who requested a court order for the withdrawal of the respirator. The order was granted. Rather than being perceived as assisted suicide, the plaintiff's application was seen as a desire "to live for as long as the state of his health would permit without artificial augmentation and support." 801 P2d at 627. The court added, however, that it found a state interest "in encouraging the charitable and humane care of those whose lives may be artificially extended under conditions which have the prospect of providing at least a modicum of quality living." 801 P2d at 621. The court also ruled that patients seeking to terminate life support must be given information about support systems that might help them.

Even if the respirator is removed, there is no guarantee that the resulting death will be quick or painless. In trying to breathe without a ventilator, a patient can experience severe breathing difficulties, which can make him or her highly agitated or anxious. The gasping breathing that occurs when the respirator is removed can be excruciating for the family. As a result, antianxiety agents or narcotics are often administered before the respirator is removed in order to ease the anxiety and to allow the patient to die more peacefully.

PRACTICE TIP: Because of the risks and benefits of mechanical respiration and people's individual sensitivities, the attorney may wish to explore the client's values in relation to ventilation before including specific desires in a health care power of attorney. Suggested questions include the following:

- Why would you wish to be ventilated, or why not?
- What do you consider to be the benefits?
- What do you consider to be the burdens?
- How did you weigh the burdens and the benefits to reach your conclusion?

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7. Artificial Nutritional Support

§9.71 a. Types of Artificial Nutritional Support

Artificial nutrition and hydration is perhaps the most controversial medical technology topic today. The phrase "artificial nutrition and hydration" usually refers to supplying food and fluid through tubes inserted in the patient's veins, nose and throat, stomach, or small intestine. This is the means by which critically ill persons can be nourished.

One of the most common ways of providing artificial nutrition is the nasogastric (NG) tube, a soft plastic tube inserted through the nose and down the esophagus into the stomach. Liquid food, with the consistency of a milkshake, contains minerals, vitamins, and calories and is passed through the tube to sustain someone who is unable or unwilling to eat.

The NG tube can be very uncomfortable. Patients often gag when it is being inserted, and the tube may cause pressure ulcers in and around the nose. Because the tube is annoying and bothersome, patients often try to pull it out. When this happens, patients usually must be restrained to keep them from removing their only source of nourishment.

The NG tube is normally used in temporary situations. The medical hope is that once the underlying problem preventing the patient from eating and drinking has been remedied, the tube can be removed and the patient can return to normal eating and drinking.

If longer-term artificial nutrition is needed, a gastrostomy is performed, in which a feeding tube (G-tube) is passed directly into the stomach through an incision in the abdominal wall. Recently, instead of surgical placement of the G-tube, percutaneous endoscopic gastrostomy (PEG) placement is performed at the bedside, using only mild sedation and local anesthesia. This method has greatly expanded use of the G-tube. It is much more comfortable than the NG tube and can stay in place much longer without great inconvenience to the patient. It is particularly useful for patients who cannot swallow or who have abnormalities of the esophagus. Once the G-tube is established, it is easy to care for and replace. Its drawbacks are that aspiration of the stomach contents can occur and irritation can develop at the entry site.

For patients who may have defective gastric emptying, a jejunostomy tube may be preferred. A tube is placed through a surgical incision in the abdominal wall into the first portion of the small intestine, the jejunum. This type of tube feeding is used less often than the G-tube. The jejunostomy tube is not without its complications. In addition to problems such as irritation developing around the entry site and clogging or displacement of the tube, the jejunostomy tube usually requires a continuous drip and vigilant monitoring. The jejunostomy tube patient may suffer from severe diarrhea as well.

Intravenous feeding (IV) was the earliest form of artificial support. Usually introduced by a needle in a vein in the arms or legs, the IV administers a dextrose solution in either saline or water to provide volume to replace fluids lost by the body and a minimum amount of calories. Recently, scientific advances have made it possible to add vitamins, minerals, and soluble solids to intravenous solutions, but they are inadequate to provide long-term nutrition needed by the body for true sustenance over an indefinite period of time. Its administration is usually short-term because few people's veins can tolerate long-term use. It is not unusual for an individual to run out of usable sites as the various veins begin to collapse due to IV use. Nursing homes and home health care nurses seldom use IVs for nutritional purposes. Instead, intravenous feeding remains only a temporary form of true nutrition.

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§9.72 b. Decision to Withdraw Artificial Nutritional Support

To feed or to withhold artificial nutrition is one of the most difficult health care decisions faced by families today. Most of the courts that have addressed this problem have taken the position that no legal distinction can be drawn between artificial nutrition and hydration and other life-sustaining medical treatments. Thus, the courts have held that artificial nourishment, like any other form of medical treatment, can be withheld or withdrawn from an incapacitated patient if the burdens outweigh the benefits received by the patient, considering the patient's present condition and prognosis. For case law discussions, see §§9.5, 9.10, 9.13-9.26. The Health Care Decisions Law (HCDL) (Prob C §§4600-4806) specifically includes the withholding or withdrawing of artificial hydration and nutrition within the definition of "health care decisions" that are authorized under the Law. Prob C §§4617(c), 4671(a). The concerns surrounding withdrawal of artificial nutrition, therefore, are not primarily legal concerns but rather are concerns arising from the emotional significance our society attaches to food. Providing food and water is considered the essence of nurturing and caring.

Some argue vehemently that food and fluids are the basic requirements of life and are therefore different from medical treatment. Food through a tube, though artificially formulated, is still food. From this perspective, if the person dies because of the withdrawal of food and fluids, the act of this withdrawal is akin to performing active euthanasia. Proponents of this position argue that providing nutritional support is *care,* not technology: Because basic human mercy requires caring for the helpless, it is inhumane not to feed someone simply because that person cannot feed himself or herself.

Others argue just as vehemently that removing a feeding tube is no different from removing other technological support, such as dialysis, a respirator, or antibiotics. Therefore, when the patient's situation is irreversible, death is imminent, or there is little or no hope of recovery of function, withdrawal of artificial nutrition is acceptable. This is true simply because continued feeding would be an indignity and a burden on both patient and family and would only serve to prolong the dying process.

Despite some difference of opinion, clinical evidence seems to show that death by dehydration is a relatively comfortable death, as long as caregivers keep the mouth and lips of the dying patient moistened. There is also some evidence that a person's sense of thirst diminishes with advanced age and neurological damage and that the body produces its own pain-killing substances in these circumstances. Ahronheim & Gasner, *The Sloganism of Starvation,* 335 The Lancet 278 (1990).

Dying from not eating can also be peaceful. Usually, the patient slips into a coma near the end. Even so, health care providers are often uncomfortable with this plan of action because they have the means to prevent it.

Nevertheless, in 1986, the American Medical Association's Council on Ethical and Judicial Affairs issued the following statement:

> Life prolonging medical treatment includes medication and artificially or technologically supplied respiration, nutrition or hydration. In treating a terminally ill or irreversibly comatose patient, the physician should determine whether the benefits of treatment outweigh its burdens. At all times, the dignity of the patient should be maintained.

Council on Ethical and Judicial Affairs, American Medical Association, *Decisions Near the End of Life,* 267 JAMA 2229 (1992). Similar positions were taken by both the President's Commission for the Study of Ethical Problems in Medicine and by the Hastings Center Task Force on Death and Dying. The Hastings Center, Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying (1987).

PRACTICE TIP: Because artificial nutrition is a controversial subject, it is important that the principal's beliefs regarding the topic be included in the health care directive. However, because artificial nutrition in certain situations can be instrumental in restoring an individual's health, the wording of the directive should not be so absolute as to deny discretionary use in temporary or reversible situations.

It is not unusual for family members, agonizing over such a decision, to be asked an emotionally loaded question

(*e.g.,* "You wouldn't want to starve your mother to death, would you?") by well-meaning nurses and attendants. The attorney can be very helpful by preparing the client with all the ethical and medical facts surrounding this issue so that the client is not overwhelmed by guilt if questioned in this way. Sometimes, suggesting a timed trial of artificial nutrition and then reassessing the situation after a few weeks can be a useful compromise. This gives the agent the peace of mind that everything that could be done has been done and still ultimately honors the principal's wishes.

Helpful articles to assist the attorney in this discussion include Aronheim, *Nutrition and Hydration in the Terminal Patient,* 12 Clinics in Geriatric Med 379 (May 1996); Bynum & Finucane, *Use of Tube Feeding to Prevent Aspiration Pneumonia,* 348 The Lancet 1421 (Nov. 23, 1996); Mitchell, Kiely and Lipsitz, *The Risk Factors and Impact on Survival of Feeding Tube Placement in Nursing Home Residents With Severe Cognitive Impairment,* 157 Archives of Internal Med 327 (1997); and Bronner, The Foundation's End-of-Life Programs: Changing the American Way of Death (2003), a publication of the Robert Wood Johnson Foundation (RWJF), available at http://www.rwjf.org.

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§9.73 8. Maintenance Dialysis

Decisions to withdraw medical treatment frequently arise in the area of maintenance dialysis. Hemodialysis is the process of filtering impurities from the bloodstream. In a healthy person, the kidneys perform this function, but patients with end-stage kidney disease have lost this ability. As a result, toxic substances build up in the bloodstream (uremia), eventually causing death. If the patient's blood is artificially cleansed (dialyzed) several times a week, this process can be averted and the patient kept in relatively good health. In addition to preventing premature death from kidney failure, maintenance hemodialysis is used to keep patients with renal failure alive until they can undergo a kidney transplant procedure.

The dialysis process is burdensome, expensive, and time-consuming. Dialysis lasts for several hours and must be done several times a week, making the patient feel imprisoned by the dialysis schedule. In addition, although the process cleanses the blood, because of rapid fluid and electrolyte shifts, the patient rarely feels well after the dialysis is finished. Usually, the underlying disease is at work as well. Also, there are significant food and fluid limitations.

When dialysis is no longer beneficial—whether because there is little chance of recovery of kidney function, there are no more available vascular access areas, or it is simply too burdensome—a decision to withdraw from dialysis must be faced. Because dialysis cannot cure the disease but can only prolong the patient's life, he or she may decide that life on dialysis is not worth the burden imposed by the process. Caregivers and family members may feel very differently. This can be a time of intense disagreement and emotion. When withdrawing treatment for a chronic disease that is not considered terminal is considered, other family members can be very troubled by the decision. As long as the individual is competent to make his or her own decision, the individual can enforce his or her wishes. But if the individual slips into a coma, an advance directive is crucial in assisting those involved to decide as the individual would have decided. Otherwise, it would be very difficult to take action in the face of family or institutional disagreement.

PRACTICE TIP: An attorney whose client is preparing for dialysis or is already on dialysis should encourage the client to discuss with his or her physician the various problems a dialysis patient potentially faces and perhaps also encourage the client to attend a dialysis support group. A provision in the client's health care power of attorney can then be carefully drafted, outlining the conditions under which the dialysis should be stopped if the client is unable to speak for himself or herself. Another drafting option is to state the goals or benefits the client expects to receive from dialysis and give the agent the discretion to stop dialysis when those goals are no longer being met.

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§9.74 9. Medicalization of Marijuana

Proposition 215, the Compassionate Use Act (Health & S C §11362.5), passed in California in 1996, was an initiative permitting a patient with any "illness for which marijuana provides relief" to possess or grow marijuana for personal use—but not for distribution or sale to others—without any state-imposed civil or criminal penalties. The patient's immediate caregivers are also exempt from state prosecution. The patient must show a physician's recommendation verifying a medical need. Health & S C §11362.5. At least 13 other states (Alaska, Colorado, Hawaii, Maine, Maryland, Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont, and Washington) also authorize the use of marijuana for medicinal purposes. See the National Organization for the Reform of Marijuana Law's website at http://www.norml.org/index.cfm?Group_ID=3391. In fact, Assemblyman Barney Frank of Massachusetts introduced the Medical Marijuana Patient Protection Act of 2009, H.R. 2835, on June 11, 2009 to encourage federal protection.

In 2004, state law was expanded by Health & S C §§11362.7-11362.83, which created a medical marijuana program to standardize the implementation of Proposition 215 and allow patients to form marijuana cultivation associations or cooperatives, commonly known as cannabis clubs. See Stats 2003, ch 875, §1. The statute directs the Department of Health Services to create a photo identification card system for those who can legally use or dispense marijuana under state law (Health & S C §11362.71), limits the quantities of marijuana that a qualified person can possess (Health & S C §11362.77), and sets penalties for fraudulent participation in the program (Health & S C §11362.81).

The law conflicts with federal law. The federal government's response to the passage of California's (and other states') proposition was published at 62 Fed Reg 6164 (1997). The federal government clearly warns doctors who "recommend" marijuana to their patients, instructs the Department of Health and Human Services to undertake discussions with medical organizations throughout the nation, warns of funding cuts to private contractors, and threatens to close the door—by lobbying Congress for changes in the Controlled Substances Act (CSA) (21 USC §§801-904)—on any future efforts to enact state propositions that recognize marijuana's medical utility.

In 2002, however, the Ninth Circuit Court affirmed a district court decision that permanently enjoined federal officials from threatening or prosecuting physicians, revoking their licenses, or excluding them from Medicare or Medicaid participation because of conduct relating to medical marijuana that does not rise to the level of a criminal offense. The court based its ruling on physicians' First Amendment rights. *Conant v Walters* (9th Cir 2002) 309 F3d 629. In 2005, however, the House of Representatives rejected legislation for the third straight year that would have protected medicinal marijuana users from federal arrest in states that allow doctors to prescribe pot for their patients. Epstein, *House Rejects Medicinal Pot Measure,* San Francisco Chronicle, June 16, 2005, p A5, col 3.

A recent California Supreme Court case addressed another issue affecting medical marijuana users. The Compassionate Use Act of 1996 failed to address whether patients who were prescribed medicinal marijuana could be prosecuted for transporting marijuana. In *People v Wright* (2006) 40 C4th 81, 93-94, 51 CR3d 80, the California Supreme Court ruled that an individual who was prescribed medicinal marijuana by a physician cannot be prosecuted for transporting marijuana. Justice Carlos Moreno indicated that laws recognizing new defenses must be applied retroactively to pending appeals and that Wright should have been allowed to use the Compassionate Use Act of 1996 as a defense.

In another recent case, *People v Windus* (2008) 165 CA4th 634, 81 CR3d 227, a stale prescription from a doctor could not preclude the use of a Compassionate Use Act of 1996 defense because the act did not require an expiration of a medical recommendation after a certain period of time nor require periodic renewal of a doctor's recommendation for marijuana use. The defendant possessed approximately 1.6 pounds of marijuana at the time of his arrest. He did have a medical recommendation for marijuana use but it was 3 years old and did not specify any amount. The appeals court indicated that the defendant could proffer a doctor's opinion at trial as to the amount of marijuana necessary to meet his medical needs.

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§9.75 a. Medical Necessity Defense and Controlled Substances Act

In September 1999, the Ninth Circuit Court of Appeals ordered the United States District Court for the Northern District of California to review its October 1998 decision that closed the Oakland Cannabis Buyers' Cooperative for violating 21 USC §841(a) of the federal Controlled Substances Act (CSA) (21 USC §§801-904). The appeals court ruled that the district court had not given proper weight to the possibility that marijuana was an indispensable treatment for people served by the club and thus protected by the "medical necessity" defense.

However, the United States Supreme Court reversed and remanded the case, ruling that 21 USC §841(a) does not allow defense claims of medical necessity. The justices ruled unanimously that the Oakland Cannabis Buyers' Cooperative should be shut down for distributing marijuana in violation of the federal CSA. *U.S. v Oakland Cannabis Buyers' Coop.* (2001) 532 US 483, 149 L Ed 2d 722, 121 S Ct 1711.

Despite the federal position, in *People v Mower* (2002) 28 C4th 457, 122 CR2d 326, the California Supreme Court held that Health & S C §11362.5(d) provides a defendant limited immunity from prosecution that allows him or her to raise the medical-necessity defense at trial and to bring a motion to set aside an indictment or information before trial.

In *People v Mentch* (2008) 45 C4th 274, 85 CR3d 480, the California Supreme Court held that in order to claim a "primary caregiver defense" the caregiver needed to show proof that he or she was: 1) consistently providing care giving services; 2) independent of any assistance in taking medical marijuana; and 3) retained at or before the time he or she assumed the care giving responsibility for assisting with medical marijuana. The defendant in this case was not a consistent caregiver and had no defense as to the excess amount of marijuana sold.

In October 2001, 30 federal DEA agents raided California marijuana clubs, seizing files and records, removing equipment, and uprooting plants. Justice Department spokesperson Susan Dryden stated, "The recent enforcement is indicative that we have not lost our priorities in other areas since September 11. The attorney general and the administration have been very clear: We will be aggressive." Winter, *U.S. Cracks Down on Medical Marijuana in California,* New York Times, Late Edition, Oct. 30, 2001, Section A, p 12, col 1. See also *Pearson v McCaffrey* (D DC 2001) 139 F Supp 2d 113 (federal policy that prohibits prescribing or recommending medical use of marijuana is constitutional).

The Obama administration has indicated that it intends to halt such raids on marijuana clinics unless it determines that the medical marijuana laws were being used "as a shield" www.nytimes.com/2009/03/19/us/19holder.html.

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§9.76 b. Constitutional Rights and Controlled Substances Act

The Attorney General continued to direct the DEA to conduct raids against state medical marijuana growers. In response, a group of patients and their medical marijuana organization sued Attorney General Ashcroft and the DEA Administrator. Santa Cruz County and the City of Santa Cruz, which had adopted ordinances supporting the availability of medicinal marijuana, joined as plaintiffs. The plaintiffs asserted the deprivation of their constitutional rights under the Fifth, Ninth, and Tenth Amendments of the Constitution, asserted compliance with California and local law allowing the use of medicinal marijuana, and asserted that the DEA and Attorney General had unlawfully exercised congressional powers under the commerce clause (US Const art I, §8, cl 3). The defendants declared that they had acted within their rights under the Controlled Substances Act (CSA) (21 USC §§801-904) and filed a motion to dismiss. The plaintiffs moved for a preliminary injunction to stop the DEA from conducting additional raids and seizures. *County of Santa Cruz v Ashcroft* (ND Cal 2003) 279 F Supp 2d 1192.

The district court ultimately found that the CSA as applied to the plaintiffs was unconstitutional under the commerce clause and that the CSA did not apply to the plaintiffs' activities. *County of Santa Cruz v Ashcroft* (ND Cal 2004) 314 F Supp 2d 1000. The court therefore granted the plaintiffs' motion for a preliminary injunction. The court also dismissed a number of the plaintiffs' causes of action with leave to amend.

The court based its decision on *Raich v Ashcroft* (9th Cir 2003) 352 F3d 1222, a Ninth Circuit decision that the United States Supreme Court vacated in *Gonzales v Raich* (2005) 545 US 1, 162 L Ed 2d 1, 125 S Ct 2195. The Supreme Court held that Congress's commerce clause authority squarely included the power to prohibit the local cultivation and use of marijuana in compliance with California law. The case focused on whether the federal government had the authority to regulate home-grown marijuana plants. The court concluded that the constitutional authority of Congress to regulate the interstate drug market includes small home-grown quantities of doctor-recommended marijuana. The case was remanded to the district court to address the respondents' substantive due process claim and their medical-necessity defense. However, the medical-necessity defense has previously been rejected by the Supreme Court in *U.S. v Oakland Cannabis Buyers' Coop.* (2001) 532 US 483, 149 L Ed 2d 722, 121 S Ct 1711, discussed in §9.75.

In 2006, the Food and Drug Administration issued a press release indicating that it does not support the use of marijuana for medical purposes. The FDA said it had "concluded that no sound scientific studies supported medical use of marijuana for treatment in the United States, and no animal or human data supported the safety or efficacy of marijuana for general medical use." In referring to state legislation regarding the legalization of medical marijuana, the FDA stated: "These measures are inconsistent with efforts to ensure that medications undergo the rigorous scientific scrutiny of the FDA approval process and are proven safe and effective under the standards of the Federal Food, Drug, and Cosmetic Act (FD&C Act)." The press release is available at http://www.fda.gov/bbs/topics/NEWS/2006/NEW01362.html.

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§9.77 IV. DUTY TO EDUCATE

One might assume that the various health care decisions discussed in this chapter are rare exceptions to our traditional client base. However, the statistics on death and dying in the United States are indeed sobering. In his book, Sherwin B. Nuland reports that fewer than one in four Americans will enjoy a quick and unexpected passing from this life. Nuland, How We Die: Reflections on Life's Final Chapter, p 18 (1994). This means that three out of four people need to be prepared to cope with a chronic dying process, which could potentially drag on for years. We need to begin to assist our clients in shaping realistic goals and expectations in order to empower them in the management of their dying process. We need to improve the quality of their right-to-die and right-to-live decision making.

One of the best ways to keep informed and up to date on these significant bioethical issues is to regularly visit websites dedicated to current discussions about these concerns. The following are websites worthy of exploration:

American Society for Bioethics and Humanities	http://www.asbh.org
Medical College of Wisconsin Bioethics Home Page	http://www.mcw.edu/bioethics
Center for Bioethics at the University of Pennsylvania	http://www.med.upenn.edu/bioethic/

In 2000, award-winning journalists Bill and Judy Moyers presented a four-part PBS television series on end-of-life issues facing Americans called "On Our Own Terms: Moyers on Dying in America." The "On Our Own Terms" website, http://www.thirteen.org/onourownterms, provides access to a bulletin board, downloadable materials, and a complete list of outreach activities and associates.

The American Medical Association (AMA) also provides articles and discussion on end-of-life issues. Search for "end-of-life" on the AMA website at http://www.ama-assn.org.

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10

Third Party Acceptance of Powers of Attorney and Health Care Directives

Robert S. Kosloff

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/10 Third Party Acceptance of Powers of Attorney and Health Care Directives/§10.1 I. INTRODUCTION

§10.1 I. INTRODUCTION

The question that often arises when working with a durable power of attorney (DPOA) or advance health care directive (AHCD) is whether a third party (*e.g.,* title officer, bank officer, transfer agent, doctor, hospital) will accept the instrument. The foresight of an individual who creates a DPOA or AHCD can be thwarted by third parties who decline or refuse to honor the document even when the agent presents the third party with a validly executed instrument. Before initiating legal action, there is much an attorney can do to convince a third party to honor the document in question. This chapter will summarize some of the solutions to this problem.

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II. THIRD PARTY ACCEPTANCE OF DURABLE POWER OF ATTORNEY FOR FINANCIAL MANAGEMENT (DPOA)

§10.2 A. Legal Duty

Under the Power of Attorney Law (Prob C §§4000-4545), third parties have a general duty to accord an agent the same rights and privileges with respect to the interests of the principal that would be accorded to the principal if he or she were personally present and acting. Prob C §4300. To facilitate compliance with this duty, the law protects a third person, acting in good faith, who relies on the agent's representations. See Prob C §§4301, 4303, 4305. See discussion in 24 Cal L Rev'n Comm'n Reports 323, 352 (1994). The Law also provides for enforcement of a DPOA, including an award of attorney fees against a third party who unreasonably refuses to honor a power of attorney. See §§11.34-11.36. Realistically, however, one of the agent's biggest problems continues to be the difficulty of convincing third parties to accept the DPOA.

The agent may need legal counsel to help convince a third party to accept the DPOA. This task is particularly important when the agent must deal with existing accounts and does not have the luxury of being able to "shop around" to find third persons willing to deal with the agent. See §10.17 for a sample letter that the attorney can send to third persons with whom the agent must deal.

Third parties have the right to require that the agent provide certain information, including proof of identity, specimen signatures of the principal and agent, and the agent's affidavit establishing that the power is still in effect. Prob C §4302. Probate Code §4305 provides for an affidavit, executed by the agent, stating that at the time the agent exercised the power he or she did not have actual notice of a termination or revocation of the power of attorney. This affidavit can be used to protect third persons who rely on the power of attorney. See §10.12 for sample form.

CAVEAT: Many attorneys report incidents of third parties refusing to accept a properly executed DPOA, even when presented with a Prob C §4305 affidavit. In some cases the third party will try to force the agent to sign an affidavit containing a provision requiring the agent personally to indemnify the third party for its attorney fees in the event of any legal action taken to complain of the agent's acts for the principal under the DPOA. There is no provision in California law authorizing this indemnity clause. It can be argued that the attempted imposition of an indemnification requirement in order to allow the agent to act constitutes a bad-faith refusal to recognize a valid DPOA.

PRACTICE TIP: If the same attorney who represented the principal in drafting the DPOA also represents the agent, inherent conflicts of interest must be considered. See Cal Rules of Prof Cond 3-310 and chap 3.

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§10.3 B. Aids to Acceptance by Third Parties

The attorney can take several steps to increase the probability that third parties will accept a DPOA. The following suggestions, in addition to advising the third party of the provisions in Prob C §§4300, 4306, and 4406 (if a Uniform Statutory Form Power of Attorney is used), may help avert the need for legal action to enforce the agent's authority. Also, some of the suggestions that follow, *e.g.,* advising the principal to execute a new DPOA every few years and to execute DPOAs at the principal's bank and brokerage on the bank's and brokerage's forms, may, as a practical matter, be important general advice for principals irrespective of whether the DPOA is attorney-drafted or a statutory form.

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§10.4 1. General Suggestions

Practically speaking, the attorney should consider the following:

- **Keep the DPOA as simple as possible.** If only a limited DPOA is needed for a particular transaction, the attorney should tailor the DPOA to the situation and specifically describe the task that the agent is authorized to undertake for the principal. Financial institutions often have different forms for different types of transactions. To prepare for the agent's immediate access to the principal's funds, be sure that the institution's representative understands exactly which accounts, safe deposit boxes, and transactions are covered and, if necessary, provide multiple copies of the attorney-drafted or statutory DPOA.
- **Advise the principal to keep the DPOA current.** Although it may be impractical for the principal to execute a DPOA each year, the principal should certainly be encouraged to execute one every few years. The attorney can use a tickler system to remind a client and can keep an existing instrument on computer disks to facilitate reexecution with minimal attorney time and effort, after verifying that the principal's circumstances and wishes regarding the DPOA remain the same. Of course, the new document must reflect any changes in applicable law that may have occurred in the intervening years.
- **Prepare an affidavit in accord with Prob C §4305 to be signed by the agent.** See form in §10.12. The affidavit, which is a declaration under penalty of perjury that the DPOA has not been terminated or revoked, should be a major aid in obtaining third party acceptance.

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§10.5 2. Better Communication

An attorney should communicate in a number of ways with a third party to aid acceptance of a DPOA. The following are some suggestions:

- **Advise the principal to provide a copy of the DPOA to each financial institution shortly after it is executed and effective.** It is recommended that the notice be sent with a request for receipt and acceptance, and the acceptance should be retained with the original DPOA. See sample letter for retirement accounts in §5.26. If the DPOA is a springing power of attorney, it may be prudent to wait until the triggering event has occurred before providing the DPOA to the third party.
- **Prepare a direct attorney communication for use with third parties.** This can take the form of the sample letter in §10.13. In addition, prepare an attorney certification authenticating the copy of the power of attorney that is being submitted to the third party.
- **Join other counsel in an active project to educate officers of title companies and financial institutions about the DPOA.** This is a more efficient way of dealing with these institutions than a one-on-one effort by an agent trying to use a DPOA in the middle of a crisis.
- **Notify all relevant parties of a DPOA revocation or modification.** It is imperative that the attorney notify any person or entity who has received a copy of the power of attorney. The following laws protect third parties if they do not have notice of a modification or revocation:
- An agent or third party who does not have notice of the modification is protected from liability. Prob C §4150(b).
- An agent or third party who does not have notice of the revocation of a power of attorney is protected from liability. Prob C §4151(b).
- An agent or third party who does not have notice of an event that terminates the power of attorney or the authority of an agent is protected from liability. Prob C §4152(b).
- An agent or third party who does not have notice of the revocation of the authority of an agent is protected from liability. Prob C §4153(b).
- An agent or third party who does not have notice of the incapacity of a principal under a nondurable power of attorney is protected from liability. Prob C §4155(b).

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§10.6 3. Drafting Solutions

When drafting a DPOA, the attorney should consider the following strategies:

- **Include a clause that exonerates third parties from liability for accepting the DPOA.** The clause should also bind the principal's estate, heirs, successors, and assigns. See form in §10.13. See also §10.14 for a form that may be added as a further inducement to third parties to accept a DPOA with respect to releasing information, records, and documents, and see §10.16 for a provision holding harmless third parties who rely on the agent's representation regarding the validity of the instrument and the agent's powers.
- **Anticipate clauses or language that a particular third party will want to see in the instrument.** Ask third parties in advance what they will require. Use the third party's forms, modified or supplemented as the attorney considers necessary in the circumstances.
- **Include a recital that the principal understands the importance of the instrument he or she is signing.** Although the recital will be of no legal effect, it may help to convince a reluctant third party that the principal understood the consequences of the instrument. The recital should state that the principal recognizes that he or she is giving the agent broad powers and that these powers will become effective immediately—or only on the principal's subsequent incapacity in the case of a springing DPOA—and that they will continue indefinitely unless the DPOA is specifically revoked or terminated by death. See §5.69 for an example of such language in an immediately effective general DPOA.

PRACTICE TIP: To help convince a third party that the principal understood the consequences of the DPOA, the attorney can include the warnings that are required at the beginning of a nonattorney statutory form DPOA as an alternative to or in addition to the recital. See the form in §4.22 and the warnings included in the sample general and immediately effective DPOA instrument in §§5.69-5.70.

- **Include at the beginning of a limited DPOA a recital of the particular circumstances and reasons for execution of the instrument.** This may alleviate a third party's concern about liability because the principal has limited the scope of the agent's authority to a few specific issues and has explained his or her reason for executing the DPOA. While not legally required, the recital may aid acceptance by a suspicious third party. See explanation in the sample limited DPOA in §§4.6-4.7.
- **Include a clause that authorizes and directs the agent to commence enforcement proceedings, at the principal's expense, against any third party who refuses to honor the DPOA.** For a clause giving broad authority to the agent to seek court orders and damages against a third party who refuses to comply with an agent's actions, or to enjoin unauthorized actions by third parties, see §10.14.

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C. Particularly Troublesome Third Parties

§10.7 1. Banks

If the attorney drafts a DPOA, it should include specific authority regarding bank accounts and safe deposit boxes. See forms in §§5.7-5.10. The attorney should advise the client to make specific, separate arrangements with the bank to allow entry into the box under the DPOA. Even with the legal authority to act, an agent may still have problems with a bank honoring the DPOA. On bank accounts, see §10.8, and on safe deposit boxes, §10.9.

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§10.8 a. Bank Accounts

Many banks refuse to accept a DPOA that is not executed on the bank's own forms. If the principal cannot go to the bank to sign a bank's power of attorney card, some banks can be persuaded to send a notary to the principal's residence for at-home signature. Other banks permit the principal to sign and notarize the bank's power of attorney card and return it to the bank. Note that Prob C §5204 creates a simple statutory durable power of attorney especially for bank accounts, which does not require notarization. See §5.9.

PRACTICE TIP: Attorneys should advise their clients that many banks routinely hesitate to honor attorney-drafted powers of attorney and should advise clients to complete power of attorney forms in advance at their own banks in appropriate circumstances.

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§10.9 b. Safe Deposit Boxes

Language in an attorney-drawn DPOA authorizing an agent to enter a safe deposit box is not easily accepted by many banks. The attorney usually must call a senior bank officer or a bank's legal counsel to convince the bank to accept such authorization. A safer method is to have the client execute a DPOA for the safe deposit box on the bank's own forms in conformity with Prob C §5204. Under that section, a special statutory power of attorney for contracts concerning safe deposit services with a financial institution can be created, allowing a principal to appoint "agents" rather than joint owners when the account owner or contracting party actually intends an agency relationship.

NOTE: A power of attorney that is or may be durable must contain the language specified in Prob C §5204(d). See §§4.3, 5.9.

Under a statutory DPOA, if the proper box is initialed (see §5.71), an agent has authority to hire or close a safe deposit box or space in a vault or to enter a safe deposit box or vault and withdraw or add to the contents. Prob C §4455(c) and (g).

A common suggestion from clients is to add the name of another person on title to the safe deposit box. The attorney should discuss with the principal the difference between adding another person's name on the title as a joint tenant, thus creating an ownership interest, and creating an agency that does not create an ownership interest.

CAUTION: A problem can arise if a third party, such as an adult child, is given a power of attorney to enter a safe deposit box owned jointly by two other persons, such as the child's parents. A bank may take the position that the DPOA in favor of the child terminates entirely at the death of the first parent. This position can cause problems if the surviving parent is incapacitated or unable to go to the bank to sign a new agency form in favor of the child. Regardless of the ultimate legal outcome, the bank's position can, at the very least, delay access to the box. There is no easy solution to this problem.

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§10.10 2. Title Companies

When the attorney knows that a DPOA may be needed to transfer specific real property, the instrument should expressly refer to the real property and include as an attachment the legal description of that property to encourage acceptance of the DPOA. Recording a DPOA serves as notice of the agent's authority. This authority is then protected until a revocation is also recorded. See CC §1216. See discussion and form in §§5.2-5.3.

An immediately effective DPOA that affects real property should be recorded soon after execution because some title companies are reluctant to accept a "stale" DPOA, *i.e.,* one executed more than 6 months or a year before the date of proposed use, even if the instrument is correctly drafted in all respects. Other title companies consider a DPOA to be stale only if it was executed more than 5 years before the date of the proposed use.

Some title companies do not accept a general DPOA even if it complies with all requirements. They demand instead a limited DPOA conveying authority to deal only in the particular real property transaction at hand. Sometimes, the attorney can convince the title company to accept a current general DPOA containing a full legal description of the real property. If the issue is likely to arise, the attorney should consider executing a separate, limited DPOA to deal with the specific property.

Title companies often require specific powers. The absence of any one of such powers could cause the title company to refuse the DPOA. These powers vary, depending on the transaction. See powers included in the form in §5.3, which apply to transfers of real property.

PRACTICE TIP: A title company may be more inclined to accept a statutory form DPOA executed with the advice of counsel. If one title company does not accept the DPOA, the client can be advised to try other title companies. For warnings on the use of statutory form DPOA, see §4.21.

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§10.11 3. Brokerage Firm or Stock Transfer Agents

If a client has a significant stock portfolio, it is recommended that he or she have a discussion with the brokerage firm or stock transfer agents about what authority he or she will need to see in order to act if the client loses capacity. For example, some stock transfer agents have strict requirements and general distrust of a DPOA. One major stock transfer agent accepts directions to transfer stock given by an agent under a DPOA only if the transfer agent receives a notarized affidavit of an attorney or stockbroker, executed within 30 days, declaring that the principal is in fact personally known by the declarant to be alive at the date of the declaration. Another transfer agent accepts a DPOA only if the instrument specifically authorizes the type of transfer contemplated, such as to a trust or to a brokerage account in the name of the principal.

One transfer agent demanded that the DPOA be recorded within 30 days after execution, even though no real property was being transferred. Some transfer agents will not accept directions to transfer stock to the agent's own name, even if a DPOA contains the authority to make gifts to the agent when, *e.g.,* the agent is an adult child of the principal and the DPOA contains authority to make annual exclusion gifts to all children.

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D. Attorney-Drafted Forms to Aid DPOA Acceptance by Third Parties

§10.12 1. Form: Affidavit (Prob C §4305)

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

10.12-1 Affidavit (Prob C §4305)

I, _ _[*name*]_ _, do hereby declare that:

1. I am the Agent under the durable power of attorney executed by _ _[*name of principal*]_ _ on _ _[*date on which power executed*]_ _.

2. Under California Probate Code §4305(a), on _ _[*date*]_ _, which is the date of the exercise of the durable power of attorney by the Agent named therein, I had no actual knowledge of the termination of the power of attorney or of the Agent's authority by revocation or by the principal's death.

3. I understand that my signing this affidavit is conclusive proof of nonrevocation of the power as of this date.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this affidavit was executed on _ _[*date*]_ _ at _ _[*place*]_ _.

__[*Signature*]__

State of California)
)
County of _ _[*name of county*]_ _)
)
)
_____)

On _ _[*date*]_ _ before me, _ _[*name and title of officer*]_ _, personally appeared _ _[*name(s)*]_ _, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal:

__[*Signature of officer*]__ [*Officer's seal*]

Comment: Notarization is not required in all circumstances, but it is predictable that most third parties will want to see a notarized form. The declaration must be notarized, however, if the exercise of the power of attorney requires execution and delivery of any instrument that is recordable. Prob C §4305(a).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/10 Third Party Acceptance of Powers of Attorney and Health Care Directives/§10.13 2. Form: Third Parties Directed to Accept Agent's Signature and Acts

§10.13 2. Form: Third Parties Directed to Accept Agent's Signature and Acts

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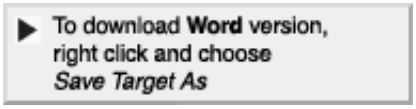
▶ To download **WordPerfect** version, right click and choose *Save Target As*

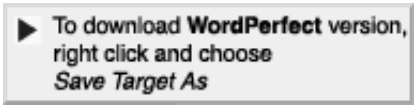
10.13-1 Third parties directed to accept agent's signature and acts

The Agent's signature under the authority granted in this power of attorney may be accepted by any third party or organization as having the same force and effect that the Principal's signature would have if the Principal were personally present and acting on the Principal's behalf. No person or organization that relies on the Agent's authority shall incur any liability to the Principal, the Principal's estate, heirs, successors, or assigns because of reliance on this instrument. The Principal's estate, heirs, successors, and assigns shall be bound by the Agent's acts under this power of attorney.

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§10.14 3. Form: Enforcement and Damages for Noncompliance





10.14-1 Enforcement and damages for noncompliance

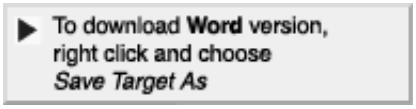
The Agent shall have the right to seek appropriate court orders mandating acts that the Agent deems appropriate if a third party refuses to comply with actions taken by the Agent that are authorized by this instrument, or enjoining acts by third parties that the Agent has not authorized. In addition, the Agent may sue a third party who fails to comply with actions the principal has authorized the Agent to take and may demand damages, including punitive damages and attorney fees, on the Principal's behalf for such noncompliance.

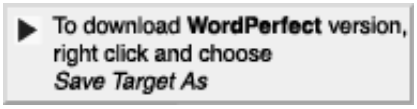
Comment: See §§11.55-11.56 for discussion and forms for action for noncompliance.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/10 Third Party Acceptance of Powers of Attorney and Health Care Directives/§10.15 4. Form: Release of Information to Agent Authorized and Privilege Waived

§10.15 4. Form: Release of Information to Agent Authorized and Privilege Waived





10.15-1 Release of information to agent authorized and privilege waived

Any third party from whom the Agent under this power of attorney may request information, records, or other documents regarding the Principal's personal affairs may release and deliver all such information, records, or documents to the Agent without liability to the Principal, the Principal's estate, or the Principal's heirs, successors, or assigns. The Principal hereby waives any privilege that may apply to release of such information, records, or other documents, but only to the extent necessary to authorize such release.

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§10.16 5. Form: Third Parties Held Harmless

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10.16-1 Third parties held harmless

[*Add one of the following alternatives*]

[*Alternative 1: Broad standard provision*]

No person who relies on any representation the Agent may make regarding (1) the fact that the powers of the Agent hereunder are then in effect, (2) the scope of the Agent's authority under this instrument, (3) the Principal's competency at the time this instrument is executed, (4) the fact that this instrument has not been amended, terminated, or revoked, or (5) the fact that the Agent continues to serve as the principal's Agent, shall incur any liability to the Principal, the Principal's estate, or the Principal's heirs, successors, or assigns for permitting the Agent to exercise any power granted in this instrument, nor shall any person who deals with the Agent be responsible to determine or ensure the proper application of funds or property.

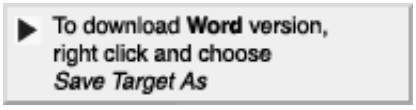
[*Alternative 2: Limited provision*]

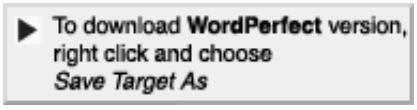
If this instrument is revoked or amended for any reason, the Principal, the Principal's estate, and the Principal's heirs, successors, and assigns will hold such party or parties harmless from any loss suffered, or liability incurred, by such party or parties in acting in accordance with this instrument before that party's receipt of written notice of any such termination or amendment.

Comment: Probate Code §4235 gives an agent authority to obtain information from third persons if the principal becomes wholly or partially incapacitated, or if there is a question concerning the capacity of the principal to give instructions to and supervise the agent. See §4.74.

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§10.17 6. Form: Sample Letter From Principal's Attorney to Third Party





10.17-1 Sample letter from principal's attorney to third party

Re: Durable Power of Attorney Dated _ _ _ _ _ _

Principal: _ _ _ _ _ _
Agent: _ _ _ _ _ _
Account No.: _ _ _ _ _ _
Dear _ _ _ _ _ _:

We represent _ _[*name*]_ _, the principal who created an agency in favor of _ _[*name*]_ _, in the durable power of attorney dated _ _[*date*]_ _. Enclosed you will find a true copy of this power of attorney.

Our client holds the above account at your institution. From now on, please deal directly with _ _[*name of agent*]_ _ as our client's agent on all matters associated with the account. As you will note from the enclosed document, the agent has full authority to direct you and to deal with assets in this account.

In executing the enclosed durable power of attorney, our client intended that you honor the agency that _ _[*he/she*]_ _ created. Your attention is directed to California Probate Code §4303, which provides that a person who acts in good faith reliance on a power of attorney is not liable to the principal or to any other person for so acting if all of the following requirements are satisfied:

1. The power of attorney is presented to the person by the attorney-in-fact (the agent) named in the power of attorney;

2. The power of attorney appears on its face to be valid; and

3. The power of attorney includes a notary public's certificate of acknowledgment or is signed by two witnesses.

The agent will personally deliver to you a _ _[*recorded*]_ _ copy of the principal's durable power of attorney. The document has been executed in a form valid in California and has been signed, dated, and notarized.

We trust that your institution will honor the agent's authority and follow the agent's instructions. Please advise us promptly if you foresee any problems complying with this request so that we can advise our client to take appropriate steps.

Please feel free to call if you have any questions.

Sincerely,

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name of principal*]_ _

Agreed and confirmed:
Date: _ _ _ _ _ _ **By: __[*Signature of third party*]__**

Comment: If the agent is having a problem with a third party who is refusing to accept the agent's authority, the attorney letter should specifically refer to Prob C §§4300, 4306, and 4406 (if a Uniform Statutory Form Power of

Attorney is used), which require third persons to honor powers of attorney. See chap 11 on judicial proceedings. If a Uniform Statutory Form Power of Attorney is used, the reference to two witnesses in paragraph 3 above may be deleted.

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§10.18 E. Last Straw: Legal Proceeding to Enforce Power of Attorney

A petition under Prob C §4541(f) may be filed to compel a third party to honor the agent's authority. Under this section the agent may be able to recover attorney fees from the third party. Probate Code §4306 provides that a third party who refuses to honor a power of attorney, after being provided with an affidavit as described in Prob C §4305,

> is liable for attorney's fees incurred in an action or proceeding necessary to confirm the attorney-in-fact's … authority, 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 … the attorney-in-fact's authority.

NOTE: Probate Code §4406 is also available to support an award of attorney fees for refusal to honor a statutory form durable power of attorney.

For a full discussion (and sample petition), see §§11.47-11.53, 11.55-11.56.

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III. THIRD PARTY ACCEPTANCE OF ADVANCE HEALTH CARE DIRECTIVE

§10.19 A. Introduction

Even though the law clearly states that health care providers are not subject to civil or criminal liability for honoring the principal's or agent's instructions on medical decision making, in reality health care providers are very concerned about the risks of following instructions regarding a patient who lacks capacity.

There is a tremendous fear of litigation in the medical community. Many are ignorant of the law in this area and can envision nothing but the specter of lawsuits, criminal charges, and professional censure. Sometimes a straightforward, nonadversarial explanatory letter to the providers, reassuring them of the legality of the power of attorney, is enough to resolve the issue. The letter can also explain what the power of attorney says, how it should be approached, and what the Patient Self-Determination Act (PSDA) (42 USC §1395cc(f)) requires from the physician. See §§10.25-10.27.

NOTE: Under California law there is no duty of a health care provider to provide information to a patient regarding an AHCD. See Prob C §4805.

Remember the admonition contained in the legislative findings in the Health Care Decisions Law: "In the absence of controversy, a court is normally not the proper forum in which to make health care decisions, including decisions regarding life-sustaining treatment." Prob C §4650(c). If persuasion and education do not work, a petition to compel the third party institution to honor the authority of a health care agent or surrogate under the Health Care Decisions Law may be brought. Prob C §4766(e). Thus, the attorney can always indicate to the agent and to the institution that such a remedy is available, but it would be best to choose this intervention only as a last resort.

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§10.20 B. Types of Health Care Documents

In California, there are two primary types of health care documents executed by clients when planning for future health care decisions: an advance health care directive (AHCD) and a power of attorney for health care (PAHC).

NOTE: All PAHCs are AHCDs; however, not all AHCDs are PAHCs.

A PAHC is defined as "a written instrument designating an agent to make health care decisions for the principal." Prob C §4629. An AHCD means "either an individual health care instruction or a power of attorney for health care." Prob C §4605. Thus, an AHCD may be only a written health care instruction that indicates a preference for a type of health care but may not designate an agent.

For nearly all purposes, however, the two terms are used interchangeably because nearly all AHCDs appoint a health care agent and thus would also be defined as a PAHC. For purposes of this chapter, we will refer to both as AHCDs.

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C. Third Party's Legal Duty

§10.21 1. Third Parties May Not Legitimately Refuse to Honor AHCD

A health care provider must comply with an individual health care instruction except in the following instances (Prob C §§4733-4735):

- It is contrary to the policy of the institution, and that policy has been adequately conveyed to the agent or the patient; or
- It requires medically futile care or health care that is contrary to generally accepted standards in the health care community.

Before implementing the health care decision, the provider has the duty to communicate to the patient the decision and the identity of the person who made it (Prob C §4730) and to record in the patient's medical record information about the existence or revocation of an advance health care directive (Prob C §4731). The provider must also communicate and record the assessment of the patient's capacity to make health care decisions and any other relevant information on health care instructions or the authority of an agent or a surrogate. Prob C §4732.

If the health care provider declines to honor the individual health care instruction for the reasons given above, the provider must make all reasonable efforts to transfer the patient to another health care provider or institution that is willing to comply with the instructions. Until the transfer can be accomplished, the provider must continue caring for the patient and providing appropriate pain relief. Prob C §4736.

For a full discussion of the health care professional's duties under an AHCD and a PAHC, see chaps 7-9.

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§10.22 2. Limitation of Liability

Probate Code §4740 limits civil and criminal liability (and professional discipline) of a health care provider when it acts in any of the following ways:

- Complies with a health care decision of a person that the provider believes in good faith has the authority to make the decision for the patient, including a decision to withhold or withdraw health care;
- Declines to comply with a health care decision in the belief that the agent making the decision lacked authority;
- Complies with an advance health care directive, assuming the directive to be valid and presently effective; or
- Declines to comply with a health care decision for reasons of conscience (Prob C §4734(a)), or because of a conscience-based institutional policy if the policy was timely communicated to the patient or the agent (Prob C §4734(b)), or because the decision requires medically ineffective health care or health care contrary to generally accepted medical standards (Prob C §4735).

The Health Care Decisions Law (HCDL) (Prob C §§4600-4805) also explicitly "does not authorize or require a health care provider … to provide health care contrary to generally accepted health care standards." Prob C §4654. The health care provider is granted further protection by being allowed to presume that an AHCD or similar instrument, even one executed in another state or jurisdiction, is valid. Prob C §4676(b).

Obviously, the immunity granted to a health care provider under the HCDL does not relieve the provider from malpractice liability or from the duty to provide the agent with accurate and reliable information necessary to give informed consent. See Comment to Prob C §4740.

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§10.23 D. Aids to Acceptance of AHCD

The attorney may be called on to convince a third party provider to honor the power of attorney and should therefore be aware of the following possibilities for action. In order to avoid any appearance of conflict when assisting the agent in enforcing the client's wishes, it may be useful to have the client sign a consent and waiver form at the same time that he or she executes the AHCD. The consent form would waive any conflict and specifically authorize the attorney to represent the agent in circumstances that involve the enforcement of a client's wishes as expressed in his or her AHCD.

There are several ways in which an attorney can help ensure that the client's AHCD is honored:

- **The attorney should instruct the client on the following steps, which the agent can take if it becomes necessary to use the power of attorney.** These suggestions can be put into a form letter to be given to the client after execution of the document.
- **Meet with the administrator of the hospital or nursing home when the client is admitted.** The agent might also check with the risk manager of the health facility to learn the institution's policy on advance health care directives and life support issues.
- **Determine whether the document has been registered with the Secretary of State's office.** Note that under Prob C §4800(b), the Secretary of State shall respond by the close of business on the next business day to a request for information made pursuant to Section 4717(a)(3) by the emergency department of a general acute care hospital. Was such a request made, or was a request not made in a timely manner?
- **Know the ethics committee of a health facility.** Find out who sits on the committee and who chairs the committee. Discover the place and time the committee meets. Get a copy of the ethics committee's manual, if possible. Learn how to request a hearing on the principal's behalf, the kinds of cases the committee has decided in the past, and how long the committee usually takes to decide a case. Often, problems can be resolved through the mediation of an ethics committee.
- **Send a letter describing the patient's AHCD or PAHC to the health facility's legal adviser, administrator, risk manager, and ethics committee.** The attorney might even consider using a release/hold harmless agreement to give added assurance to the facility. Do not offer a general release that would cover medical malpractice. For sample letters, see §§10.25-10.27.
- **Try to discover the reasons for a facility's not honoring a AHCD.** Are there problems with communications? Are there issues of futility of care? Are there issues of physician reluctance? Are family dynamics interfering with the process? If there is a possibility for open discussion about these concerns, the problems can generally be diffused once all parties understand each other and the underlying issues.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/10 Third Party Acceptance of Powers of Attorney and Health Care Directives/§10.24 E. Legal Proceedings to Enforce AHCD

§10.24 E. Legal Proceedings to Enforce AHCD

The Health Care Decisions Law contains a strong statement disfavoring judicial intervention in health care decision making: "In the absence of controversy, a court is normally not the proper forum in which to make health care decisions regarding life-sustaining treatment." Prob C §4650(c).

Nevertheless, court proceedings are available (see Prob C §§4750-4771) for several purposes, including the following (Prob C §4766):

- To determine whether the patient has the capacity to make health care decisions;
- To determine whether an AHCD is in effect or has terminated;
- To determine whether the agent's acts or proposed acts are consistent with the patient's desires as expressed in the AHCD, or otherwise made known to the court, or, if unknown, are consistent with the patient's best interests;
- To declare that the agent's authority has terminated or to approve the agent's resignation; and
- To compel a third person to honor an individual health care instruction or the authority of an agent or surrogate.

For purposes of compelling a third person to honor individual health care instructions or the authority of an agent or surrogate (Prob C §4766(e)), a petition may be filed pursuant to Prob C §4765 by any of the following:

- The patient;
- The patient's spouse unless legally separated;
- A relative of the patient;
- The patient's agent or surrogate;
- The conservator of the person of the patient;
- The court investigator assigned to the case of the patient;
- The public guardian of the county where the patient resides;
- The supervising heath care provider or health care institution involved with the patient's care; or
- Any other interested person or friend of the patient.

Pursuant to Prob C §4753(a), with the exception of a conservator or agent (see Prob C §4753(b)), an AHCD may expressly eliminate the authority of a person listed in §4765 to petition the court for any one or more of the purposes enumerated in §4766 if both of the following requirements are satisfied:

(1) The advance health care directive is executed by an individual having the advice of a lawyer authorized to practice law in the state where the advance health care directive is executed; and

(2) The individual's lawyer signs a certificate stating, in substance, the following:

> I am a lawyer authorized to practice law in the state where this advance health care directive was executed, and _ _[*insert name*]_ _ was my client at the time this advance directive was executed. I have advised my client concerning his or her rights in connection with this advance directive and the applicable law and the consequences of signing or not signing this advance directive, and my client, after being so advised, has executed this advance directive.

There is no right to a jury trial. Prob C §4754.

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F. Letters to Various Entities

§10.25 1. Form: Letter to Doctor Concerning AHCD

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10.25-1 Letter to doctor concerning AHCD

Re: Advance Health Care Directive of _ _[*name*]_ _

Dear _ _[*name of physician*]_ _:

We have recently drafted an advance health care directive for our client, _ _[*name*]_ _, which _ _[*he/she*]_ _ signed yesterday. _ _[*He/She*]_ _ has requested that we send you a copy for your review and placement in your files.

Because I am a firm believer in preventing problems before they occur, I want to be sure that the document we have prepared to express _ _[*name*]_ _'s wishes is appropriate and workable given your knowledge of _ _[*his/her*]_ _ health care situation.

For too long the legal and medical community have worked at cross-purposes. Instead, it seems to me that we should be a team, each bringing our unique expertise together for the best interests of our mutual _ _[*client/patient*]_ _. While I do my best to keep informed about end-of-life medical issues, only you can adequately address _ _[*name*]_ _'s medical concerns.

Thus, I would appreciate your review of the enclosed advance health care directive of _ _[*name*]_ _ in light of the following questions:

Is anything unclear about these instructions?

Is anything clearly unreasonable or difficult for you to implement in the instructions?

If such a conflict were to emerge, is there a way of managing that conflict?

Do you feel that _ _[*name*]_ _ has been provided enough frank description from your office of critical care interventions for _ _[*her/him*]_ _ to make an informed decision about _ _[*his/her*]_ _ preferences?

Are you aware of anyone in _ _[*name*]_ _'s family or on your staff or among your professional colleagues who may have concerns, problems, or objections to the decisions in this advance health care directive?

Is there anything we have failed to address that you think might be important to _ _[*name*]_ _?

After reviewing _ _[*name*]_ _'s advance health care directive, if you feel that any items need to be addressed, please discuss your concerns with _ _[*name*]_ _ during _ _[*his/her*]_ _ next appointment (or appointments, if there is too much to discuss in the limited time you are allotted to meet with _ _[*him/her*]_ _).

I do not mean this review to be a burden to you, because I am aware of your time constraints and the fact that you are not reimbursed adequately for such service. However, it is my belief that such a review will be beneficial in terms of the time, stress, and ethical conflicts that can be prevented by such a discussion.

Of course, I would be happy to discuss these issues directly with you, but I am not asking you to do so, because of the extra burden that might place on you. I will simply ask _ _[*name*]_ _ to inform me of the outcome of _ _[*his/her*]_ _ discussion with you in the event _ _[*he/she*]_ _ desires to revise the document in

light of your opinion and advice. I trust you will record your conversations with _ _[*name*]_ _ in _ _[*his/her*]_ _ chart to serve as a later reference.

I know you recognize that signing an advance health care directive is a weighty matter because it forces _ _[*name*]_ _ to make decisions about how _ _[*he/she*]_ _ will die and be remembered by _ _[*his/her*]_ _ loved ones. Thus, I truly thank you for giving this review request your sensitive consideration. Please let me know if you have any questions or concerns. Your cooperation will be much appreciated.

Very truly yours,

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Enc

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/10 Third Party Acceptance of Powers of Attorney and Health Care Directives/§10.26 2. Form: Letter to Nursing Home Administrator Concerning AHCD

§10.26 2. Form: Letter to Nursing Home Administrator Concerning AHCD

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10.26-1 Letter to nursing home administrator concerning AHCD

Re: Advance Health Care Directive of _ _[*name*]_ _

Dear _ _[*name of nursing home administrator*]_ _:

It is my understanding that my client, _ _[*name*]_ _, has just been admitted to your skilled nursing facility. While _ _[*he/she*]_ _ or _ _[*his/her*]_ _ agent may have already provided you with a copy of _ _[*his/her*]_ _ advance health care directive, I am enclosing a copy to be sure it becomes part of your records.

By signing this advance health care directive, _ _[*name*]_ _ has given careful consideration to _ _[*his/her*]_ _ choice of agent and to decisions about _ _[*his/her*]_ _ quality of life. These things are of crucial importance to _ _[*him/her*]_ _; therefore, it is vitally important that _ _[*his/her*]_ _ wishes be honored.

Because I am a firm believer in preventing problems before they occur, I want to be sure that your facility will honor _ _[*his/her*]_ _ advance health care directive, given your knowledge of _ _[*his/her*]_ _ health care situation. Therefore, I would appreciate your review of the enclosed advance health care directive.

After you review this document, please inform me if you have any written institutional policy that would prevent you from honoring these instructions. Are you aware of anyone on your staff who may have concerns, problems, or objections regarding the decisions in this advance health care directive? If so, how do you suggest these potential conflicts might be addressed so that future problems can be prevented?

I know that you recognize the importance of your residents' personal autonomy and quality of life. Thus, I trust you will understand why addressing these issues proactively is important to _ _[*name*]_ _. I thank you for your kind consideration of our request for review of _ _[*name*]_ _'s advance health care directive and look forward to hearing from you soon regarding your evaluation.

Very truly yours,

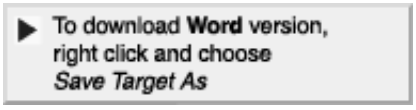
Date: _ _ _ _ _ _

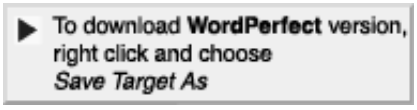
__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Enc

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§10.27 3. Form: Letter to Residential Care Facility for Elderly (RCFE) Concerning AHCD





10.27-1 Letter to residential care facility for elderly (RCFE) concerning AHCD

Re: Advance Health Care Directive of _ _[*name*]_ _

Dear _ _[*name of RCFE administrator*]_ _:

It is my understanding that my client, _ _[*name*]_ _, has just been admitted to your RCFE. Although _ _[*he/she*]_ _ or _ _[*his/her*]_ _ agent may have already provided you with a copy of _ _[*his/her*]_ _ advance health care directive, I am enclosing a copy to be sure it becomes part of your records.

As you can see from this advance health care directive, _ _[*name*]_ _ wants to be allowed to die a natural death in the event of a cardiopulmonary arrest. We recognize that your license requires you to call 911 regardless of what is stated in _ _[*name*]_ _'s advance health care directive. Thus, I have informed _ _[*name*]_ _ of the importance of getting a DNR order from _ _[*his/her*]_ _ physician so that if 911 needs to be called, you will have the necessary DNR order to show them when they arrive.

I trust that you will work with _ _[*name*]_ _ and _ _[*his/her*]_ _ agent to assist _ _[*him/her*]_ _ in obtaining this DNR order for your records and that once it is obtained, you will be sure all your staff is informed of it and that it will be in a file readily accessible to all staff in the event of an emergency.

Thank you for giving this matter your kind attention. I appreciate your assisting _ _[*name*]_ _ to ensure that _ _[*his/her*]_ _ final wishes are honored when and if that time comes while _ _[*he/she*]_ _ is in your facility. Do not hesitate to call me if I can answer any questions or be of assistance.

Very truly yours,

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Enc

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11

Judicial Proceedings

Don Edward Green

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.1 I. INTRODUCTION: GENERAL CONCEPTS

§11.1 I. INTRODUCTION: GENERAL CONCEPTS

Litigation in the area of a principal's financial management, personal care, and health care will involve any powers of attorney for financial management (DPOA), powers of attorney for personal care decisions, powers of attorney for health care decisions (PAHC), and powers of attorney for advance health care directives (AHCD) that the person has executed. There may be legal actions (1) between the agent or surrogate and the principal or patient regarding the agent's or surrogate's services to the principal or patient, and (2) between a third party and the agent or surrogate involving the principal's or patient's rights. Litigation in either category might, depending on circumstances and tactical choices, be brought by a petition in the probate court or in an ordinary civil action.

NOTE: Technically, California has no "probate court" as such. However, use of this phrase is almost mandatory to avoid the cumbersome but more technically correct designation, "department of the superior court acting under jurisdiction provided by the Probate Code."

The proceedings may be as simple as an uncontested petition between the nominee and principal of a springing power to establish that the power has "sprung," or they may be as complex as any civil action in any court. This chapter focuses primarily on petitions in the probate court under Prob C §§4500-4545 (financial management and personal care issues) and Prob C §§4750-4771 (health care issues), with some discussion of the potential interplay of powers of attorney with general civil litigation.

Regarding the conflicts discussed in this chapter, it is generally assumed unless otherwise noted that the principal has become incapacitated. When the principal still has capacity and a conflict with an agent arises, the focus of the litigation is usually more straightforward, *e.g.,* an action for conversion or negligence, along with injunctive relief and confirmation that the power of attorney has been revoked.

Civil proceedings brought by the attorney-in-fact pursuant to a power of attorney are outside the scope of this chapter. However, on the death of the principal, the authority of the attorney-in-fact to pursue the matter terminates, except when the power of attorney includes the very rare "power coupled with an interest." See *Smith v Shewry* (2009) 173 CA4th 1163; 93 CR3d 436. A power of attorney is coupled with an interest if (*Lombardo v Santa Monica Y.M.C.A.* (1985) 169 CA3d 529, 215 CR 224; *Becket v Welton Becket & Assoc.* (1974) 39 CA3d 815, 114 CR 531):

- It is made for the benefit of the attorney-in-fact rather than the principal;
- It is given to secure the performance of a duty to the attorney-in-fact or to protect a title interest; and
- It is given at the time the duty or title is created or for new consideration.

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§11.2 A. Probate Court Is Court of General Jurisdiction

Any discussion of probate litigation has been made more problematic by the enactment of Prob C §800, which provides that the court in proceedings under the Probate Code is a court of general jurisdiction and which seems to have finally and totally eliminated the concept of the probate court as a court of "limited jurisdiction." Thus, in one "probate" proceeding there might be filed both a calendared, noticed petition to remove an agent and a civil summons and complaint against third parties who are wrongfully holding the principal's assets. How attorneys, judges, and clerks will deal with the hybridizing of these formerly distinct actions is not yet clear.

If a combined pleading is filed, requesting both relief governed by the Code of Civil Procedure as a civil action and relief governed by the Probate Code, both sets of procedural requirements must be met. For example, an attorney might file a request to remove an agent along with a complaint for damages under the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) (Welf & I C §§15600-15660). The request to remove the agent is governed by the Probate Code, so it must be calendared and a (Judicial Council) notice of hearing must be served. Regarding the EADACPA complaint, a summons must be issued and served along with the pleading; this portion of the pleading will not be at issue until answers have been filed or defaults taken.

Further complicating the matter, Prob C §801 provides that the court, on its own motion or on the motion of any interested party, may order that an action or proceeding not specifically provided in the Probate Code be determined in a separate civil action. The court may order transfer of the probate action or proceeding to the separate civil action. See §11.22. However, the court may transfer the cause of action only after giving notice and an opportunity to be heard and cannot dismiss the cause of action. *Conservatorship of Kayle* (2005) 134 CA4th 1, 35 CR3d 671.

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§11.3 B. Powers of Attorney Versus Non-Health-Care Issues

A further difficulty in discussions of litigation and powers of attorney is the characterization of powers of attorney as either relating to health care or "other." See Prob C §§4050, 4541, 4766. The importance of this distinction has been heightened by the enactment of Division 4.7 of the Probate Code (Prob C §§4600-4805), comprising the Health Care Decisions Law (HCDL) (Stats 1999, ch 658). All health care issues that were governed by former Division 4.5, pt 4, of the Power of Attorney Law (Prob C §§4000-4545) are now governed by Division 4.7 of the Probate Code. Although there are procedural similarities, an initial determination will have to be made to decide whether to proceed under Prob C §§4500-4545 (non-health-care issues) or under Prob C §§4750-4771 (health care issues).

NOTE: The HCDL applies to all advance health care directives, including powers of attorney for health care decisions and individual health care instructions, and to surrogates as well as agents.

Until the enactment of the Power of Attorney Law, powers of attorney were commonly understood to refer to either health care or financial management. However, the Power of Attorney Law created (or at least recognized) a third area, referred to as "personal care." Personal care powers are governed by the Power of Attorney Law at Prob C §4123(a) and in the HCDL at Prob C §4671(b). Inclusion of "personal care" in both code sections may have been an oversight in enactment of the HCDL. However, the result appears to be that personal care powers are governed concurrently by both the Power of Attorney Law and the HCDL, so either may be utilized.

For purposes of this chapter, all powers of attorney dealing with anything other than health care are referred to as "financial management and personal care powers."

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II. PRELIMINARY CONSIDERATIONS

§11.4 A. Avoiding Conflicts

Litigation, like warfare, rarely produces real winners. The best service to clients in most situations, if possible, is to defuse the conflict. For example, nothing seems to drive family members into litigation faster than the agent's refusal to communicate with them. Far too often an agent will refuse reasonable (albeit inherently insulting) requests for information on the basis that nothing in the law or the power of attorney document itself requires such disclosure. This is generally a shortsighted approach. It convinces whoever made the inquiry that nefarious skullduggery must be afoot, which only immediate, massive intervention by the superior court can abate.

Almost invariably, the person who made the inquiry will have sufficient standing and information to get into court and initiate discovery, so the agent's intransigence accomplishes nothing. A better perspective for the agent in this situation is to focus more on the principal's best interest and desires (*e.g.,* promoting family harmony and avoiding litigation) and less on the agent's "rights." Litigation might be avoided by providing a reasonable amount of information voluntarily. Without such voluntary disclosure, by the time the information is secured through formal discovery, everything will probably be viewed in the most sinister light.

Sometimes, merely by providing a calm and unemotional conduit for communication, the attorney will be able to get the information needed to ease the client's fears. Although not as flashy as a successful conclusion to a long trial, the attorney who prevents a conflict has probably better served the client.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.5 B. Whether to File

§11.5 B. Whether to File

People generally hate litigation. Not every uncorrected civil wrong should be litigated. The emotional and financial costs and uncertainties inherent in any litigation often outweigh the potential benefit. Despite some clear wrong, it is not necessarily unreasonable for a client to decline to litigate. Clients who are rushed into litigation by an eager attorney are more likely to be dissatisfied later, regardless of the result. Unlike decisions on courtroom tactics, the decision of whether to litigate is a burden that should be placed on the client after carefully discussing the risks, potential benefits, and alternatives.

Mediation or arbitration should also be considered and discussed, particularly because conflicts involving durable powers of attorney commonly arise within the context of a family. Alternative dispute resolution (ADR) procedures tend to have a less corrosive effect on extended family relationships.

Often, the initial stages of representation have a crisis quality that precludes ADR at that point. However, after the initial flurry, when the situation is stabilized with appropriate restraining orders, the facts may become clearer and the emotions calmed. At that point, ADR should be considered. Tactically, suggesting ADR to the opponents may imply a confidence and reasonableness that may be beneficial regardless of whether ADR is actually used.

PRACTICE TIP: If a case does settle in mediation, counsel should expressly state in the settlement agreement that the agreement is admissible and enforceable, even if the agreement is prepared after the mediation. Evid C §1123.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.6 C. Choice of Court and Proceeding

§11.6 C. Choice of Court and Proceeding

The remedies in the Probate Code regarding powers of attorney and advance health care directives are "cumulative and not exclusive of any other remedies provided by law." Prob C §§4501, 4751. Probate court proceedings are generally viewed as being, to some extent, more expeditious than other civil actions. In the normal course, the Probate Code's remedies are generally "at issue" and before a judge for initial determinations within 15 to 45 days.

NOTE: Required notice is 15 days (Prob C §§4544, 4769), and some courts allow any setting the attorney wants. At least one court routinely sets all probate petitions for 45 days after the petition is filed. One difference from other civil actions is that there is no need to wait for answers to be filed or defaults taken before the court can make a decision in an uncontested matter.

Even if some matters do require a trial, at the first hearing the probate judge may make partial orders on issues that are either uncontested or without any legally viable conflict.

Judges accustomed to hearing probate matters are somewhat more likely to take a protective posture regarding an incapacitated or otherwise disadvantaged person. The long tradition of the probate court as the protector of widows and orphans often lingers in the procedural approach. Conflicts over powers of attorney require tactical decisions about the best way to proceed with the litigation. Proceeding as provided in Prob C §§4500-4545 and 4750-4771 is only one available option.

The court has discretion to dismiss a petition if it appears that the proceeding is not reasonably necessary to protect the principal. Prob C §4543. Note also that Prob C §801 allows the court to sever civil causes of action. See §§11.2, 11.22.

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§11.7 1. Appointment of Conservator With Power to Revoke or Amend

Counsel seeking to remove an agent under a power of attorney on behalf of a client should consider a petition to appoint a conservator of the estate. Such a conservator may be authorized to revoke or amend a power of attorney, other than a power of attorney for health care. Prob C §§2252(c), 4206(b). This approach would not only terminate the agent's authority, but it would also immediately provide for a conservator to take over management of the assets.

NOTE: Removal of the agent is also available under Prob C §4206 on the appointment of a temporary conservator. Although a "temporary conservator" is not expressly referred to in Prob C §4206, the Law Revision Commission Comment to that statute shows that this was clearly intended by the comment's cross-reference to Prob C §2252, the statute establishing the powers and duties of temporary conservators.

Courts should generally be reluctant to give a conservator—particularly a temporary conservator—the power to revoke or amend a power of attorney. The principal probably chose the agent with some care, largely for the purpose of avoiding a conservatorship (see, *e.g.,* Prob C §§4500, 4750). Due process generally would require that some notice (under Prob C §1202) be given to the agent before the conservator is given the authority to revoke the power of attorney.

PRACTICE TIP: Once the power of attorney has been properly revoked, the court has no authority to reestablish it. Not even the powers available to the court through substituted judgment under Prob C §§2580-2586 allow establishment of a new power of attorney. Therefore, a prudent approach in the initial stages of the proceeding, when a basis is shown for interim relief, is for the court to authorize the temporary conservator to "amend" or "suspend" the power of attorney to disempower the agent pendente lite (*i.e.,* pending the litigation). This approach allows the court later, if warranted after both sides have had an opportunity to be heard, to direct the conservator to reamend the power of attorney to restore the agent's powers and then terminate the conservatorship. Enjoining use of the power of attorney under CCP §527 is an alternative. As to control of the principal's assets by third parties (*e.g.,* banks and stockbrokers), see Practice Tip in §11.54.

Inclusion of "personal care" powers in both Prob C §§4123(a) and 4671(b) makes it unclear whether a conservator can be given the power to revoke or amend personal care powers.

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§11.8 2. Challenge to Agent's Amendment of Trust

Durable powers of attorney are commonly created in conjunction with revocable trusts, so the agent will be able to fund or amend the trust as needed if the trustor/principal becomes incapacitated. If the primary focus of concern about an agent's action is an amendment executed by the agent, it may be more effective to file a petition under Prob C §17200 to determine the validity of the amendment. Because typically the agent will have been named as successor trustee, either in the original trust or the agent's amendment, the petition could at the same time seek removal of the trustee and appointment of a more appropriate successor. Applying Prob C §§800 and 1000, there may be no reason such a petition could not include a request for appropriate actions against the wrongfully self-dealing agent, *e.g.,* removal. There is no law that clearly delineates when two court files must be opened instead of one.

If two separate actions are filed, focusing on the different instruments (trust and power of attorney) rather than on the fiduciary relationship between parties (principal/trustor and agent/trustee), the actions should at least be consolidated for trial because the same evidence is ordinarily adduced for each action.

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§11.9 3. Civil Action for Damages for Agent's Wrongdoing

If the primary focus of the litigation is to seek damages against the agent or surrogate for wrongdoing, it may make sense in some cases to file the matter simply as an ordinary civil action, with a complaint and a summons. Probate litigation, particularly will contests, can be as factually complex and cumbersome as any civil litigation, but probate courts do not generally deal with the kind of procedural complexity that results from numerous cross-complaints involving various causes of action among multiple parties. A probate court may order a petition dismissed if, for example, it is not reasonably necessary for the protection of the interests of the principal or patient or the principal's or patient's estate. Prob C §§4543, 4768. The order may include a determination that the matter should be resolved in an ordinary civil proceeding.

When seeking judicial intervention for the protection of the patient or principal, careful consideration should also be given to proceeding under the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) in Welf & I C §§15600-15660. The provisions for attorney fees and damages under the EADACPA will, in some situations, make that action a better choice. See §4.77. For full discussion of remedies in elder abuse litigation, see California Elder Law Litigation: An Advocate's Guide (Cal CEB 2003).

One other civil action that should be considered when serious litigation involves a power of attorney or advance health care directive is a malpractice action against the attorney who prepared it and counseled its execution. Among the issues to be reviewed are (1) whether unnecessary ambiguity in the document invited or exacerbated the litigation, (2) whether the document is invalid because of some defect in its preparation, (3) whether the principal or patient was properly advised of risks and benefits, and (4) whether the agent or surrogate was also given advice by the attorney without a written waiver of the conflict of interest from this dual representation. Legal malpractice actions are contentious and expensive, and the attorney's hostility or defensiveness may undesirably affect the drafting attorney's attitude on the matter. However, because of uncertainty about the moment at which the statute of limitations begins to run on these actions, this issue is one that should be at least considered early in the proceedings.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.10 4. Injunction

§11.10 4. Injunction

Although a permanent injunction might sometimes resolve an issue regarding a power of attorney, advance health care directive, or appointment of an agent or surrogate, this remedy is rarely sought as the primary relief in conflicts regarding powers of attorney. By contrast, the temporary restraining order and preliminary injunction relief provided under CCP §527 is almost routinely sought when attempting to intervene prospectively regarding the actions of an agent or surrogate. Under Prob C §1000, this relief is potentially available in conjunction with any other remedy provided in the Probate Code.

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§11.11 5. Jury Trial

An ordinary civil procedure would entitle the plaintiff to a jury trial on causes of action such as negligence, breach of contract, or conversion. However, jury trials are generally not available for petitions in the probate court (see, *e.g.,* Prob C §§825, 4504, 4754). To the extent that civil pleadings and probate petitions are brought in the same action under Prob C §1000, there might be a right to a jury trial on some of the issues but not others. A court in this situation could hear the matters simultaneously, with the jury to decide issues within the jury's purview and the judge to decide the other issues. Alternatively, the court may hear the matter first, regarding the issues that may be heard without a jury; often, the resolution of those issues will avoid the need for a jury trial concerning the remaining issues because the court's findings will make the underlying issues res judicata.

See also §11.32.

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§11.12 6. Agent's Authority to Bind Principal to Arbitration

The strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement. *Buckner v Tamarin* (2002) 98 CA4th 140, 142, 119 CR2d 489. Generally speaking, a party cannot be compelled to arbitrate a dispute that he or she has not agreed to resolve by arbitration. *Benasra v Marciano* (2001) 92 CA4th 987, 990, 112 CR2d 358. Thus, an arbitration agreement signed by the children of a comatose nursing home patient was invalid because their mother was incompetent when they signed the arbitration agreement and the mother lacked the capacity to authorize them to enter into the agreement on her behalf. *Pagarigan v Libby Care Ctr., Inc*. (2002) 99 CA4th 298, 120 CR2d 892. See *Goliger v AMS Props., Inc.* (2004) 123 CA4th 374, 19 CR3d 819 (mother who allowed daughter to admit her to health care facility was not bound by arbitration agreement signed by daughter as "responsible party"). Moreover, the spouse of an incapacitated person does not, by virtue of marriage, have authority as agent to execute an arbitration agreement for the incapacitated spouse. *Flores v Evergreen at San Diego, LLC* (2007) 148 CA4th 581, 55 CR3d 823.

In contrast, an adult daughter who was given durable power of attorney for health care by her mother had the authority to enter into binding arbitration agreements on the mother's behalf. *Garrison v Superior Court* (2005) 132 CA4th 253, 33 CR3d 350. Also, an agent under a statutory advance health care directive has the power to execute agreements requiring arbitration of elder abuse claims against a nursing home, and this is binding on the principal's successors after the principal's death. *Hogan v Country Villa Health Servs.* (2007) 148 CA4th 259, 55 CR3d 450. In *Fitzhugh v Granada Healthcare & Rehabilitation Ctr., LLC* (2007) 150 CA4th 469, 58 CR3d 585, however, even though the principal's husband, as her agent, had signed the arbitration agreement on her behalf, the trial court denied the motion for arbitration because the lawsuit involved parties and causes of action that were not subject to arbitration and the court wanted to avoid the possibility of inconsistent results between the arbitration and the litigation of the nonarbitrable actions. The court of appeal upheld this exercise of the trial court's discretion.

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§11.13 D. Ethics, Duty, and Privilege

The ethical problems that arise so frequently and insidiously in estate planning tend to be exposed when the matter comes into litigation. For example, if the attorney who drafted the durable power of attorney discussed it with the proposed agent, typically a child of the principal, in the cold light of a courtroom the attorney may be found to have represented both the principal and the agent and thus be unable to represent either in the litigation.

When there is a question about the capacity of a principal or proposed conservatee in proceedings under the Probate Code, many judges will expect the attorney to exercise independent judgment, balancing factors that include the principal's best interests, mental capacity, and expressed desires. The drafting attorney may be viewed as having a conflict between independently representing the principal and defending the attorney's actions in drafting the instrument. See Capacity and Undue Influence: Assessing, Challenging, and Defending (Cal CEB Action Guide February 2008).

Further, the drafting attorney will often be called to testify as a witness regarding the principal's intent and related discussions. If that attorney is to represent any party in the litigation, the client's informed, written consent is required before the attorney may proceed. Cal Rules of Prof Cond 5-210.

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§11.14 1. Attorney-Client Privilege

In *Moeller v Superior Court* (1997) 16 C4th 1124, 69 CR2d 317, the court held that a successor trustee has a right to discover confidential communications between a predecessor trustee and the predecessor's attorney on matters of trust administration. The court found that the attorney-client privilege belongs to the "office of the trustee" rather than the individual incumbent. It stated that a trustee seeking advice in a personal capacity in anticipation of possible charges of breach of fiduciary duty may be able to avoid disclosure by paying a separate attorney. In *Wells Fargo Bank v Superior Court* (2000) 22 C4th 201, 91 CR2d 716, the California Supreme Court held that the trustee's obligation of disclosure to the beneficiaries is overridden by the attorney-client privilege. See also *Eddy v Fields* (2004) 121 CA4th 1543, 18 CR3d 487 (attorney for two trustees who disclosed files to another attorney representing one of those trustees waived any work-product privilege that might apply when files were demanded by successor trustee).

An agent who consults an attorney is apparently in a similar position regarding privilege and may well be unaware that, in light of *Moeller,* paying the attorney from the principal's funds may deprive the person acting as agent of attorney-client confidentiality. Further, many agents under durable powers are also beneficiaries of the principal's estate plan, so that their fiduciary obligations potentially conflict with their individual interests. Many practitioners have believed that this divided loyalty did not create a conflict of interest for the attorney, who had only a single client. By separating the office of the fiduciary from the person serving in that office, *Moeller* potentially undercuts that analysis.

The situation in *Moeller* (a successor fiduciary seeking to discover a predecessor's attorney-client communications) may be rare in the context of a durable power or health care directive. Although the *Moeller* rule is generally considered applicable to other fiduciaries governed by the Probate Code, it is less clear who may be the successor to the attorney-client privilege when an agent or surrogate is removed. In some cases, the durable power or health care directive will designate a successor who would act when an agent or surrogate is removed. There appears no reason in this situation that the *Moeller* rule would not entitle the successor to the otherwise privileged communications of the removed agent or surrogate.

Commonly, however, when an agent under a durable power or a surrogate is removed, there is no successor serving in that capacity. A conservator is appointed to serve instead. At this point, the attorney-client privilege of the former agent would terminate because there is no longer an agent or surrogate to hold the privilege. Evid C §954(c). This would leave the communications subject to discovery by any interested party.

In a case in which an interested party wants to see attorney-client communications of the agent or surrogate, the combination of the *Moeller* and *Wells Fargo* rules will increase the tactical focus on removing the person serving as fiduciary. Then, either the privilege ceases (if there is no successor to the office of the fiduciary) or a new person serves who may have a very different perspective about the desirability of concealing the attorney-client communications of the successor.

The *Wells Fargo* case, holding that there is no direct right of a beneficiary (*e.g.,* the principal of a durable power) to the attorney-client communications of the fiduciary, may produce an unfortunate confidence in the attorney-client relationship involving a fiduciary. However, it remains important to consider the implications of *Moeller* in representing fiduciaries. Unless the attorney is retained to represent the person who is acting as fiduciary rather than the office of the fiduciary, there can be no assurance that the person who retains the attorney will hold the attorney-client privilege. Rarely will the attorney be retained to represent the person, because this will require that the attorney fees be paid from the personal funds of the fiduciary. Potential dispossession of the attorney-client privilege is certain to be unanticipated by many fiduciaries who retain attorneys to advise them, unless the attorney takes considerable care in discussing the matter at the beginning of the relationship. It would be prudent to confirm this discussion in writing or include an advisement in the retainer agreement.

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§11.15 2. Conflict of Interest

Still unexplored in the aftermath of the decisions in *Moeller v Superior Court* (1997) 16 C4th 1124, 69 CR2d 317, and *Wells Fargo Bank v Superior Court* (2000) 22 C4th 201, 91 CR2d 716 (see §11.14), is the conflict-of-interest issue between the office of the fiduciary and any personal interest the fiduciary may have in the subject matter. In both *Moeller* and *Wells Fargo,* the fiduciary whose attorney-client communications were sought was a bank. Much more common is the situation in which one of the heirs of the principal serves as the fiduciary. For example, consider a broadly drafted financial management power that includes estate planning authority. Many such powers are held by one of the principal's children so that estate planning may continue after the principal's incapacity. An attorney hired by the agent holding such a power will commonly be asked to advise in a dual role, both about the power holder's personal interests and his or her fiduciary obligations. Typically, the agent prefers not to personally pay any more of the attorney fees than is necessary and will urge the attorney to charge as much as possible to the office of the agent for any discussion, analysis, and defense of the agent's actions. Arguably, on the basis of the *Moeller* holding, an informed agreement regarding the potential conflict of interest is needed to represent the person holding the power of attorney individually as well as in his or her capacity as fiduciary. See *Borissoff v Taylor & Faust* (2004) 33 C4th 523, 15 CR3d 735 (successor personal representative had standing to bring malpractice action against attorneys retained by predecessor).

At some point, other children of the principal may question the propriety of the agent's actions and convince a court to remove the agent and allow a named successor (*e.g.,* another of the principal's children) to act as agent under the durable power. The successor agent may then demand access to all the attorney-client communications paid for from the principal's estate, because there is no attorney-client privilege with respect to jointly represented clients. These communications may then be used as evidence to try to prove that the former agent was using the durable power to skew the estate plan in the agent's own interest. Further, the successor agent may compel the attorney to withdraw from representing either party because of the actual conflict of interest that developed. At this point, the attorney will want to have in his or her file an engagement and conflict-of-interest agreement showing that the former client was advised of this possibility and consented to it.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.16 E. Evidentiary Issues

§11.16 E. Evidentiary Issues

Issues regarding the principal's intent and instructions to or understandings with the agent or surrogate commonly arise in litigation about the power of attorney. Directions by the principal to the agent or surrogate should be admissible as verbal acts because the agent or surrogate is a fiduciary, bound to serve the interests of the principal. See, *e.g.,* Prob C §§4232, 4234 of the Power of Attorney Law (Prob C §§4000-4545) and Prob C §§4684 and 4714 of the Health Care Decisions Law (HCDL). See also Law Revision Commission Comment to Prob C §2355.

Oral statements between the agent and the principal regarding whether the agent under a financial management power will act appear irrelevant under Prob C §4230, which provides that an agent has no duty to act except to complete a transaction that the agent has begun. The Law Revision Commission Comment to §4230 states: "Reliance is not sufficient to impose a legal duty to act, as provided in subdivision (b)." If, rather than an oral agreement, the agent has expressly agreed in writing to act for the principal, the agent does have a duty to act under the terms of the agreement. Prob C §4230(c). The agreement is enforceable against the agent as a fiduciary even if there was no consideration for the agreement. In contrast, because Prob C §4714 uses the word "shall," a health care surrogate must act when needed.

Relevant statements of the principal about the durable power of attorney, made at the time of execution, should be admissible under Evid C §1241. However, regarding a claim being made against the person, there appears no analogous provision to Evid C §1261 (admitting decedent's statements regarding claims against decedent's estate) on admissibility of statements made by someone who is *incapacitated*.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.17 F. Issues Regarding Incapacity

§11.17 F. Issues Regarding Incapacity

Issues of legal capacity are commonly involved in litigation regarding durable powers of attorney. These issues include whether

- the principal was competent to execute the DPA;
- the principal was competent to instruct the agent;
- the principal is or was competent to revoke or amend the DPA; and
- the agent is or was competent to act.

Under the Due Process in Competence Determinations Act (DPCDA) (Prob C §§810-813, 1801, 1881, 3201, 3204), incapacity must be determined by looking at specific, relevant functional abilities. The DPCDA provides a clear direction to both practitioners and the court that capacity determinations are to be made by a commonsense evaluation of specific mental functions. Probate Code §811(b) states that deficits are relevant only if (individually or in combination) they significantly impair the person's ability to understand the consequences of the act or decision in question. On the DPCDA, see §§3.28-3.40. For a full discussion of the DPCDA, see Capacity and Undue Influence: Assessing, Challenging, and Defending (Cal CEB Action Guide February 2008).

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§11.18 1. Proving Deficits and Incapacity Under DPCDA

There is generally no requirement that mental deficits be proved by expert testimony. Lay testimony about observed forgetfulness and hallucinations, for example, should be admissible without the need for an expert to corroborate these conclusions. Most courts will doubtless continue to admit as relevant doctors' general opinions about a person's capacity and diagnoses of the person's condition, but their conclusions have at least been relegated to peripheral rather than central importance. Doctors' opinions, however, may be most pertinent regarding the correlation between the specific mental function deficit and the particular act or decision in question. The ultimate decision of whether a person's deficits are such that our social interest in protection outweighs our values of freedom and independence is properly the province of lawyers and judges, not of medical-psychological experts.

The focus of the Due Process in Competence Determinations Act (DPCDA) (Prob C §§810-813, 1801, 1881, 3201, 3204) on mental function deficits will also reduce conflicts in expert testimony. Testing of mental functions generally produces fairly consistent results. However, diagnosis of mental conditions (particularly mental illness) often results in disagreements among the doctors. Thus, "due process" in the title of DPCDA reflects a legislative judgment that decisions based on medical conclusions about capacity, which in turn are based on mental diagnosis, are so subjective and unreliable as to be inconsistent with the due process requirement of a fair and orderly adjudication.

The factors listed in Prob C §811 should be used as a checklist both for preparing the evidence to be introduced as well as for preparing witnesses about issues on which they may be cross-examined. An expert, even with impressive credentials, who has testified that a person has capacity may be dramatically undercut by presentation of the results of a standard mental function test showing a serious and relevant mental function impairment. There are sample forms containing the checklist in §§3.39-3.40. Although the Judicial Council form in §3.40 is intended for use in conservatorship proceedings, it may be useful in dealing with medical practitioners, and judges will be familiar with reviewing its format. When the principal's capacity is at issue, filing one of these forms, executed and verified by a qualified expert, along with the petition should go far to prevent or deflate potential objectors' assertions that the petition is meritless and filed for ulterior motives.

While Prob C §811 focuses on the specific functional deficits to be considered, Prob C §812 directs the application of that analysis to the underlying issue of capacity. Probate Code §813 applies the analysis to medical decisions by specifically referring to the factors for determining capacity as they apply to medical-consent determinations.

For further discussion, see §§3.28-3.40. For a practical guide for counsel dealing with capacity and undue influence issues in a variety of estate planning contexts, see Capacity and Undue Influence: Assessing, Challenging, and Defending (Cal CEB Action Guide February 2008).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.19 2. Presumptions Under DPCDA Affecting Capacity to Contract

§11.19 2. Presumptions Under DPCDA Affecting Capacity to Contract

The Due Process in Competence Determinations Act (DPCDA) (Prob C §§810-813, 1801, 1881, 3201, 3204) added CC §39(b), which provides a rebuttable presumption that a person is of unsound mind for purposes of CC §39 (regarding capacity to contract) if the person is substantially unable to manage his or her own financial resources or resist fraud or undue influence. The language matches the language in Prob C §1801(b), which states that a conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence.

The effect of this coordination is twofold. First, of course, establishment of a general conservatorship of the estate deprives a person of the capacity to contract (including execution of a power of attorney) except for the powers specifically reserved to the conservatee. Second, the establishment of a conservatorship is likely to be seen as casting great doubt on actions undertaken by the conservatee in the period before the conservatorship in which the conservatee's condition was substantially the same.

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§11.20 3. Proving Incapacity Under the Health Care Decisions Law

Probate Code §4658 must be considered when capacity is at issue in the context of health care decision making. It provides that, unless otherwise specified in a written advance health care directive, for the purposes of the Health Care Decisions Law (HCDL) (Prob C §§4600-4805) the primary physician determines whether a patient lacks capacity or is subject to another condition that affects an individual health care instruction or the authority of an agent or surrogate.

The Comment to Prob C §4658 states, "This section makes clear that capacity determinations need not be made by the courts. For provisions governing judicial determinations of capacity, see Sections 810-813." It is, however, unclear what consideration the court should give to the primary physician's determination if the issue does come to court. Should the court consider the determination of capacity *de novo* or must it accept the physician's determination unless it makes a finding to the contrary (*e.g.,* that the physician has acted in bad faith or failed to make a determination properly under Prob C §§810-813)? If the physician has not determined some important issue of capacity, must the court stay the proceedings while an action is undertaken to compel the physician to do so?

Probate Code §§810-813 were intended to clarify that the determination of capacity is fundamentally a legal, not medical, question. Neither §4658 nor the Law Revision Commission Comments show a legislative intent to repudiate that principle. Absent legislative clarification, it appears that the best course for the court is to determine whether the principal has capacity, giving the physician's opinion substantial weight without deferring to it.

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III. PROCEDURAL CONSIDERATIONS

§11.21 A. Applicable Law

Probate Code §4052 deals with choice-of-law issues under the Power of Attorney Law (Prob C §§4000-4545). Probate Code §4676 addresses choice-of-law issues under the Health Care Decisions Law (HCDL) (Prob C §§4600-4805). Generally, if the principal resided in California when the power of attorney governed by the Power of Attorney Law was executed; if the power of attorney was executed in California; or if the authority conferred on the agent relates to property, acts, or transactions in California or were intended to occur in California, then California law will apply to the operation of the power of attorney. See Prob C §4052. The power of attorney remains subject to California law even if there is a change of domicile of the principal or the agent or if the property that was the subject of the power of attorney is removed from California. Prob C §4052(c). A written advance health care directive or similar instrument executed in another state or jurisdiction in compliance with the laws of that state or jurisdiction or of California is valid and enforceable in California to the same extent as a written advance care directive validly executed in California. Prob C §4676. If the matter is litigated in California, of course, then California procedures will also apply.

Any procedural issues in the probate court that are not resolved in the Probate Code are to be handled by the rules of practice applicable to civil actions. These issues include utilization of discovery procedures in the Code of Civil Procedure. Prob C §§1000, 4505, 4755. All contested issues of fact in probate proceedings are to be tried in conformity with the rules of practice in civil actions. Prob C §1000.

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B. Jurisdiction

§11.22 1. Subject Matter Jurisdiction

Probate Code §§4520 and 4760, which provide that the superior court in proceedings under the Power of Attorney Law (Prob C §§4000-4545) and the Health Care Decisions Law (HCDL) (Prob C §§4600-4805), respectively, is a court of general jurisdiction, are essentially duplicative of Prob C §800, which applies throughout the Probate Code. Merely because these statutes were enacted in the same legislative session, it would be unreasonable to infer that the legislature intended anything by this dual enactment other than to make sure that the former doctrine of limited jurisdiction in the probate court would not apply.

Probate Code §§4521 and 4761 expressly authorize the court to act under the comprehensive provisions of CCP §410.10, which states: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." Jurisdiction, however, should be distinguished from statutory procedural requirements. Merely because the probate court (more technically, the superior court sitting in the exercise of its authority as provided in the Probate Code) has general jurisdiction does not mean therefore that every issue related to anything before the probate court may properly be brought before the court by a petition. If an action fits within the statutory procedural remedies provided in the Probate Code, those procedures may be followed. Otherwise, the proper procedure is whatever the legislature has specified (typically a complaint filed and summons issued to be personally served and answered).

The court has the authority not to hear matters that are not specifically provided in the Probate Code. Under Prob C §801, the court, on its own motion or on the motion of any interested party, may order that an action or proceeding not specifically provided in the Probate Code be determined in a separate civil action. The court may order transfer of the severed action or proceeding to the separate civil action.

The distinction between superior court and (nonexistent) probate courts may retain a stubborn vitality. See *Estate of Jimenez* (1997) 56 CA4th 733, 65 CR2d 710, in which the trial court's dismissal of a petition regarding disposal of the decedent's remains in a probate proceeding was sustained. Although the result appears justifiable under Prob C §801, it is unfortunate that the trial and appellate courts' decisions appear to have been based on the concept of the limited jurisdiction of the probate court. The precedent that the *Jimenez* court found "most instructive" is *O'Donnell v Slack* (1899) 123 C 285, 55 P 906. 56 CA4th at 740. *O'Donnell* was decided nearly a century before the enactment of Prob C §800. It would have been much more efficient for the court and the parties if the court had simply recognized the petition as governed by Health & S C §7526 and proceeded to a determination on the merits. Alternatively, the court could have transferred the matter to a department that ordinarily hears civil matters if such a transfer better accommodated the court's internal operations.

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§11.23 2. Personal Jurisdiction

Petitions under Prob C §§4500-4545 (part of the Power of Attorney Law (Prob C §§4000-4545)) and Prob C §§4750-4771 (part of the Health Care Decisions Law (HCDL) (Prob C §§4600-4805)), regarding powers of attorney, are proceedings in personam. There is no provision for publication, the traditional indicia of proceedings in rem. This difference is important because it clarifies the need to consider giving notice to any third parties, including institutions, who may be affected by the proceeding. For example, if a bank refuses to honor the durable power of attorney governed by the Power of Attorney Law, the agent could bring an action under Prob C §4500 to establish the validity of the power. If a health care provider refuses to honor an advance health care directive governed by the HCDL, the agent or surrogate could bring an action under Prob C §4750.

However, if only the principal were served notice of a petition to establish the effectiveness of a durable power of attorney or advance health care directive, the bank or health care provider may not be legally bound by the order. Likewise, an action to compel one bank or health care provider to honor the durable power of attorney or advance health care directive will not be res judicata in an action to likewise compel a second bank or second health care provider. Unlike the requirements for an action brought to establish the validity of the power of attorney or advance health care directive, the requirements for an action brought against a third party to compel that party to honor an individual health care instruction or the authority of an agent or surrogate specify personal service of petitions to the third party. Prob C §§4544, 4769. See §11.27.

PRACTICE TIP: As a practical matter, banks and title companies tend to be the third parties most reluctant to recognize durable powers of attorney, but both groups tend to be immediately cooperative when given a copy of a court order even if they were not a party to the proceeding.

Another example of why notice to third persons is advised even if not required is that if an agent files a petition for approval of a gift to a charity of property specifically devised to the principal's children and only gives notice to the principal, then the children would not be precluded from relitigating the validity of the gift.

Any agent or surrogate who acts under a power of attorney governed by the Power of Attorney Law or the HCDL is subject to personal jurisdiction in California with respect to matters relating to acts and transactions of the agent or surrogate performed in California or affecting property or a principal or patient in California. Prob C §§4522, 4762.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.24 C. Nondurable Powers

§11.24 C. Nondurable Powers

Most powers of attorney are executed as conservatorship substitutes. Thus, it is appropriate that the issues regarding protection of persons who are incapacitated may be handled in the court accustomed to dealing with these issues in conservatorships. However, the Power of Attorney Law (Prob C §§4000-4545) clearly identifies the provisions that apply only to durable powers. Most of the provisions, including the remedy sections found in Prob C §§4500-4545 (Power of Attorney Law) and Prob C §§4750-4771 (Health Care Decisions Law (HCDL) (Prob C §§4600-4805)), apply to durable and nondurable powers alike.

NOTE: A power of attorney for health care decisions is, by definition, durable because it is only effective for patients who lack capacity to make health care decisions themselves. Prob C §4651.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.25 D. Venue

§11.25 D. Venue

Venue for filing a petition under the Power of Attorney Law (Prob C §§4500-4545) is determined under Prob C §4523 in the following order of priority:

(1) The county of the principal's residence;

(2) The county of the agent's residence;

(3) The county in which the subject property is located; and

(4) Any other county that is in the principal's best interest.

Venue for filing a petition (Prob C §§4750-4771) under the Health Care Decisions Law (HCDL) (Prob C §§4600-4805) is determined under Prob C §4763 in the following order of priority:

(1) The county of the patient's residence;

(2) The county of the agent's or surrogate's residence; and

(3) Any other county that is in the patient's best interest.

Although powers of attorney are commonly conservatorship substitutes, the provisions of Prob C §§4523 and 4763 are not analogous to the more flexible provisions of Prob C §2201, which specify that venue for conservatorship petitions may be filed in either the county of the conservatee's residence or wherever is in the principal's best interest. However, since nothing is stated regarding subsequent changes of venue, Prob C §1000 should allow such motions under CCP §397 (general change-of-venue statute).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.26 E. Standing

§11.26 E. Standing

Recognizing that abuses of the principal or patient need to be brought to the court's attention, Prob C §§4540 (Power of Attorney Law (Prob C §§4000-4545)) and 4765 (Health Care Decisions Law (HCDL) (Prob C §§4600-4805)) generally give standing to almost anyone who might want to bring such a petition, including any interested person or friend of the principal or patient. Also recognizing that the fiduciary responsibility of an agent or surrogate is vitiated without the possibility of judicial oversight, Prob C §§4502 and 4752 provide generally that the power of attorney under the Power of Attorney Law and an advance health care directive under the HCDL cannot preclude use of the remedies in Prob C §§4500-4545 and 4750-4771.

These general rules are limited by Prob C §4503 (Power of Attorney Law) and Prob C §4753 (HCDL), which provide that the authority of some persons to petition may be proscribed in the power of attorney or in an advance health care directive if the power of attorney or the advance health care directive was executed under the advice of an attorney, who provides a written certification in the terms stated in Prob C §§4503 and 4753(a)(2), respectively.

Regarding non-health-care petitions, Prob C §4503(b) states, however, that the following persons *may not* be proscribed from filing a petition under Prob C §4541:

- The agent;
- The principal;
- The conservator of the person or estate of the principal; and
- The public guardian.

As to health care petitions, Prob C §4753(b) states that the following persons *may not* be proscribed from filing a petition:

- The conservator of the person of the principal/patient (regarding certain health care issues described in Prob C §4766(b) or (d), including, *e.g.,* whether the advance health care directive is in effect or has terminated or whether the authority of an agent or surrogate is terminated, as specified); and
- The agent (regarding certain health care issues described in Prob C §4766(b) or (c), including, *e.g.,* whether the advance health care directive has terminated or whether acts or proposed acts are appropriate).

Because the remedies provided in the Power of Attorney Law and the HCDL are cumulative, it is likely that an interested person who wishes to intervene for the protection of the principal or patient, or in the person's own interests, will be able to use some other avenue to accomplish substantially the same result. Another tactic in this situation is to find someone who has not been disqualified and persuade that person to be the nominal petitioner.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/ F. Notice/ §11.27 1. Statutory Notice Requirements

F. Notice

§11.27 1. Statutory Notice Requirements

Fifteen days' notice is the standard time specified in the Probate Code for mailing notice of petitions under the Power of Attorney Law (Prob C §§4000-4545) and the Health Care Decisions Law (HCDL) (Prob C §§4600-4805). See Prob C §§4544, 4769. The notice provisions of the Probate Code do not specify any different time for notice depending on whether the notice is mailed or personally served, in contrast to the Code of Civil Procedure provisions involving notice of motions.

Notice of the time and place of the hearing, together with a copy of the petition, is always required to be given to the agent or surrogate and the principal or patient, except, of course, that notice is not required to be given to the petitioner. Prob C §§4544, 4769(a). Third parties are entitled to personal service of notice and a copy of a petition to compel them to honor individual health care instructions or the authority of an agent or surrogate. Prob C §§4544, 4769(b).

PRACTICE TIP: Because a proceeding under Prob C §§4500-4545 or §§4750-4771 is a proceeding in personam (see §11.23), limiting notice only to this statutory minimum designation of persons entitled to notice may be a mistake. If the petition deals with some other third party's interest or expectancy, a more prudent approach would be to serve that person as well. In this situation, the additional service may also avoid a continuance when the court recognizes the inadequacy of the statutorily prescribed notice and requires further notice under Prob C §1202. Although this may initially invite some additional conflict, it is preferable to obtaining and relying on an order that is later successfully challenged by someone who was not given notice of the original proceeding.

No statutory provision expressly controls the form or manner of notice to these other third parties, but courts will ordinarily be most comfortable with 15 days' mailed notice with a copy of the petition. Mailing only the notice of hearing may force the court to scrutinize the caption of the petition to determine the extent to which it realistically advises recipients of the scope and effect of the relief being sought.

When a person is represented by an attorney of record, any notice to that person must also be mailed to the attorney. Prob C §1214.

The 15-day mailed notice provided by the Probate Code for most proceedings is dramatically less than the 30-day personal service required in most other civil proceedings. For this reason, the probate courts are much more willing to allow interested parties a continuance to respond. Likewise, relief under CCP §473 will be more easily available to a person who received such short, mailed notice than would be afforded someone who received 30 days' notice by personal service.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.28 2. Notice Under California Rules of Court

§11.28 2. Notice Under California Rules of Court

Several provisions in Title 7 of the California Rules of Court should be consulted when giving notice. Note particularly the following:

- **California Rules of Court 7.50.** Requires that the notice state the complete title (caption) of the petition, not a paraphrase or abbreviation.
- **California Rules of Court 7.51(a)(2).** Precludes mailing the notice to a person in care of another person unless the person entitled to notice is an adult and has directed the party giving notice in writing to send the notice in care of the second person.
- **California Rules of Court 7.51(a)(3).** Requires that notices mailed to more than one person in the same household be sent separately to each person.
- **California Rules of Court 7.51(b).** Reiterates the requirement in Prob C §1214 that when a party has an attorney of record, the notice must be sent to both the attorney and the party.
- **California Rules of Court 7.51(c).** Deals with situations when the person entitled to notice has a guardian or conservator. In these situations, the notice must be sent to the guardian or conservator. In addition, notice must be sent to the ward or the conservatee, unless the court dispenses with this notice or the notice is personally served on a California-resident guardian or conservator of the estate under Prob C §1210.
- **California Rules of Court 7.51(d).** Requires that, except for certain specified exceptions, notice to a minor must be sent both to the minor and to the person or persons who have legal custody of the minor and who also reside with the minor.
- **California Rules of Court 7.52.** Deals with service of notice when the recipient's address is unknown. The rule requires a declaration of due diligence in searching for the person and specifies minimum requirements for this search. After the court is satisfied that all reasonable steps have been taken unsuccessfully, it may waive notice to the person or may specify alternative notice. Most courts do not require published notice of hearing in this situation.
- **California Rules of Court 7.53.** Provides that an amended petition, or amendment to a petition, requires the same notice as was required for the original petition. A supplement to a pleading, however, does not require additional notice of hearing, although a copy of it must be served if service of a copy of the pleading was required, unless waived by the court; Cal Rules of Ct 7.3 defines these terms. Essentially, amending a petition implies a material change in what is being requested, *e.g.,* increasing the amount of fees requested or extending the time for an accounting. On the other hand, merely providing additional information in support of the existing petition, *e.g.,* "Supplement to Petition" or "Supplemental Declaration for Petition," is a supplement.

NOTE: Some courts require that amendments be calendared. Thus, if the court's calendar for the original setting date is already full, the matter will be determined on the later date for which the amendment is set.

- **California Rules of Court 7.101.** A general rule that makes all Judicial Council forms mandatory. Therefore, when giving notice, use the Notice of Hearing—Decedent's Estate or Trust (Probate—Decedents' Estates) (Judicial Council Form DE-120). If proof of personal service is necessary, use Proof of Personal Service of Notice of Hearing—Decedent's Estate or Trust (Probate—Decedents' Estates) (Judicial Council Form DE-120(P)).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.29 G. Miscellaneous Procedural Provisions

§11.29 G. Miscellaneous Procedural Provisions

Like other procedures under the Probate Code, those in Division 3 (beginning with §1000) apply to fill in numerous, minor procedural details. Thus, an unverified petition, or one verified by the attorney, is not acceptable, as it would be in a civil action under the Code of Civil Procedure, if the petitioner is a fiduciary. Prob C §1023. Attorney verifications on information and belief are also undesirable because they do not provide the evidentiary basis for the court to rule on the petition if no opposition is filed.

The protections against vexatious litigants are expressly applicable to proceedings under the Probate Code. Prob C §1000; CCP §391.7. Occasionally some dissatisfied relative, friend, or lover of the principal may file unwarranted challenges to the validity of the power of attorney or to the actions of the agent. When that occurs, consideration should be given to application of the remedies under the Code of Civil Procedure against vexatious litigants.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.30 H. Guardian Ad Litem

§11.30 H. Guardian Ad Litem

The court, on its own motion or the request of any interested person, may appoint a guardian ad litem to represent a minor, incapacitated person, or others whose identity or whereabouts is unknown. Prob C §1003. There is no provision in the Power of Attorney Law (Prob C §§4000-4545) or the Health Care Decisions Law (HCDL) (Prob C §§4600-4805) for appointment of an attorney directly for these persons. However, probate courts commonly appoint attorneys as guardians ad litem for them as needed. Appointing an attorney as guardian ad litem incurs no additional expense, because guardians ad litem who are not attorneys may not appear in pro per. *Torres v Friedman* (1985) 169 CA3d 880, 215 CR 604.

Appointing someone other than an independent attorney also raises conflict-of-interest issues. Commonly, in litigation regarding powers of attorney, both sides will claim and believe that they have no conflict of interest because they are only in the court to protect the principal's rights. However, the parties usually have a personal stake in the outcome of the litigation because most of the issues litigated will affect their inheritance rights. The court should avoid appointment of guardians ad litem with conflicts of interest. The court may also take into consideration any conflict of interest for the person nominating the guardian ad litem. *Williams v Superior Court* (2007) 147 CA4th 36, 54 CR3d 13.

Appointment of guardians ad litem has commonly been done ex parte. However, recent cases have highlighted a due process problem with that approach. The issue has arisen recently in appointment of guardians ad litem for handicapped parents of minors in dependency proceedings. There appears no reason the same analysis would not likewise apply for people involved in litigation regarding powers of attorney (*e.g.,* the principal).

Appointment of a guardian ad litem involves a finding of some incapacity. For minors, the finding is inherent in their minority. For adults, the test is whether the person has the capacity to understand the nature or consequences of the proceeding and to assist counsel in preparing the case. *In re James F.* (2008) 42 C4th 901, 910, 70 CR3d 358. The evidentiary burden for the determination is governed by Prob C §§810-813.

The effect of the guardian ad litem's appointment is to transfer direction and control of the litigation from the person to the guardian ad litem, who may waive the person's right to a contested hearing. Before appointing a guardian ad litem for a person in a dependency proceeding, the court must hold an informal hearing at which the person has an opportunity to be heard. The court or counsel should explain to the person the purpose of the guardian ad litem and the grounds for believing that the person is mentally incompetent. If the person consents to the appointment, the person's due process rights are satisfied. A person who does not consent must be given an opportunity to persuade the court that appointment of a guardian ad litem is not required, and the court should make an inquiry sufficient to satisfy itself that the person is, or is not, competent. If the court appoints a guardian ad litem without the person's consent, the record must contain substantial evidence of the person's incompetence. Unaddressed by the court in *In re James F.* is the extent to which a waiver of notice and consent to the appointment of a guardian ad litem avoids the need for these requirements. The safer course would be to hold a noticed hearing for the determination of a guardian ad litem, thereby avoiding the issue of whether a person who is incompetent is capable of waiving notice.

Somewhat comforting is the further holding in *In re James F.* that the due process issues regarding appointment of guardians ad litem are susceptible to harmless-error analysis. If it is clear that a person (*e.g.,* the principal) is incompetent, presenting the application for appointment of the guardian ad litem ex parte should not result in reversible error if the court does not require a noticed hearing. Submitting the application ex parte may be particularly attractive in the typical litigation context in which the petitioner believes that substantial mischief is occurring that requires the quickest intervention by the court. It might provide a better record if the page signed by the allegedly incompetent person includes a statement of the matters that the Supreme Court said should be covered at the "informal hearing" regarding appointment of the guardian ad litem.

NOTE: Use of Judicial Council Form DE-350/GC-100 (Petition for Appointment of Guardian Ad Litem—Probate Code) and Judicial Council Form DE-351/GC-101 (Order Appointing Guardian Ad Litem—Probate) is mandatory.

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§11.31 I. Contents of Petition

The petition should state facts showing that the petition is authorized under the Power of Attorney Law (Prob C §§4000-4545) or the Health Care Decisions Law (HCDL) (Prob C §§4600-4805) (*e.g.,* how California has jurisdiction), the basis for venue, and the grounds of the petition. If a copy of the power of attorney or advance health care directive is available, it should be attached as an exhibit; otherwise, the petition must recite the terms of the power of attorney or advance health care directive to the extent known to the petitioner. Prob C §§4542, 4767.

The petition should also state the names and addresses of all persons entitled to or otherwise being given notice, as well as the relationship that is the basis for giving such notice. Because notice is fundamental and jurisdictional, the court needs this information to find that proper notice was given. Prob C §§1202, 1260.

The caption of the petition must clearly and completely identify the nature of the relief sought or granted. Cal Rules of Ct 7.102.

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§11.32 J. Discovery, Law and Motion, and Trials

There is no specific discovery provision under the Power of Attorney Law (Prob C §§4000-4545) or the Health Care Decisions Law (HCDL) (Prob C §§4600-4805), as there is, for example, in decedent's estate or conservatorship proceedings. Discovery is governed by the Code of Civil Procedure, and all issues of fact joined in probate proceedings are to be tried in conformity with the rules of practice in civil actions. Prob C §1000. *Mota v Superior Court* (2007) 156 CA4th 351, 67 CR3d 303.

Differences of opinion have developed as to the applicability of some pre-trial law and motion procedures in litigation matters under the Probate Code. Ordinarily this is of little practical effect, as judges in Probate Code proceedings have traditionally evaluated the sufficiency of the petition to justify any relief, without the requirement for a demurrer or motion for judgment on the pleadings. In part, the confusion arises from what seems a merely semantic distinction: in general civil actions, issues are resolved by a "judgment" while in proceedings under the Probate issues are resolved by an "order." See Prob C §§1046, 1300, 1302. See also *Estate of Stoddart* (2004) 115 CA4th 1118, 9 CR3d 770. Thus it has been argued (with varying degrees of success) that, for example, a motion for summary judgment is inapplicable in a probate court proceeding because no judgment (summary or otherwise) is involved.

Contested matters are resolved by trials as in other civil actions. Declarations in petitions under the Probate Code are admissible only in uncontested proceedings. *Estate of Wallace* (1977) 74 CA3d 196, 141 CR 426, *Estate of Young* (2008) 160 CA4th 62, 72 CR3d 520.

There is no right to a jury trial on a petition under the Power of Attorney Law or the HCDL. Prob C §§4504, 4754. See §11.11.

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§11.33 K. Obtaining Medical Information Under HIPAA and CMIA

Evidence of the principal's health or mental condition is often central to litigation involving a power of attorney. Getting this evidence has become more difficult because of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub L 104-191, 110 Stat 1936) and the voluminous regulations promulgated under the Act. For an extensive discussion of HIPAA, see §§7.76-7.85, 8.34.

Lack of cooperation from medical personnel, however, is not a new issue, and the appropriate response will be the same as it has always been. First, try cooperation and communication. If that fails, use standard discovery (*e.g.,* depositions) and subpoenas (including duces tecum) for interim hearings at which some evidence of the principal's condition may be required.

Under HIPAA, a person such as a conservator or agent under a health care power who "has authority to act on behalf of an individual who is an adult … in making decisions related to health care" has the same rights to the medical information as the individual does. 45 CFR §164.502(g)(2). Sometimes that will create an opportunity to get access to the information faster than other legal remedies. See §7.13.

Another avenue may be found in 45 CFR §164.512(j), which allows a physician to disclose information "to avert a serious threat to health or safety." See §4.12.

California's Confidentiality of Medical Information Act (CMIA) (CC §§56-56.37) before the enactment of HIPAA was not generally a substantial barrier to obtaining needed medical information for legal proceedings. That may change, however, because a violation of CMIA (which is not preempted when more restrictive than HIPAA) would also be a violation of HIPAA. See §7.76.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.34 L. Expenses and Attorney Fees

§11.34 L. Expenses and Attorney Fees

As in other civil proceedings, petitions under the Power of Attorney Law (Prob C §§4000-4545) and the Health Care Decisions Law (HCDL) (Prob C §§4600-4805) are generally subject to the "American Rule" that all parties bear their own attorney fee expenses. However, there are exceptions, which are discussed in §§11.35-11.36.

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§11.35 1. Reimbursement for Expenses and Attorney Fees

The agent under a power of attorney governed by the Power of Attorney Law (Prob C §§4000-4545) is entitled to reimbursement from the principal "for reasonable expenses incurred as a result of acting as attorney-in-fact." Prob C §4204. As noted in the Law Revision Commission Comment to this section, this would "include the cost of bookkeeping, tax and legal services incurred by the attorney-in-fact in performing duties on the principal's behalf." Obviously, the principal's funds would be used for litigation to force a third power to honor the agent's authority.

Probate Code §4204 does not apply to health care powers. Prob C §4050(a)(1). In the absence of an analogous provision in the Health Care Decisions Law (HCDL) (Prob C §§4600-4805), common law provisions apply and should achieve the same result. See Prob C §4688 (agency law governs when no provision for rule governing agents under powers of attorney).

To the extent that the agent's acts are determined to be proper, the agent should be entitled to use the principal's funds to pay for legal fees and costs incurred. Even the fees incurred in supporting the amount of the fees charged by the agent or the principal might be payable from the principal's estate. See, by analogy, *Estate of Trynin* (1989) 49 C3d 868, 264 CR 93.

PRACTICE TIP: As a practical matter, however, when the litigation begins, the agent under a power of attorney for property management will often be denied access to the principal's funds, either by a preliminary injunction or by termination of the agent's authority. The agent or surrogate under an advance health care directive may not ever have had direct access to the principal's assets. This can be a major problem if the agent or surrogate is accused of malfeasance, because a court will be reluctant to force payment of the agent's or surrogate's attorney fees from the principal's funds until the propriety of the agent's or surrogate's actions has been determined.

Because agents and surrogates are chosen on the basis of many factors other than their wealth, without access to the principal's assets an agent or surrogate may be unable to afford to present evidence of the propriety of the agent's or surrogate's actions in a court proceeding. This is different from, for example, a trustee who would generally have access to the trust assets to pay litigation fees, subject only to the potential for surcharge if it were found that the trustee had committed malfeasance. In an appropriate case, recognizing that the principal created the potential for conflict by choosing and empowering that agent or surrogate, a court may consider ordering the agent's or surrogate's fees paid from the principal's assets, subject to a surcharge against the agent or surrogate if it is finally determined that the agent's or surrogate's actions were improper. Otherwise, the attorney may be presented with the dreaded "contingent hourly" fee arrangement in which the attorney fees will be paid at the attorney's hourly rate, but only if the attorney is successful.

See §11.14 regarding source of payment of attorney fees. Payment from funds of the principal may vitiate the agent's or surrogate's attorney-client privilege in regard to a successor agent or surrogate, the principal, or any legal representative of the principal.

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§11.36 2. Award of Attorney Fees

Generally distinct from the agent's or the surrogate's right of reimbursement from the principal are the fee award provisions of Prob C §4545 (Power of Attorney Law (Prob C §§4000-4545)) and Prob C §4771 (Health Care Decisions Law (HCDL) (Prob C §§4600-4805)). These sections give the court discretion to award fees to the agent or surrogate if the court determines that the proceeding was commenced without reasonable cause. In litigation with third parties, this decision will essentially inure to the benefit of the principal, who was already responsible for payment of the agent's fees under Prob C §4204 (this does not apply to health care powers) (see §11.35). If the litigation was instigated by the principal or the principal's legal representative such as a conservator, the agent (or surrogate) should be likewise entitled to payment of fees by the principal if the agent's (or surrogate's) actions were proper, regardless of whether the principal's action was initiated with reasonable cause. The court should use the authority granted in Prob C §§4545 and 4771, particularly when confronted with abuses such as a bank's refusal to accept any form of a power of attorney except the one prepared by the bank. See §11.55.

Fees are also payable to the person commencing the proceeding if the court determines that (1) the agent has clearly violated the fiduciary duties under Prob C §4545(b) or has unreasonably failed to submit accounts or report acts to the principal or conservator of the estate or of the person after written request (Prob C §4545(b)), or (2) the agent or surrogate has clearly violated the duties under an advance health care directive (Prob C §4771). Thus, if the principal or legal representative had initiated the proceeding, the principal could also be entitled to attorney fees in addition to any other surcharge recoverable from the agent.

This possibility invites some tactical planning in initiating litigation regarding a power of attorney or an advance health care directive. For example, if the person attacking the agent is appointed as conservator of the estate or even as guardian ad litem for the principal, the person will have access to payment of legal fees from the estate of the principal (conservatee), subject to possible reimbursement from the agent. However, if the person attacks the agent only as an interested party, it is more likely that the person will receive no reimbursement.

If an agent under a power of attorney governed by the Power of Attorney Law furnishes an affidavit as prescribed in Prob C §4305, a third person dealing with the agent who refuses to accept the exercise of an agent's authority referred to in the affidavit is liable for attorney fees incurred in an action or proceeding necessary to confirm the agent's qualifications, unless the court determines that the third person believed in good faith that the agent was not qualified or was attempting to exceed or improperly exercise the agent's authority. Prob C §4306. These provisions do not apply to health care powers.

In a proceeding under Prob C §4406 to compel a third person to honor the agent's authority under a properly executed statutory form power of attorney after the third person refuses to honor the agent's authority within a reasonable time, the court must award attorney fees to the agent if the court finds that the third person acted unreasonably in refusing to accept the agent's authority under the statutory form power of attorney. Prob C §4406(b). A third person does not act unreasonably if the refusal is authorized or required by state or federal law. Prob C §4406(c). A third person's refusal is unreasonable if the only reason for the refusal is that the power of attorney is not on a form prescribed by the third person to whom the power of attorney is presented. Prob C §4406(d).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.37 M. Costs

§11.37 M. Costs

Cost awards are available in litigation under the Power of Attorney Law (Prob C §§4000-4545) and under the Health Care Decisions Law (HCDL) (Prob C §§4600-4805) as in other litigation, except that Prob C §1002 provides that the costs may be ordered paid "by any party to the proceedings or out of the assets of the estate, as justice may require." Thus, if an interested party successfully secures removal of the agent or a surrogate, the petitioner's costs would probably be payable from the principal's assets, particularly if the agent (or surrogate) is unable to pay them.

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§11.38 N. Appeals

The appeals provisions in the Probate Code are consolidated in Prob C §§1300-1312. General provisions affecting agents and other fiduciaries governed by the Probate Code are in Prob C §1300. These provisions include giving instructions to the fiduciary, fixing fees, surcharging a fiduciary, approving accounts, and removing or discharging the fiduciary. Probate Code §1302 refers to appealable orders with respect to a power of attorney under the Power of Attorney Law (Prob C §§4000-4545) (see Prob C §§4541, 4543), and Prob C §1302.5 refers to appealable orders under the Health Care Decisions Law (HCDL) (Prob C §§4600-4805) (see Prob C §§4766, 4768).

Probate Code §1310 provides generally that appeals stay the court's order, unless an undertaking is required and not posted. However, Prob C §1310(b) provides that the trial court may, for the purpose of preventing injury or loss to a person or property, direct the exercise of the powers of the fiduciary. All acts of the fiduciary under the directions of the court made under Prob C §1310(b) are valid, irrespective of the result of the appeal. In addition, if the court has entered a judgment for money or an order directing payment of money, an appeal does not stay the operation and effect of the judgment or order unless a bond is posted or the payment is to be made from a decedent's probate estate or from the estate of a person who is subject to a guardianship or conservatorship of the estate. Prob C §1310(e).

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§11.39 O. Representation by Counsel

An agent under a power of attorney may not represent the principal in legal proceedings without an attorney but may act without an attorney when representing himself or herself as the agent. For example, the agent may act without an attorney to seek court approval of an accounting by the agent. The agent may not act pro se, however, to enforce the validity of the power against a third party. See, by analogy, *Hansen v Hansen* (2003) 114 CA4th 618, 7 CR3d 688, in which the court held that a conservator, executor, or personal representative of a person's estate who is unlicensed to practice law cannot appear in propria persona on behalf of the estate in matters outside the probate proceedings, and *Ziegler v Nickel* (1998) 64 CA4th 545, 75 CR2d 312, in which the trustee's complaint regarding a mobilehome purchase was dismissed by the court. See also *Torres v Friedman* (1985) 169 CA3d 880, 215 CR 604, in which an attorney's purported withdrawal as attorney of record for a guardian ad litem was determined to have been invalid.

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IV. ADVANCE HEALTH CARE DIRECTIVES

§11.40 A. Temporary Orders

On a showing of good cause, the court may issue a temporary order prescribing the patient's health care until disposition of a petition under Prob C §4766. Prob C §4770. If a power of attorney for health care is in effect and a conservator or temporary conservator of the person is appointed for the principal, the court that appoints the conservator may, on a showing of good cause, issue a temporary order prescribing the health care of the principal, the order to remain in effect at most for the period necessary to permit the filing of a petition under Prob C §4766. Prob C §4770.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.41 B. Petition Regarding Advance Health Care Directives

§11.41 B. Petition Regarding Advance Health Care Directives

Probate Code §4766 identifies the following purposes for which a petition may be filed regarding an advance health care directive (AHCD):

- Determining whether the patient has capacity to make health care decisions (Prob C §4766(a));
- Determining whether the AHCD is in effect or has terminated (Prob C §4766(b)); determination that the AHCD is in effect may include (1) whether it was effectively executed or (2) whether the principal objects to its use (Prob C §4689);
- Determining whether the prior or proposed acts of the agent are consistent with the principal's expressed desires, if any, or otherwise made known to the court, or, when the desires of the principal are unknown or unclear, whether the acts are in the principal's best interest (Prob C §4766(c));
- Declaring that the AHCD has terminated, on finding that *both* (Prob C §4766(d))
- the agent or surrogate has violated or failed to perform, or is unfit to perform, the duty under an AHCD to act in a manner consistent with the patient's desires or, when the patient's desires are unknown or unclear, is acting (by action or inaction) in a manner that is clearly contrary to the patient's best interest); and
- at the time of the determination by the court, the patient lacks capacity to execute or revoke an AHCD or to disqualify a surrogate;
- Compelling a third person to honor individual health care instructions or the authority of an agent or surrogate (Prob C §4766(e); see form in §11.44);

NOTE: Probate Code §4684 states, "An agent shall make a health care decision … in accordance with … the principal's best interest," and Prob C §4685 gives clear priority to decisions of the health care agent over a conservator.

- Declaring that the authority of an agent or surrogate is terminated on a determination by the court that the agent or surrogate has made a health care decision for the patient that authorized anything illegal (Prob C §4766(d); see Prob C §4653).

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§11.42 C. No Direct Authority to Compel Recognition

There is one potentially major difference between Prob C §4766 (regarding advance health care directives (AHCD)) and Prob C §4541 (regarding all financial management and personal care powers). Section 4766 has no provision to require a third person to honor the AHCD. However, there may be other ways to achieve the desired result.

Probate Code §4766(b) allows a petition to determine whether the AHCD is in effect or has terminated and, under Prob C §4766(c), whether the agent's acts are consistent with the principal's desires or are in the principal's best interests. A petition under Prob C §4766(b)-(c) might be brought.

Furthermore, Prob C §4742 provides:

> (a) A health care provider or health care institution that intentionally violates this part is subject to liability to the aggrieved individual for damages of two thousand five hundred dollars ($2,500) or actual damages resulting from the violation, whichever is greater, plus reasonable attorney's fees.
>
> (b) A person who intentionally falsifies, forges, conceals, defaces, or obliterates an individual's advance health care directive or a revocation of an advance health care directive without the individual's consent, or who coerces or fraudulently induces an individual to give, revoke, or not to give an advance health care directive, is subject to liability to that individual for damages of ten thousand dollars ($10,000) or actual damages resulting from the action, whichever is greater, plus reasonable attorney's fees.
>
> (c) The damages provided in this section are cumulative and not exclusive of any other remedies provided by law.

Because the remedies of Prob C §4766 are cumulative and not exclusive (Prob C §4751), the agent (or surrogate) might also seek a permanent injunction requiring that conservators, hospitals, and others with a duty to serve the principal (patient) not do or fail to do anything as properly directed by the agent (or surrogate). Alternatively, the agent (or surrogate) might file a declaratory relief action. As to conservators, the agent's (or surrogate's) best remedy may be a petition for instructions in the conservatorship. Prob C §2359.

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§11.43 D. Terminating Life Support

No case as yet deals directly with a decision to terminate life support by an agent or surrogate under the Health Care Decisions Law (HCDL) (Prob C §§4600-4805). However, *Conservatorship of Wendland* (2001) 26 C4th 519, 110 CR2d 412, clarifies some of the issues likely to arise in litigation regarding termination of life support. Although *Wendland* is a conservatorship case, the opinion compares the law applicable to conservators with that applicable to agents or surrogates.

Wendland involved a conservator's decision to terminate life support for a conservatee who was severely brain damaged but was conscious and had some ability to communicate. The court held that a conservator could terminate life support only on a showing by clear and convincing evidence that the termination would be either consistent with the conservatee's wishes or in the conservatee's best interest. The court expressly limited the application of the standard to cases involving termination of life support for a conscious conservatee. 26 C4th at 555. For all other health care decisions by conservators, the usual preponderance-of-the-evidence standard applies. For further discussion of the case, see §§9.23-9.24.

The court stated in dictum that the strict standard that is applied to conservators would not apply to a decision by an agent or surrogate to terminate life support. The court also appeared to recognize that the decision of an agent or surrogate would be presumptively valid. In spite of these hints, it is not clear from *Wendland* what the scope of the court's review would be in the event of a legal challenge to an agent's or surrogate's decision to terminate life support.

Also unclear is the standard of proof to apply in determining whether the agent or surrogate was legally appointed. The same rationale for applying the clear and convincing standard in termination of life support for conscious conservatees may apply to determining the authority of the agent or surrogate to terminate life support for a principal. This might, however, produce the anomalous result of having the appointment of an agent or surrogate recognized for most purposes if proven by a preponderance of evidence, but not for termination of life support. Questions commonly arise regarding whether a person was competent at the time of an appointment, and proving that the principal was competent by clear and convincing evidence could be very difficult.

The language of a power of attorney for health care may work against the agent in a situation analogous to *Wendland*. Drafters of these powers commonly focus on terminal illness and prolonged comas. In *Wendland,* the conservatee's condition was the result of a highway accident, and he might have lived for many years. The decision emphasized that the conservatee had never discussed this particular scenario, although he had repeatedly expressed the common sentiments about not wanting to be kept alive if he were in a coma. If the power of attorney for health care refers only to comas and terminal conditions, the court will have to decide whether the language limits the agent's authority to only those decisions or whether the agent's authority extends to decisions beyond the words of the document and may be based on his or her understanding of the personal values of the principal (Prob C §4684).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.44 E. Form: Sample Petition to Compel Third Party to Honor Agent's Authority to Arrange for Disposal of Principal's Remains as Authorized in Advance Health Care Directive

§11.44 E. Form: Sample Petition to Compel Third Party to Honor Agent's Authority to Arrange for Disposal of Principal's Remains as Authorized in Advance Health Care Directive

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11.44-1 Sample petition to compel third party to honor agent's authority to arrange for disposal of principal's remains as authorized in advance health care directive

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Petitioner Lisa Roe

_ _ _ _ _ _ Court, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *Judicial District*]_ _

Lisa Roe,	**)**	**No. _ _ _ _ _ _**
Plaintiff(s)	**)**	
	)	**PETITION TO COMPEL**
vs	**)**	**CREMATORY TO HONOR**
	)	**AGENT'S AUTHORITY TO**
Suburban Crematorium,	**)**	**ARRANGE FOR DISPOSAL OF**
Defendant(s)	**)**	**PRINCIPAL'S REMAINS**
_____	**)**	**(PROB C §4766(e))**

PETITIONER alleges:

1. Status of Petitioner. Petitioner, Lisa Roe, is named as the agent to act on behalf of Jane Doe (PRINCIPAL), in an advance health care directive signed by PRINCIPAL on November 10, 2007. Since that date, Petitioner has acted as agent. A copy of the advance health care directive is attached as Exhibit A.

2. Petitioner's authority regarding disposition of PRINCIPAL'S remains. Under Paragraph 1.5 of the advance health care directive signed by PRINCIPAL on November 10, 2007, Petitioner is given authority to arrange for disposition of PRINCIPAL'S remains.

3. Death of PRINCIPAL. PRINCIPAL died of natural causes on February 5, 2008.

4. Arrangements for disposition of remains. Before PRINCIPAL'S death, arrangements were made for disposition of PRINCIPAL'S remains by cremation as provided by Hometown Funeral Services.

5. Refusal to allow arranged disposition of remains without conditions. Hometown Funeral Services has attempted in good faith to have PRINCIPAL'S remains disposed of by cremation, but Suburban Crematorium has refused to do so without the signature and approval of the PRINCIPAL'S spouse.

6. Impossibility of conditions. PRINCIPAL'S spouse cannot be located. PRINCIPAL'S spouse is not physically present at the only residence address known to Petitioner and no other location or telephone number is known so that the spouse can be reached.

WHEREFORE, Petitioner requests that the court order and direct Suburban Crematorium to dispose of the remains of PRINCIPAL forthwith, without the signature of PRINCIPAL'S spouse, through cremation.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Lisa Roe

Date: _ _ _ _ _ _ __[*Signature*]__
Lisa Roe

VERIFICATION

I, Lisa Roe, declare:

I am the petitioner named above. I have read the foregoing Petition to Compel Crematory to Honor Agent's Authority to Arrange for Disposal of Principal's Remains. I know its contents, and the same is true of my own knowledge except in regard to matters stated on information and belief, and regarding those matters I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
Lisa Roe
Petitioner

Comment: This form may be modified for any situation in which a third party is refusing to honor directions in an advance health care directive.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.45 F. Form: Sample Order to Compel Third Party to Honor Agent's Authority to Arrange for Disposal of Principal's Remains as Authorized in Advance Health Care Directive

§11.45 F. Form: Sample Order to Compel Third Party to Honor Agent's Authority to Arrange for Disposal of Principal's Remains as Authorized in Advance Health Care Directive

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11.45-1 Sample order to compel third party to honor agent's authority to arrange for disposal of principal's remains as authorized in advance health care directive

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Petitioner, Lisa Roe

_ _ _ _ _ _ Court, County of _ _ _ _ _ _
_ _[*Judicial District*]**_ _**

Lisa Roe,	**)**	**No. 123456**
Petitioner	**)**	
	)	**ORDER TO COMPEL**
vs	**)**	**CREMATORY TO HONOR**
	)	**AGENT'S AUTHORITY TO**
Suburban Crematorium,	**)**	**ARRANGE FOR DISPOSAL OF**
Defendant	**)**	**PRINCIPAL'S REMAINS**
	)	**(PROB C §4766(e))**
_____)		

The Court, having read and considered the petition of Petitioner, and all notices having been given as required by law, grants the petition as follows:

Suburban Crematorium is ordered and directed to dispose of the remains of PRINCIPAL forthwith, without the signature of PRINCIPAL'S spouse, through cremation.

Date: _ _ _ _ _ _ **__**[*Signature*]**__**
Judge of the _ _[*title of court*]**_ _**

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V. FINANCIAL MANAGEMENT AND PERSONAL CARE POWERS

A. General Provisions

§11.46 1. Temporary Orders

There is no provision in the Power of Attorney Law (Prob C §§4000-4545) regarding financial management and personal care powers that is analogous to the temporary health care order authorized by Prob C §4770 of the Health Care Decisions Law (HCDL) (Prob C §§4600-4805). Preliminary relief regarding those powers is generally secured with either (1) TROs and preliminary injunctions under CCP §527 or (2) appointment of a temporary conservator, or (3) both. See also §11.54.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.47 2. Petitions Under Prob C §4541

§11.47 2. Petitions Under Prob C §4541

Probate Code §4541 defines the scope of petitions for a power of attorney that is not an advance health care directive, *i.e.,* financial management and personal care powers under the Power of Attorney Law (Prob C §§4000-4545). The purposes set forth in Prob C §4541 are set out in §§11.48-11.52. A petition under Prob C §4541(f) to compel a third person to honor the authority of the agent is discussed in §11.55.

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§11.48 a. Determining Whether Power Is in Effect or Has Terminated

A petition filed to ascertain whether the power of attorney is in effect or has terminated (Prob C §4541(a)) may include a request to determine whether it was effectively executed or whether a springing power has become effective, empowering the agent to act. See §§4.8, 4.10-4.14.

A petition under this provision may be solely between the principal and the agent or may involve a third party being compelled to act.

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§11.49 b. Passing on Prior or Proposed Acts of Agent

A petition under Prob C §4541(b) may be filed to pass on prior or proposed acts of the agent, including approval of authority to disobey the principal's instructions under Prob C §4234(b). See §1.14. Agents most often use this section before taking some action that is viewed as subject to later attack. This is done particularly when there is a sense of hostility from an heir of the principal or another interested party and is colloquially known as "securing the blessing of the court." As in declaratory relief actions, courts should be willing to approve proper acts prospectively, because bringing such matters before the court avoids future litigation and gives interested parties an opportunity to comment on them while the proposed action can be simply avoided. However, there are three common problems found in such petitions by fiduciaries.

The first problem is failing to recommend a proposed course of action. Although a fiduciary may properly acknowledge that the fiduciary is in doubt, it is nonetheless a fiduciary's responsibility to make decisions. A petition that fails to propose a course of action suggests that the fiduciary has not thoroughly reviewed the matter.

The second problem is failing to provide sufficient information to enable the court to evaluate the issue properly. This failure suggests lack of prudence by the agent in failing to gather enough information to enable a rational choice to be made. Properly presenting the information required may involve substantial effort, but a court cannot be expected to approve a proposed action otherwise.

The third problem is failing to give sufficient notice. Persons who would be interested and may provide useful perspectives to the court should be given notice even if not expressly required by Prob C §4544. For example, it would be prudent to consider whether the principal's heirs or devisees may reasonably be affected by the proposed action. If so, identifying these persons in the petition and giving them notice will give some reassurance to the court and may avoid a continuance. Prob C §1202. See §§11.23, 11.27.

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§11.50 c. Compelling Agent to Submit Accounts or Reports

Probate Code §4541(c) permits the filing of a petition to compel the agent to submit accounts or reports if the agent has not submitted one within 60 days after written request by the person petitioning. The inclusion of the 60-day limitation in this section rather than in Prob C §4236 (duty to keep records and account) raises potential problems. It appears that this 60-day requirement could not be shortened by an express provision in the power of attorney, because Prob C §4502 essentially mandates that agents have at least 60 days to present an account or a report before a petition may be filed to compel the account or report.

The 60-day limit will be particularly frustrating in a situation in which it seems clear that the agent has misappropriated the principal's assets. No matter how patent the wrongdoing, it appears that a written request and a 60-day delay is required before the agent may be ordered to present an account or report. Rather than waiting for the hearing on the account, it may be proper to use discovery and other interim relief to minimize the damage to the principal from the agent's acts. See §11.54.

If an agent is required to file a report and accounting with the court, the content of the account must meet the requirements of Prob C §§1060-1064. For full discussion of a court report and account, see California Trust Administration, chap 7 (2d ed Cal CEB 2001) and 2 California Decedent Estate Practice, chap 19 (Cal CEB 1986).

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.51 d. Revoking Agent's Authority

§11.51 d. Revoking Agent's Authority

An agent's authority may be revoked under Prob C §4541(d) if all the following are found:

- The agent either has violated the agent's fiduciary duties or is unfit to serve as agent;
- At the time of the determination by the court, the principal lacks capacity; and
- Revocation is in the best interest of the principal or the principal's estate.

In this situation, it may also be important to show the court that some reasonable provision has been made for the future care of the principal. This may simply be a provision in the power of attorney appointing a successor who is willing and able to act. More often, it will involve concurrent appointment of a conservator. See §§11.7, 11.54.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.52 e. Approving Agent's Resignation

§11.52 e. Approving Agent's Resignation

Approving the resignation of the agent is allowed under Prob C §4541(e) as follows:

(1) If the agent is subject to an affirmative duty to act under the power of attorney, the court *may* approve the resignation, subject to any orders necessary to protect the principal's interests; or

(2) In other situations, the approval *shall* be accepted, subject only to the court's discretion to require notice.

The distinction between "may" and "shall" in (1) and (2) is important. The court may refuse to approve resignation of an agent who is legally bound to continue service, at least until some appropriate alternative arrangement is provided for (*e.g.,* appointment of a conservator to assume care of the principal's financial affairs).

If the agent is not bound to serve, the court may, for example, require notice to (1) any successor agents named in the power of attorney, (2) the persons who would receive notice of a petition to appoint a conservator, (3) the beneficiaries named in the principal's will (if any), and (4) the public conservator's office.

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§11.53 3. Lack of Express Remedies Section

There is no section in the Power of Attorney Law (Prob C §§4000-4545) about the court's remedy for the issues raised in the petitions under Prob C §4541. When a petition is authorized, however, appropriate relief is inherently within the court's authority. Prob C §1046. Section 1046 provides that the court in any probate proceeding shall determine any matter at issue and make appropriate orders.

The 1995 Comprehensive Power of Attorney Law, 24 Cal L Rev'n Comm'n Reports 323, 355 (1994), in the section titled "Judicial Proceedings," states: "The procedure for obtaining judicial interpretation *and enforcement* of duties of attorneys-in-fact under powers of attorney is reorganized in the new law, but remains largely the same." (Emphasis added; footnote omitted.) The footnote refers to former CC §§2410-2423. However, former CC §2413(b) stated: "The court may make all orders and decrees and take all other action necessary or proper to dispose of the matters presented by the petition." This language does not appear in the Power of Attorney Law. Other, similar petition provisions of the Probate Code do typically provide such a remedy section. See, *e.g.,* Prob C §§856, 2584, 17206.

It would be unreasonable to conclude that the legislature intended to disempower the court from taking effective action on petitions under the express provisions of the Power of Attorney Law. However, legislation may be needed to further clarify what remedies are available for the issues raised in petitions under the Power of Attorney Law.

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§11.54 B. Types of Petitions Challenging Agent's Actions

Petitions by conservators or other interested persons regarding an agent's actions under a durable power of attorney for financial management or personal care are likely to be generated by a belief that the agent has violated his or her fiduciary duty. In this situation, a variety of remedies should be considered and potentially effected simultaneously, including the following:

- A motion for a TRO and preliminary injunction under CCP §527;
- Petitions for temporary and general conservatorship, with authority to revoke the power of attorney or amend it to appoint someone other than the named agent;
- A petition under Prob C §§4541(b) (passing on the agent's acts), 4541(c) (compelling an account and report after a 60-day written request), and 4541(d) (declaring the agent's power revoked); and
- Additional civil damages against the agent for constructive fraud, pain, and suffering (due to resulting lack of funds to properly provide for the principal), and punitive damages.

Unlike the laws guiding the formation of a conservatorship, the Power of Attorney Law (Prob C §§4000-4545) has no provision for appointing or empowering a temporary substitute agent analogous to a temporary conservator. A power of attorney that provides for a successor to serve while the primary agent is incapacitated or unable to serve for any reason could supply a solution. See §§4.57-4.61. Alternatively, a court order suspending the agent's powers and temporarily enjoining all transactions or removal of the principal's assets would as effectively protect the principal as would removal of the agent, while retaining the ability to reinstate the agent if the agent's actions are eventually determined not to have warranted removal.

PRACTICE TIP: In pursuing the remedies discussed in this section, it is crucial to remember that the Power of Attorney Law has meticulously exculpated third parties who act in good faith reliance on a durable power of attorney. Prob C §§4301-4303, 4305, 4307-4308. Notifying third parties of the allegations against the agent is appropriate, but it may not be sufficient; a better approach is either to secure agreement with the third party (*e.g.,* the bank or stockbroker holding the principal's assets) not to honor the durable power or to personally serve the third party and secure an order preventing the institution from honoring the power pending the outcome of the litigation. Consideration should also be given to recording a lis pendens in counties in which the principal holds property.

Despite the exculpatory provisions, if a third party does recognize the ostensible power of attorney, there may be a remedy if the power was never valid. Third parties are subject to the risks of forgery and unrecognized incapacity in other transactions, and the same issues arise regarding powers of attorney. The exculpatory sections in the Power of Attorney Law all refer to a power of attorney. If a piece of paper labeled "power of attorney" was never executed by the principal, or was void ab initio, it seems unlikely it can convey any authority over the purported agent. Even the reference in Prob C §4303(a)(2) protecting third parties if "the power of attorney appears on its face to be valid" begs the question. If a document was never a power of attorney, the way it appears on its face should be irrelevant. This will, of course, be no protection to the principal if the power of attorney was valid at one time; in that case, the subsequent revocation would not bind third parties who were relying on it in good faith.

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§11.55 C. Refusal to Recognize Financial Management and Personal Care Powers

A petition under Prob C §4541(f) may be filed to compel a third party to honor the agent's authority. Under this section the agent may be able to recover attorney fees from the third party. Probate Code §4306 provides that a third party who refuses to honor a power of attorney, after being provided with an affidavit as described in Prob C §4305,

> is liable for attorney's fees incurred in an action or proceeding necessary to confirm the attorney-in-fact's … authority, unless the court determines that the person believed in good faith that the attorney-in-fact was not qualified or was attempting to exceed … the attorney-in-fact's authority.

In the normal course of events, a third party who simply refuses to consider accepting the authority of a power of attorney has nothing to gain (there would be no liability for honoring the power of attorney) and something to lose (paying the attorneys on both sides). See §11.36.

Note that Prob C §4406 is also available to support an award of attorney fees for refusal to honor a statutory form durable power of attorney.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/ VI. SAMPLE PETITIONS AND ORDER/§11.56 A. Form: Sample Petition to Compel Third Party to Honor Agent's Authority and for Attorney Fees and Costs

VI. SAMPLE PETITIONS AND ORDER

§11.56 A. Form: Sample Petition to Compel Third Party to Honor Agent's Authority and for Attorney Fees and Costs

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11.56-1 Sample petition to compel third party to honor agent's authority and for attorney fees and costs

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Petitioner, John Doe

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

In re Durable Power of Attorney of Jane Roe	)	**No. 98765**
	)	**PETITION TO COMPEL THIRD**
John Doe, Attorney-in-Fact for Jane Roe, Principal, Petitioner	)	**PARTY TO HONOR AUTHORITY OF ATTORNEY-IN-FACT AND FOR ATTORNEY FEES AND COSTS (PROB C §4541)** [*Add as appropriate: PROB C §4406 or §4306*]
vs	)	
BANK OF POLYNOMIA, Respondent	)	
	)	**Dep't: _ _ _ _ _ _**
	)	**Date: _ _ _ _ _ _**
_____	)	**Time: _ _ _ _ _ _**

Petitioner, John Doe, alleges that:

1. John Doe was appointed as attorney-in-fact for Jane Roe under that certain Durable Power of Attorney (Power of Attorney), a copy of which is attached hereto as Exhibit A and incorporated into this document by reference.

2. The Power of Attorney was validly and competently executed by Jane Roe and has not been terminated or revoked.

3. Jane Roe resides at _ _[*address*]_ _, _ _[*city*]_ _, California.

4. Respondent Bank of Polynomia does business at _ _[*address*]_ _, _ _[*city*]_ _, in the County of _ _[*name*]_ _, California, and Jane Roe has funds on deposit with the Bank of Polynomia in that county.

5. John Doe, as attorney-in-fact, demanded withdrawal of said funds on or about January 1, 2006. Along with the demand, petitioner furnished respondent an affidavit under California Probate Code §4305, a copy of which is attached as Exhibit B. Respondent did thereupon fail and refuse, and has at all times thereafter continuously failed and refused, to honor petitioner's demand.

[*Add one of the following alternatives*]

[*Alternative 1: No reason given for refusal to honor power of attorney*]

6. Petitioner is informed and believes that the failure and refusal of respondent to honor petitioner's authority as attorney-in-fact is not done in good faith. Respondent has refused to advise petitioner of any reasonable basis for respondent's refusal.

[*Alternative 2: Improper reason given for refusal to honor power of attorney*]

6. Respondent has advised petitioner that the refusal to honor petitioner's authority as attorney-in-fact is allegedly because _ _[*specify*]_ _. This is not a reasonable basis on which to refuse to honor petitioner's authority. Respondent has no facts to support the refusal, and the refusal is based solely on respondent's speculation and supposition.

[*Continue*]

WHEREFORE, petitioner requests an Order as follows:

1. Directing respondent to honor petitioner's authority as attorney-in-fact and to pay and deliver to respondent all funds of Jane Roe on deposit with said respondent, including interest on such funds.

2. Awarding petitioner as attorney-in-fact for Jane Roe reasonable attorney fees and costs against respondent; and

3. For such other relief as the Court finds appropriate.

Date: _ _ _ _ _ _ __[*Signature*]__
John Doe,
Attorney-in-Fact
for Jane Roe

VERIFICATION

I, John Doe, declare:

I am the petitioner named above. I have read the foregoing Petition to Compel Third Party to Honor Authority of Attorney-in-Fact and for Attorney Fees and Costs. I know its contents, and the same is true of my own knowledge except in regard to matters stated on information and belief, and regarding those matters I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
John Doe,
Attorney-in-Fact
for Jane Roe

Copies: Original for filing; copies to serve on respondent, respondent's attorney, and principal, if the principal is not the petitioner; office copies.

Comment: The petition must be verified. Prob C §1021(a)(1), (b)(1); Cal Rules of Ct 7.103.

When a petition to compel a third person to honor the authority of an agent is filed, notice of the time and place of the hearing, together with a copy of the petition, must be personally served on the third person. Prob C §4544. Notice of Hearing—Decedent's Estate or Trust (Probate—Decedents' Estates) (Judicial Council Form DE-120) and Proof of Personal Service of Notice of Hearing—Decedent's Estate or Trust (Probate—Decedents' Estates) (Judicial Council Form DE-120(P)) must be used. See §§11.27-11.28.

Depending on local rules under which the petition is pending, if appearances and live testimony are not required, the attorney for petitioner should prepare and file a detailed declaration in support of the request for attorney fees. If local rules require an appearance and testimony, the petitioner should be prepared to appear and testify about the matters

alleged in the petition, and the attorney should be prepared to testify regarding attorney fees.

If the petition is filed as part of the proceedings for the administration of a decedent's estate, the caption form, allegations, and prayer for relief must be modified accordingly.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.57 B. Form: Sample Petition to Compel Accounting by Attorney-in-Fact, Award Attorney Fees, Remove Attorney-in-Fact, and Recognize Successor

§11.57 B. Form: Sample Petition to Compel Accounting by Attorney-in-Fact, Award Attorney Fees, Remove Attorney-in-Fact, and Recognize Successor

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11.57-1 Sample petition to compel accounting by attorney-in-fact, award attorney fees, remove attorney-in-fact, and recognize successor

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Petitioner, Arthur King

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

In re Durable Power of Attorney of Eli King	)	**No. 12345**
	)	**PETITION TO COMPEL**
ARTHUR KING, Petitioner	)	**ACCOUNTING BY ATTORNEY-IN-FACT, AWARD ATTORNEY FEES, REMOVE ATTORNEY-IN-FACT, AND RECOGNIZE SUCCESSOR**
vs	)	**(Prob C §§4541, 4545)**
FAY MORGAN, Respondent	)	
	)	**Dep't: _ _ _ _ _ _**
	)	**Date: _ _ _ _ _ _**
	)	**Time: _ _ _ _ _ _**
_____	)	

Petitioner, Arthur King, alleges that:

1. Principal, Eli King, resides at _ _[*address*]_ _, _ _[*city*]_ _, Alameda County, California. Principal's spouse is deceased.

2. Respondent, Fay Morgan, is a daughter of principal and resides at _ _[*address*]_ _, _ _[*city*]_ _, Alameda County, California.

3. Petitioner is a son of principal and a resident of Alameda County, California.

4. Principal designated respondent as principal's attorney-in-fact in a written Durable Power of Attorney (Power of Attorney) executed on February 15, 1998. Petitioner was designated as successor attorney-in-fact in the Power of Attorney. A copy of the Power of Attorney is attached as Exhibit A and incorporated by reference.

5. Under the terms of the Power of Attorney, respondent has full power to receive, disburse, manage, and control all of principal's property. The terms of the Power of Attorney do not eliminate petitioner's right to bring this Petition.

6. Since June 1, 2004, principal has been a resident of the ABC Care Home (Home). He needs significant

assistance in handling his financial affairs and lacks capacity to give or revoke a power of attorney.

7. In September 2007, petitioner received a letter dated September 12, 2007, from Home, stating that principal's monthly residence fees, medical fees, prescription charges, and other miscellaneous costs had not been paid for the months of July and August 2007 and that principal's residence fee for September 2007 was due and unpaid. A copy of the letter is attached to this Petition as Exhibit B and incorporated by reference. Before July 2007 respondent had been paying all these monthly amounts with principal's funds under the Power of Attorney.

8. On receipt of the letter from Home, petitioner attempted to contact respondent by telephone, but respondent failed to return petitioner's calls, and petitioner has been unable to speak with respondent by telephone.

9. Petitioner has written letters to respondent inquiring about the matters stated in the letter from Home and has tried to arrange a personal meeting with respondent, but respondent has not responded to petitioner's letters.

10. In February 1998, when principal executed the Power of Attorney naming respondent his attorney-in-fact, principal had adequate funds to pay the residence fees and other charges at Home for a period extending well beyond principal's normal life expectancy.

11. On November 1, 2007, petitioner sent a letter to respondent by certified mail, return receipt requested (deliver to addressee only), requesting an accounting from respondent with respect to principal's funds and a report from respondent on her acts as principal's attorney-in-fact and specifically why she has not been paying principal's monthly fees at Home. More than 60 days have passed since petitioner requested an accounting from respondent, and respondent has failed to provide an accounting. Petitioner is informed and believes that the failure to account is without reasonable cause or justification.

12. On October 4, 2007, and on several occasions since then, petitioner has personally visited principal at Home and found that the premises, the care, and the services provided to principal have been excellent and that the charges of Home are reasonable.

13. Petitioner is informed and believes that respondent's failure to pay Home on principal's behalf is not based on a dispute between respondent and Home about the charges.

14. Petitioner is informed and believes that the agent has access to sufficient amounts of the principal's funds or liquid assets to make these payments.

15. Petitioner is named as successor agent in the Power of Attorney and is willing to serve. If petitioner were agent, petitioner would arrange timely payment of the principal's expenses from the principal's funds.

WHEREFORE, petitioner requests an Order as follows:

1. Compelling respondent to submit an accounting of principal's property over which respondent has had control for the period from February 15, 2002, to the present;

2. Removing respondent as attorney-in-fact and acknowledging petitioner's authority to act as attorney-in-fact;

3. Awarding reasonable attorney fees, to be paid personally by respondent and not from the principal's funds; and

4. Such other relief as the Court finds appropriate.

Date: _ _ _ _ _ _ __[*Signature*]__
Arthur King
Petitioner

VERIFICATION

I, Arthur King, declare:

I am the petitioner named above. I have read the foregoing Petition to Compel Accounting by Attorney-in-Fact, Award Attorney Fees, Remove Attorney-in-Fact, and Recognize Successor. I know its contents, and the same is true of my own knowledge except in regard to matters stated on information and belief, and regarding those matters I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
Arthur King
Petitioner

Copies: Original for filing; copies to serve on respondent, respondent's attorney, and principal, if the principal is not the petitioner; office copies.

Comment: The petition must be verified. Prob C §1021(a)(1), (b)(1); Cal Rules of Ct 7.103. Notice of Hearing—Decedent's Estate or Trust (Probate—Decedents' Estates) (Judicial Council Form DE-120) also must be served. See §§11.27-11.28.

Depending on local rules under which the petition is pending, if appearances and live testimony are not required, the attorney for petitioner should prepare and file a detailed declaration in support of the request for attorney fees. If local rules require an appearance and testimony, the petitioner should be prepared to appear and testify about the matters alleged in the petition, and the attorney should be prepared to testify regarding attorney fees.

If the petition is filed as part of the proceedings for the administration of a decedent's estate, the caption form, allegations, and prayer for relief must be modified accordingly.

PRACTICE TIP: Although it is comforting to draft pleadings stating facts only on information and belief, that tactic in these petitions should be avoided as much as possible. Allegations on information and belief do not provide the evidentiary foundation to support actions by the court. If the subject of the petition fails to object, or if the petition is to be used as support for some request for interim relief, the court may rely only on the allegations that are not stated only on information and belief.

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Source: Estate Planning/California Powers of Attorney and Health Care Directives/11 Judicial Proceedings/§11.58 C. Form: Sample Order to Compel Accounting by Attorney-in-Fact, Award Attorney Fees, Remove Attorney-in-Fact, and Recognize Successor

§11.58 C. Form: Sample Order to Compel Accounting by Attorney-in-Fact, Award Attorney Fees, Remove Attorney-in-Fact, and Recognize Successor

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11.58-1 Sample order to compel accounting by attorney-in-fact, award attorney fees, remove attorney-in-fact, and recognize successor

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Petitioner, Arthur King

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

In re Durable Power of Attorney of Eli King	)	**No. 12345**
	)	**ORDER TO COMPEL**
ARTHUR KING, Petitioner	)	**ACCOUNTING BY ATTORNEY-IN-FACT, AWARD ATTORNEY FEES, REMOVE ATTORNEY-IN-FACT, AND RECOGNIZE SUCCESSOR (PROB C §4541)**
vs	)	
FAY MORGAN, Respondent	)	
	)	**Dep't: _ _ _ _ _ _**
	)	**Date: _ _ _ _ _ _**
_____	)	**Time: _ _ _ _ _ _**

The petition of Arthur King to compel accounting by Fay Morgan, respondent attorney-in-fact, for attorney fees, removal of the attorney-in-fact, and recognition of a successor came on regularly for hearing on _ _[*date*]_ _, at _ _[*time*]_ _, in Department _ _ _ _ _ _, the Honorable _ _[*name*]_ _ presiding. Petitioner appeared by his attorney, MARY G. JONES. The Court finds that notice of hearing has been given as required by law. After reviewing the petition and the evidence presented, the Court finds that the allegations of the petition are true, and good cause appearing,

IT IS HEREBY ORDERED THAT:

1. Within 30 days after the date of this Order, Fay Morgan, respondent, shall file with this Court and deliver to petitioner an accounting of principal's property over which respondent had control for the period from February 15, 2002, to the present. This accounting shall be properly calendared for hearing and notice given as provided in California Probate Code §4544.

2. Respondent Fay Morgan is removed as attorney-in-fact for Eli King, and Arthur King is acknowledged as successor attorney-in-fact under that durable power of attorney dated February 15, 2002.

3. Petitioner is awarded payment from respondent of the fees for petitioner's attorneys in the amount of _ _[*dollar amount*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__

Judge of the Superior Court

Copies: Original for filing; copy for respondent; office copies.

Comment: Court actions under the Probate Code are properly designated as "orders," although the terms "judgment" and "decree" are often erroneously used instead. See Prob C §§1046, 1300, 1302. See also *Estate of Stoddart* (2004) 115 CA4th 1118, 9 CR3d 770.

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