

## Estate Planning & Probate and Elder Law Sections MCLE Program Webinar January 22, 2025

### Welcome/Announcements and Introduction

Bridget Wrobel, Estate Planning and Probate Law Section Chair

Paloma Holloman, Elder Law Section Chair

12:00 PM – 1:00 PM

### Program

#### Recent Amendments to the Illinois Power of Attorney Act and Bank Legal Counsel's Perspective When Reviewing Your Client's Power of Attorney

Moderator: Eric Wilen, *Brooks, Tarulis, and Tibble*

Speakers: Ben Neiburger, *Generation Law*, Lauren Barney, Elizabeth Khalil, and Aaron White, *CIBC Bank*

Illinois Public Act 103-0994 was signed into law by the Governor on August 9, 2024, amending the Illinois Power of Attorney Act to provide a statutory framework for when it would be reasonable for a third-party to not recognize a financial Power of Attorney and when it would be unreasonable for a third-party to refuse to honor an otherwise properly executed Power of Attorney for Property.

### Link to Evaluation:

You must complete the evaluation to receive CLE credit.

<https://www.surveymonkey.com/r/EstateElder01222025>

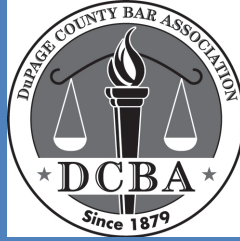
### Next CLE Programs:

January 30<sup>th</sup> - [Fur-Ever Protected: Ensuring your Pets' Future Through Legal Planning](#)

February 26<sup>th</sup> - International issues in EP and Probate

### DCBA Events:

January 22<sup>nd</sup> - [Lawyers Lending a Hand](#) - Wayne Township Food Pantry



February 20<sup>th</sup> - [February Unwind and Judges' Nite Auction Launch](#) - Reserve 22, Glen Ellyn

February 28<sup>th</sup> - [Judges' Nite 50](#) - Belushi Auditorium at COD, Glen Ellyn

April 3<sup>rd</sup> - 6<sup>th</sup> - [DCBA Presidents Trip](#) - Island of Palms, SC

### **Volunteers Needed for the Guardianship Helpdesk**


The 2<sup>nd</sup> Floor Helpdesk is available in room 2009 every Tuesday from 8:30 AM - 12:30 PM to assist pro-se litigants. Ideally, we would like two volunteer attorneys each Tuesday to staff the desk. Please sign up for a Tuesday at [www.dcba.org/guardianshiphelpdesk](http://www.dcba.org/guardianshiphelpdesk). If you see a date and the 8:30 AM slot available on the scheduling page, this means that we still need an attorney on that day. Click here - [www.dcba.org/guardianvolunteer](http://www.dcba.org/guardianvolunteer) to watch the training video. Thank you for helping if you can!

### **DCBA OnDemand CLE is Available on IICLE:**

Members can find the link to The Illinois Institute for Continuing Legal Education (IICLE) catalog on the DCBA website under the menu item **CLE & Events**→**IICLE Online Library**. You must be logged into your DCBA Membership Profile to view courses for free or at a reduced price.

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Go to the MCLE Board website to view your online transcript - <https://www.mcleboard.org/>  
Watch this video tutorial for details  [Overview of the Attorney MCLE Profile](#)

# **Recent Amendments to the IL POA Act and Bank Legal Counsel's Perspective When Reviewing Your Client's POA**

**Eric Wilen — Brooks, Tarulis & Tibble, LLC**

**Ben Neiburger – Generation Law**

**Elizabeth Khalil, CRCM, CAMS, CIPM, CIPP/C/E/US — CIBC Bank USA**

**Lauren Barney, CRCM — CIBC Bank USA**

**Aaron White, CAMS — CIBC Bank USA**

January 22, 2025

# Eric Wilen

Eric is of counsel with the Naperville law firm of Brooks, Tarulis, and Tibble, LLC and has practiced for over 25 years. Eric's practice focuses on representing business owners and high net worth families in the areas of estate planning, business succession planning, wealth transfer planning, and the administration of trusts and estates.

Eric has substantial experience in advising and counseling fiduciaries in the administration of trusts and estates.

With an LLM in Taxation from New York University School of Law, Eric uses his tax knowledge to guide clients through various federal and state tax issues and assists clients with the preparation of estate and gift tax returns.

Eric has been a frequent speaker on topics relating to estate planning with trusts, taxation of trusts and estates, and best practices for estate and trust administration. As a member of the estate planning professional community, Eric serves on the board for the DuPage County Estate Planning Council.



# Ben Neiburger, JD, CPA

Mr. Neiburger is a recognized and respected attorney in the areas of Estate Planning, Elder Law, and Medicaid Planning, which includes expertise in Long-Term Care Planning, Special Needs Trusts and Tax Planning for families and their elders.

Mr. Neiburger was named a “Super Lawyer” in Elder Law by Thompson Reuters and the publishers of *Chicago* magazine. He also received this honor in 2007, 2009 - 2024. He brings a wealth of knowledge, clear and common sense explanations, patience, gentle humor and sensitivity to each of his legal consultations.

Outside of the law, Ben participates in Extreme Triathlons and has completed crazy races in Chile, Norway, United States, and Scotland. In Scotland he experienced what it is like to have a bog in the middle of a trail marathon and doesn't recommend that experience to anyone.

For additional information about Ben Neiburger, JD, CPA and his practice, please visit [www.GenerationLaw.com](http://www.GenerationLaw.com) or give him a call at 630-782-1766.



# Elizabeth Khalil

Elizabeth is Deputy General Counsel for CIBC Bank USA and is CIBC's US Chief Privacy Officer.

She leads the CIBC Bank USA Retail Legal team, which provides legal support for the Bank's retail/consumer activities, including branch services and private banking for individual consumers. She also manages the paralegal team that responds to legal process, such as subpoenas and levies.

Elizabeth is a former federal banking regulator, having served at the Office of the Comptroller of the Currency (OCC) and Federal Deposit Insurance Corporation (FDIC) in Washington, DC. She was also previously a partner at the law firm of Dykema Gossett and a senior associate at Hogan Lovells. She received her undergraduate degree from Georgetown University and her law degree from the University of Michigan Law School.

She is the author of *US Financial Privacy and Data Security: A Practical Guide*, published in 2023 by the American Bar Association.



# Lauren Barney

Lauren provides legal support to all of CIBC Bank USA's retail and consumer products and services, including support of the Private Banking, Mortgage, and Digital Banking Teams. She is also a member of the Bank's Legal Order Process Team responsible for responding all legal process notices received by CIBC.

She formerly served as head of compliance at Byline Bank, and in other compliance roles prior to coming to the CIBC. She is licensed to practice law in Illinois and is a Certified Regulatory Compliance Manager (CRCM).



# Aaron White

Aaron is Senior Counsel at CIBC Bank USA, where he serves on the Retail Legal and Legal Process teams. As an attorney on the Retail Legal team, Aaron advises on all consumer-related legal issues and supports the retail branches, private banking, digital banking, and the consumer mortgage and collections teams.

Prior to joining CIBC, Aaron was a banking litigator for 10 years. He also represented clients in estate planning matters and probate disputes. He is licensed to practice law in Illinois and New York and is a Certified Anti-Money Laundering Specialist (CAMS).



# Agenda

- Intro
- Recap of last presentation
- The "Messy" Legislative Process
- Overview of IL POA Updates
- Planning for POA Updates
- Open Discussion

# **Recap of November 2023 Presentation**

# Recap of ISBA Presentation on POAs November 2023

- **Why Won't the Bank Accept My Client's POA?**

- Discussion regarding the issues facing trust and estate lawyers and bank attorneys
- Covered POAs, trusts, and decedent accounts
  - Meant to highlight issues and frustrations on both sides and offer tips and practical considerations
- Sparked discussions and interest regarding the topic
  - Lots of feedback and interest in doing follow up presentations

**The November 2023 ISBA presentation led to the featured cover story in the April 2024 issue of the Illinois Bar Journal entitled "Behind the Curtain – when banks deny access to those with powers of attorney, and what to do about it" by author, Ed Finkel**

# **"Messy" Legislative Process**

# Practical Cynic's View of the Legislative Process

- Have an Idea
- Preliminary draft of changes to be made
- Find other interest groups with Lobbyists or legislative staff
- Discussions/negotiations
- Find a sponsor in House and Senate. Need to have a good story for them on injustices to remedy.

# Practical Cynic's View of the Legislative Process

- Finish bill idea no later than December for submission to legislative drafting service
- Sponsors to release bill from Senate and House during legislative season (Feb to April)
- Talk with sponsors regarding feedback or objections
- Get through committee process
- Get votes (unless agreed by all interest groups)

# Path of POA Legislation

- Certain Banks' failure to honor perfectly good POAs repeatedly creates influx of bile for many attorneys.
- Bile influx causes extensive attorney anger and complaining.
- Ben's wife complains about Ben complaining and in the Fall 2022 tells him to stop or she will leave him.
- A dejected Ben comes across news item about New York POA law that passed which cures most of the Illinois issues (worked on by the New York Chapter of the National Academy of Elder Law Attorneys (NAELA))
- Reach out to New York NAELA. Stole entire text of statute and brought that to Illinois NAELA committee.

# Path of POA Legislation

- Drafted statutory change
- NAELA lobbyists found sponsor. We had great stories.
- Sponsor released the Bill in early 2023
- Prepare compelling testimony in front of committee
- Banking Lobby strenuously objected.
- Medical lobby objected because legislative drafting service changed the HCPOA portion of the statute and we didn't catch that until the Bill came out.
- We amended HCPOA portions of the bill to appease Medical lobby

# Path of POA Legislation

- Had multiple meetings with banking lobby (it felt like a fight with 20 to 1 odds against).
- They would not agree to ANY financial penalties – NON STARTER!
- Too many requirements in statute that required training for banking staff. They didn't want to have that obligation given other demands
- Based on banking lobby objections, sponsor let bill die.
- More meetings with Bankers during the summer
- Come up with language that both sides could work with. Very watered down, but it's something.
- Agreed bill went through legislative session in 2024 with near unanimous passage.

# **IL POA Updates Effective January 2025**

# Summary of the Updates to the POA Law

- **Signed into law on August 9, 2024 and effective January 1, 2025**
- **Unreasonable Reasons to Deny a POA**
  - POA is not on a specific form that the third party requires, regardless of the terms of the account agreement
  - Due to a lapse of time since the execution of the POA
  - Due to a lapse of time between signature of principal and acceptance of the agent
  - Document presented does not contain original signature of principal, witness or notarization but has a properly executed Agent's Certification
  - Document appoints an entity as an agent

Notably, there are no fines for rejecting a POA, even if rejected for a reason identified as unreasonable

# Summary of the Updates to the POA Law Continued

## • Reasonable Reasons to Deny a POA

- Agent's refusal to provide affidavit or properly executed Agent's Certification and Acceptance of Authority, Successor Agent's Certification and Acceptance of Authority, or Co-Agent's Certification and Acceptance of Authority
- Agent's refusal to provide copy of the original document that is certified to be valid by an attorney, court order, or governmental entity
- Third party refers principal and agent to local adult protective services unit
- Actual knowledge of a reasonable basis for believing in -
  - Existence of a report to local adult protective services alleging physical or financial abuse, neglect, exploitation, or abandonment of the principal by the agent or a person acting for the agent
  - Principal's death or a reasonable basis for believing that the principal has died
  - Principal's incapacity or reasonable basis for believing that the principal is incapacitated if nondurable POA
  - Principal was incapacitated when the POA was executed
  - POA was procured through fraud, duress, undue influence or the agent is engaged in fraud or abuse of principal
  - POA was terminated or revoked

# Summary of the Updates to the POA Law Continued

- Title company refusal to underwrite title insurance for a gift of real property made pursuant to a statutory short form POA that does not contain express instructions relating to gifts
- Refusal of principal's attorney to provide a certificate that the POA is valid
- Missing or incorrect signature, invalid notarization, or unacceptable POA identification
- Third party has filed a SAR, believes with good faith that the principal or agent has a prior criminal history involving financial crimes or has an unsatisfactory business relationship with the agent due to material loss to the third party, financial mismanagement, or litigation
- Third party has reasonable cause to suspect the abuse, abandonment, neglect, or financial exploitation of the principal if eligible adult under the Adult Protective Services Act

# **Banking Considerations Relating to the Updates**

# Overview of How Updated POA Statute Impacts Banks

- **Bank would be considered a third party subject to the reasonable/unreasonable reasons for failing for honor a POA**
- **Provides clear guidelines on what is considered reasonable or unreasonable**
- **Unreasonable reasons to reject POA**
  - If an institution requires a specific version of the POA, that is no longer a reasonable reason for rejection for a POA governed by IL law
  - 755 ILCS 45/2-8(d)
    - Still provides that third party that fails to comply with valid POA arbitrarily or without reasonable cause shall be subject to civil liability for damages resulting from noncompliance
      - Framework for determining what's reasonable/unreasonable
      - Provides clear reasons that will not suffice for rejecting a POA

# What Banks May Be Doing to Prepare

- **Updates to policies and procedures if current policies and procedures provide that the Bank will reject a POA for one of the reasons identified as unreasonable**
  - Lending vs. Deposit POA acceptance
  - Only applies to statutory short form
- **Similar to frameworks in other states**
  - Likely not be totally new to financial institutions that have clients located throughout the US
  - Many states are updating statutes to provide harsher penalties for rejection of POAs --> statutes favor acceptance
    - Some statutes only apply the penalties for rejection on statutory short form POAs

# Questions and Open Discussion

# Questions

- What would the audience like to see for future changes to the POA statute?
- Given the lack of explicit/statutory penalties imposed for rejecting a POA for an unreasonable reason, do you think this will impact third parties' policies relating to rejecting POAs?

DCBA Webinar – Estate Planning & Probate Section and Elder Law Section  
Wednesday, January 22, 2025, 12:00 p.m. – 1:05 p.m.

## **Recent Amendments to the Illinois Power of Attorney Act: Unreasonable and Reasonable Refusal to Honor Property Powers**

Practice Pointers and Tips – Eric R. Wilen:

This new law became effective on January 1, 2025. We now have prescribed situations when it will be **UNREASONABLE** for a third party to reject a Property POA.

1. Third Party’s Own POA. A third party cannot demand that the Principal use its prescribed POA form even if there is an agreement to use the prescribed form.

Is a third party’s Agent’s Affidavit or other Agent Attestation Form still allowed? Many of these forms require the Agent to indemnify the third party.

2. POA cannot be “Too Old”. Although the Principal may have executed a Property POA long ago, it is still a valid POA. A third party cannot reject a Property POA because it is “stale” (i.e. a lapse of time since the execution of the Property POA).
3. Agent does not have to accept right away. If a Statutory Short Form POA is executed by the Principal on January 22, 2024, and the Agent accepts on January 22, 2025 – It is still a valid Property POA.
4. Original Document Not Required. The third party cannot require the Agent to produce the document with original “inked” signatures – Agent must provide an Agent’s Certification and Acceptance of Authority.

**Practice Pointer:** Since the Agent is going to provide a photocopy of the POA, make sure the Certification includes “true copy” (or “true and correct copy” if more emphasis is appropriate).

5. Cannot Reject when the Agent is an Entity. If the Agent is a Bank, Trust Company, or other Financial Institution (i.e. Corporate Fiduciary), then consider adding to the Agent’s Certification the entity’s authorization form to accept and specific individuals (i.e. which corporate officers from the entity would be authorized to act).

**Practice Pointer:** I would think that a Corporate Fiduciary might prefer to open a Guardianship or would probably want to follow its accepted practices as if serving as the Guardian.

Here are some prescribed situations when a third party will have **REASONABLE CAUSE** to reject a Property POA.

1. No Certification from Agent. If the Agent does not provide an affidavit or a properly executed Agent's Certification and Acceptance of Authority.

**Practice Pointer:** If you are drafting a Durable Power of Attorney for Property for a client which will take effect upon execution, you may want to have the Agent sign an Agent's Certification and Acceptance of Authority at the same time the Principal signs the POA. If the Agent cannot attend the execution, then deliver an Agent's Certification and Acceptance of Authority to the Principal (i.e. your client) with the executed (or photocopy of the) POA.

2. Certification from an Attorney. A third party has reasonable cause to reject a POA if it is a photocopy of the original POA has not been certified to be "valid" by an attorney ...

**Practice Pointer:** Will a bank give the Agent a form and direct the Agent to take the form to an attorney to get signed which will confirm it is a "valid" POA? What are the Agents going to do? Are banks going to want a legal opinion that it is "valid" under law? Will the Agent need to go to court or a "governmental entity" for a ruling that the POA is "valid" under law?

3. Referral to Adult Protective Services. A third party has reasonable cause to reject a POA if the Principal and the Agent have been in "good faith" referred to Adult Protective Services.

**Practice Pointer:** It appears that the banks may need to give more consideration in whether to make a referral to Adult Protective Services when the standard is a "good faith" basis.

4. Reporting to Adult Protective Services. A third party has reasonable cause to reject a POA if the third party has actual knowledge or a reasonable basis that there has been a reporting to Adult Protective Services of physical or financial abuse, neglect, exploitation, or abandonment of the Principal.

5. Third Party Actual Knowledge or Reasonable Basis. A third party has reasonable cause to reject a POA if the third party has actual knowledge or a reasonable basis that:
- a. the Principal is deceased;
  - b. the Principal is incapacitated and the POA is Non-Durable;
  - c. the Principal was incapacitated when the POA was executed;
  - d. the POA was executed under duress, undue influence or through fraud; or the Agent is engaged in fraud or abuse of the Principal; or
  - e. the POA has been terminated or revoked.
6. Title Company. Title Insurance Company can refuse to underwrite title insurance for a gift of real property if Short Form Statutory Power of Attorney for Property is represented and does not have specific language granting Agent the power to make gifts.

**Practice Pointer:** Estate Planning attorneys should consider making sure there is language in the POA authorizing the Agent to make gifts.

**Practice Pointer:** When drafting living trusts, may want to consider adding language to the trust instrument that will allow a successor trustee to make gifts.

7. Attorney Will Not Certify. A third party has reasonable cause to reject a POA if the Principal's Attorney will not provide certification that the Principal's POA is "valid" under law.

**Practice Pointer:** Should the drafting attorney add language to their POA form (or add to the Statutory form) that the POA meets all of the requirements under Illinois law to be a "valid" POA? Should the attorney sign an "Attorney's Certification" which may be similar to the Agent's?

8. POA is Defective. A third party has reasonable cause to reject a POA if there are missing or incorrect signatures or invalid notarization (i.e. legally defective).

**Practice Pointer:** Attorneys should make sure that they are aware of the statutorily required execution formalities for a Power of Attorney for Property.

9. Financial Crimes. A third party has reasonable cause to reject a POA if Principal or Agent history involving financial crimes.
10. Prior Disputes. If the third party has had a previous, unsatisfactory business relationship with the agent due to or resulting in material loss to the third party, financial mismanagement by the agent, or litigation between the third party and the Agent alleging substantial damages.

**Practice Pointer:** I think it should come as no surprise to anyone who has been an Agent under POA and took legal action against the third party that the Agent would effectively be barred from presenting future POAs to that third party.

11. Should be a reporting to Adult Protective Services. A third party has reasonable cause to reject a POA if the third party has reasonable cause to suspect the abuse, abandonment, neglect, or financial exploitation of the Principal. The Principal must be an “Eligible Adult” as defined in the Adult Protective Services Act.

**Practice Pointer:** If a bank’s legal counsel suspects financial abuse and decides to reject the POA, then the bank may also have a reporting obligation under the Adult Protective Services Act.

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# Powerful or Powerless?

Do recent amendments  
to the Power of  
Attorney Act solve  
an old problem?

BY THOMAS N. OSRAN & ROBERT S. HELD

A photograph showing a person in a black suit on the left, gesturing with their right hand. On the right, another person's hand is holding a white document labeled "Power of Attorney". The background is a blurred office setting with a window.

Power of Attorney

## ISBA RESOURCES >>

- ISBA Free On-Demand CLE, Recent Amendments to the Illinois Power of Attorney Act: Unreasonable and Reasonable Refusal to Honor Property Powers (recorded Dec. 2024), [isba.org/cle](https://isba.org/cle).
- Ed Finkel, *Behind the Curtain*, 112 Ill. B.J. 18 (Apr. 2024), [law.isba.org/44CGBeg](https://law.isba.org/44CGBeg). See also Arnold M. Flank, *There's More Behind the Curtain*, 112 Ill. B.J. 8 (June 2024), [law.isba.org/4c40ihq](https://law.isba.org/4c40ihq).
- Robert S. Held, *Instant Karma*, 112 Ill. B.J. 26 (Apr. 2024), [law.isba.org/4cafyQU](https://law.isba.org/4cafyQU). See also Daniel Deneen & Robert S. Held, *Springing Powers and Fiduciaries: When Is a fiduciary a Fiduciary Under the Power of Attorney Act*, 112 Ill. B.J. 10 (Aug. 2024), [law.isba.org/3Z3jEid](https://law.isba.org/3Z3jEid).

## DECADES AGO, TOM OSRAN'S FIRST ATTEMPT AT DRAFTING A POWER OF ATTORNEY (POA) for property wasn't going well. A cat rescue organization volunteer had asked him to help a woman who was in a nursing home. She wanted her friend to help take care of her home and cats.

But her bank refused to honor the POA. What had Tom done wrong? He drafted the POA using the form provided in the statute<sup>1</sup> and had it properly signed in the presence of a notary.

When Osran called the bank, the truth came out: The POA was fine, but the bank simply refused to honor it. And he learned that valid POAs are routinely not honored for reasons that range from the bureaucratic to the absurd.

Amendments to the Illinois Power of Attorney Act that went into effect on Jan. 1, 2025, defining “unreasonable cause to honor” may help.<sup>2</sup> In two new sections to the Act, “unreasonable cause to honor” a POA is outlined<sup>3</sup> along with “reasonable cause to refuse to honor”<sup>4</sup> POAs. The existing section 2-8(d) already provides for “civil liability for any damages resulting from noncompliance” but only for rejections made “arbitrarily or without reasonable cause.”<sup>5</sup>

The changes also create new ways that valid POAs may be rejected. Some of these rejections can be anticipated and avoided through drafting, but others cannot. More on that below.

The amendments to the Act defining “unreasonable cause to honor” a POA<sup>6</sup> will

help when third parties refuse to honor validly drafted and executed POAs for the specific five reasons outlined in section 2-8(e).<sup>7</sup> But, unhelpfully (and perhaps fatally), the law creates no new teeth to enforce unreasonable refusals to honor valid POAs and lists 14 new ways for banks and others to legally refuse to honor otherwise valid POAs in section 2-8(f).<sup>8</sup>

Practitioners need to know how to help their clients avoid traps created by the new law and draft POAs that are more likely to be accepted by banks and others without argument. Practitioners also need to be prepared to certify the validity of previously drafted POAs and prepare such certificates for new POAs. And law firms may need to enact policies regarding the handling of requests to certify the validity of existing POAs.

## Unreasonable and reasonable rejections

The new law specifically defines two new categories of conduct. There is an “unreasonable cause to refuse to honor”<sup>9</sup> and a “reasonable cause to refuse to honor”<sup>10</sup> a POA.

Unreasonable causes are defined to include:

- the POA is not on a specific form the third party prescribes;<sup>11</sup>

1. Statutory Short Form Power of Attorney for Property, 755 ILCS 45/3-2.

2. Public Act 103-0994 (amending 755 ILCS 45/2-8).

3. 755 ILCS 45/2-8(e).

4. *Id.* § 45/2-8(f).

5. *Id.* § 45/2-8(d).

6. *Id.* § 45/1-1.

7. *Id.* § 45/2-8(e).

8. *Id.* § 45/2-8(f).

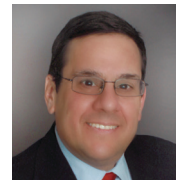
9. *Id.* § 45/2-8(e).

10. *Id.* § 45/2-8(f).

11. *Id.* § 45/2-8(e)(1).

## TAKEAWAYS >>

- Effective Jan. 1, 2025, amendments to the Power of Attorney (POA) Act define unreasonable causes and reasonable causes to refuse to honor a POA.
- Practitioners might avoid traps created by the new law and draft POAs that are more likely to be accepted by preparing a certificate of validity form and an acceptance of authority form for existing and new POAs.
- Expect POA refusals to persist, both despite and due to the new amendments.



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## NOTICEABLY ABSENT FROM EXISTING OR NEW PROVISIONS IN THE ACT IS ANY LANGUAGE ALLOWING RECOVERY OF ATTORNEY FEES OR AWARDING PUNITIVE DAMAGES FOR AN UNREASONABLE FAILURE TO HONOR A POA.

- time has passed since it was executed;<sup>12</sup>
- time has passed between the signature of the principal and date of acceptance by the agent;<sup>13</sup>
- the document lacks an original signature, witness, or notarization but is accompanied by an agent's certification and acceptance of authority;<sup>14</sup> and
- the document appoints an entity as the agent.<sup>15</sup>

So that's the good news: The law prohibits anyone from refusing to honor a valid POA for these specific five reasons.

Now the bad news. The new law provides 14 reasons for banks and others to refuse to honor POAs.<sup>16</sup> These reasons can be divided into two categories: 1) those that make sense; and 2) those that don't and may lead to more denials of valid POAs in ways that are now acceptable under the new law.

### Good reasons for denial

The following reasons for refusing to honor a POA are legally valid and make sense:

- a missing or incorrect signature, an invalid notarization, or an "unacceptable power of attorney identification";<sup>17</sup>
- the agent's or coagent's refusal to provide an affidavit or properly executed agent's certification and acceptance of authority;<sup>18</sup>
- a belief that the principal is dead,<sup>19</sup> or was incapacitated,<sup>20</sup> under duress, or subject to undue influence when

the POA was signed;<sup>21</sup> or

- a reasonable cause to suspect abuse, abandonment, neglect, or financial exploitation of the principal.<sup>22</sup>

### Bad—but now "legal"—reasons for denial

The following reasons to refuse to honor a POA may cause problems (and, in the authors' view, do not make sense):

- the "refusal by the agent to provide a copy of the original document that is certified to be valid by an attorney, court order, or governmental entity";<sup>23</sup> and
- the "refusal of the principal's attorney to provide a certificate that the power of attorney is valid."<sup>24</sup>

### Criticisms

A criticism of the amendments is the sheer number of legally valid but flimsy reasons to reject a POA. The new law creates an open barn door for institutions to refuse to honor valid and perfectly acceptable POAs.<sup>25</sup>

Many of the reasons to not honor a POA—including fears of exploitation or abuse of the principal—make sense and are helpful. But others—including some very amorphous ones like the refusal by the agent to provide a copy of the original document "certified to be valid by an attorney"—make little sense. One major benefit of a POA is for it to be a self-authenticating document that the agent can use to conduct the principal's business without the need for any more proof, negotiations with an institution, or more attorney involvement.

As discussed in the "Checklist for POAs" sidebar, one major question practitioners must ask their clients is whether the POA will take effect immediately or be a "springing" POA that requires incapacity to be effective; and, if springing, who will make that determination in writing?

Even worse, requiring the principal or agent to get the principal's attorney to "certify" the validity of the POA may be an impossible task. First, because years

may have passed, the drafting attorney or a new attorney may be unable to certify the validity of it. The principal may have executed a new POA revoking any prior POA and be too incapacitated to discuss the issue with their attorney.

Second, the POA may have been drafted without an attorney, or the drafting attorney may be retired or unavailable and now a new attorney is asked to prepare a certificate of validity. Answering a question about the validity of a POA could take more time than just creating a new POA, but the principal may now lack capacity.

Depending on how broadly courts interpret "validity," the requirement for a certificate of validity may create an obligation on attorneys that is impossible to meet and could doom the usefulness of POAs in general. Unhelpfully, the legislature did not provide a form for the certificate. An open question is, "How long will a certificate of validity be accepted for a POA before the certificate is considered stale?"

The new POA Act also does not go far enough in requiring institutions to honor valid POAs. The problem of institutions routinely (and improperly) refusing to honor POAs has persisted even though the Act previously provided for civil liability for failure to honor valid POAs and protection for good-faith reliance on a POA. The Act, before the new legislation, states: "[A]ny person who fails to comply arbitrarily or without reasonable cause shall be subject to civil liability for any damages resulting from noncompliance."<sup>26</sup> The Act also already provides that "good

12. *Id.* § 45/2-8(e)(2).

13. *Id.* § 45/2-8(e)(3).

14. *Id.* § 45/2-8(e)(4).

15. *Id.* § 45/2-8(e)(5).

16. *Id.* §§ 45/2-8(f)(1)–(14).

17. *Id.* § 45/2-8(f)(12).

18. *Id.* § 45/2-8(f)(1).

19. *Id.* § 45/2-8(f)(5).

20. *Id.* § 45/2-8(f)(7).

21. *Id.* §§ 45/2-8(f)(8)(A), (B).

22. *Id.* § 45/2-8(f)(14).

23. *Id.* § 45/2-8(f)(2).

24. *Id.* § 45/2-8(f)(11).

25. It also unhelpfully provides that "reasonable causes" to reject "include, but are not limited to" the 14 listed reasons. *Id.* § 45/2-8(f).

26. *Id.* § 45/2-8(d).

faith reliance” on a POA will be “protected with a competent principal.”<sup>27</sup>

Noticeably absent from existing or new provisions in the Act is any language allowing recovery of attorney fees or awarding punitive damages for an unreasonable failure to honor a POA.

Some practitioners favor a law, like New York’s, that provides for damages and attorney fees for the unreasonable refusal to accept a valid statutory short form POA.<sup>28</sup> Helpfully, New York requires a person receiving a POA to accept or reject it within 10 days or ask for an affidavit from the agent or an opinion from the principal’s counsel with seven days thereafter to accept or reject the POA in writing.<sup>29</sup> New York also helpfully

#### Checklist for POAs

- Who will be the agent and successor agents?
- Who may witness the signing? By statute certain witnesses are barred including, for example, family members of the principal or agent.
- What powers will the agent have?
- When will the POA take effect? Immediately or only when a certain medical disability has been determined? And who will make that determination in writing?
- Does the agent understand the duties and restrictions of the POA and accept the POA?
- Have you prepared certification and acceptance of authority for all named agents?
- Have you prepared certificates of validity?
- Are there any decisions or powers the principal does not want the agent to have?

provides a safe harbor of no liability when relying on a POA in the absence of actual knowledge of its invalidity.<sup>30</sup>

Laypersons lack the expertise to determine whether a POA matches the statutory form, is valid, and should be enforced, creating a difficult burden for banks and other institutions who are asked to honor POAs.

#### Practice pointers

Given that some third-party institutions may use the “reasonable cause” list to refuse to honor a POA as a “policy,”<sup>31</sup> attorneys should anticipate that the agents, coagents, and successor agents will likely be required to present a certification and acceptance of authority. Based on the Act, this should be drafted along with the POA to avoid this easily anticipated roadblock. An acceptance-of-authority form is included in the statute and provided at the end of this article.<sup>32</sup>

Planners should also include language in the certification that anyone relying on the POA, in the absence of actual knowledge to the contrary, may rely on the fact that it was properly executed and is in effect. A certification should also recite that there can be “civil liability” for arbitrary or unreasonable noncompliance.<sup>33</sup> This may help persuade reluctant institutions to honor valid POAs.

Planners should anticipate that institutions will require additional documentation beyond a certification and acceptance of authority. Planners also should prepare an attorney’s certificate of validity along with the POA and execute both at the same time. Unfortunately, the legislature did not draft the form, leaving it up to each

**A CRITICISM OF THE AMENDMENTS IS THE SHEER NUMBER OF LEGALLY VALID BUT FLIMSY REASONS TO REJECT A POA. THE NEW LAW CREATES AN OPEN BARN DOOR FOR INSTITUTIONS TO REFUSE TO HONOR VALID AND PERFECTLY ACCEPTABLE POAs.**

practitioner to do so.

The Michigan legislature did draft a certification of validity of power of attorney and agent’s authority form for POAs, which practitioners may find useful as a guide.<sup>34</sup> We have included it at the end of this article.

#### Conclusion

The Legislative Committee of the Illinois Chapter of the National Academy of Elder Law Attorneys should be commended for tackling one of the thorniest problems for attorneys recommending and using POAs—having their POAs rejected for the flimsiest reasons. If the new Act results in fewer denials of valid POAs, that will be great. If not, we can hopefully anticipate more changes that would streamline the process and provide greater enforcement of POAs. **■**

27. *Id.* § 45/2-8(a).

28. N.Y. Gen. Oblig. § 5-1504.

29. *Id.* § 5-1504(3)(a).

30. *Id.* § 5-1504(5).

31. 755 ILCS 45/2-8(f)(1) – (14).

32. 755 ILCS 45/2-8(b).

33. See *id.* §§ 45/2-8(c), (d).

34. Mich. Comp. Laws § 556/403.

**Agent’s Certification and Acceptance of Authority Form**

**AGENT’S CERTIFICATION AND ACCEPTANCE OF AUTHORITY**

I, \_\_\_\_\_ (insert name of agent), certify that the attached is a true copy of a power of attorney naming the undersigned as agent or successor agent for \_\_\_\_\_ (insert name of principal).

I certify that to the best of my knowledge the principal had the capacity to execute the power of attorney, is alive, and has not revoked the power of attorney; that my powers as agent have not been altered or terminated; and that the power of attorney remains in full force and effect.

I accept appointment as agent under this power of attorney.

This certification and acceptance is made under penalty of perjury.\*

Dated \_\_\_\_\_

(Agent’s signature) \_\_\_\_\_

(Print agent’s name) \_\_\_\_\_

(Agent’s address): \_\_\_\_\_

\*(Note: Perjury is defined in section 32-2 of the Criminal Code of 2012, and is a class 3 felony.)

As discussed above, the following language from section 2-8(c) and (d) are not required in the form but may help in gaining acceptance of the POA:

- (c) Any person dealing with an agent named in a copy of a document purporting to establish an agency may presume, in the absence of actual knowledge to the contrary, that the document purporting to establish the agency was validly executed, that the agency was validly established, that the named principal was competent at the time of execution, and that, at the time of reliance, the named principal is alive, the agency was validly established and has not terminated or been amended, the relevant powers of the named agent were properly and validly granted and have not terminated or been amended, and the acts of the named agent conform to the standards of this Act. No person relying on a copy of a document purporting to establish an agency shall be required to see to the application of any property delivered to or controlled by the named agent or to question the authority of the named agent.
- (d) Each person to whom a direction by the named agent in accordance with the terms of the copy of the document purporting to establish an agency is communicated shall comply with that direction, and any person who fails to comply arbitrarily or without reasonable cause shall be subject to civil liability for any damages resulting from noncompliance. A health care provider who complies with Section 4-7 shall not be deemed to have acted arbitrarily or without reasonable cause.

755 ILCS 45/2-8(b),(c), and (d).

### Michigan Certification of Validity of Power of Attorney by Agent or Attorney at Law

The following optional template may be used by an agent or an attorney at law who represents either the agent or the principal to certify facts concerning a power of attorney:

#### CERTIFICATION AS TO THE VALIDITY OF POWER OF ATTORNEY AND AGENT'S AUTHORITY

State of \_\_\_\_\_ [County] of \_\_\_\_\_, I, \_\_\_\_\_ (name of certifier),  
certify under penalty of perjury that \_\_\_\_\_ (name of principal) granted \_\_\_\_\_  
\_\_\_\_\_ (name of agent) authority as an agent or successor agent in a power of attorney dated \_\_\_\_\_.

I further certify that to my knowledge:

- (1) The principal is alive and has not revoked the power of attorney or the agent's authority to act under the power and the power and the agent's authority to act under the power have not otherwise terminated;
- (2) If the power of attorney was drafted to become effective upon the happening of a specified event or contingency, the specified event or contingency has occurred;
- (3) If the agent was named as a successor agent, the prior agent is unable or unwilling to serve; and
- (4) (Insert other relevant statements. You may attach separate sheets if additional space is needed.)

Signature and acknowledgment

\_\_\_\_\_  
Certifier's signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Print certifier's name

\_\_\_\_\_  
Certifier's capacity (as agent, attorney at law for agent, or attorney at law for principal)

\_\_\_\_\_  
Certifier's address

\_\_\_\_\_  
Certifier's telephone number

This document was acknowledged before me on \_\_\_\_\_ (date), by \_\_\_\_\_.

(Name of certifier) \_\_\_\_\_

(Seal, if any)

\_\_\_\_\_  
Signature of notary

My commission expires: \_\_\_\_\_

This document prepared by: \_\_\_\_\_

Mich. Comp. Laws section 556.403.

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AN ACT concerning civil law.

**Be it enacted by the People of the State of Illinois,  
represented in the General Assembly:**

Section 5. The Illinois Power of Attorney Act is amended by changing Section 2-8 as follows:

(755 ILCS 45/2-8) (from Ch. 110 1/2, par. 802-8)

Sec. 2-8. Reliance on document purporting to establish an agency.

(a) Any person who acts in good faith reliance on a copy of a document purporting to establish an agency will be fully protected and released to the same extent as though the reliant had dealt directly with the named principal as a fully-competent person. The named agent shall furnish an affidavit or Agent's Certification and Acceptance of Authority to the reliant on demand stating that the instrument relied on is a true copy of the agency and that, to the best of the named agent's knowledge, the named principal is alive and the relevant powers of the named agent have not been altered or terminated; but good faith reliance on a document purporting to establish an agency will protect the reliant without the affidavit or Agent's Certification and Acceptance of Authority.

(b) Upon request, the named agent in a power of attorney

shall furnish an Agent's Certification and Acceptance of Authority to the reliant in substantially the following form:

AGENT'S CERTIFICATION AND ACCEPTANCE OF AUTHORITY

I, ..... (insert name of agent), certify that the attached is a true copy of a power of attorney naming the undersigned as agent or successor agent for ..... (insert name of principal).

I certify that to the best of my knowledge the principal had the capacity to execute the power of attorney, is alive, and has not revoked the power of attorney; that my powers as agent have not been altered or terminated; and that the power of attorney remains in full force and effect.

I accept appointment as agent under this power of attorney.

This certification and acceptance is made under penalty of perjury.\*

Dated: .....

.....

(Agent's Signature)

.....

(Print Agent's Name)

.....

(Agent's Address)

\*(NOTE: Perjury is defined in Section 32-2 of the Criminal

Code of 2012, and is a Class 3 felony.)

(c) Any person dealing with an agent named in a copy of a document purporting to establish an agency may presume, in the absence of actual knowledge to the contrary, that the document purporting to establish the agency was validly executed, that the agency was validly established, that the named principal was competent at the time of execution, and that, at the time of reliance, the named principal is alive, the agency was validly established and has not terminated or been amended, the relevant powers of the named agent were properly and validly granted and have not terminated or been amended, and the acts of the named agent conform to the standards of this Act. No person relying on a copy of a document purporting to establish an agency shall be required to see to the application of any property delivered to or controlled by the named agent or to question the authority of the named agent.

(d) Each person to whom a direction by the named agent in accordance with the terms of the copy of the document purporting to establish an agency is communicated shall comply with that direction, and any person who fails to comply arbitrarily or without reasonable cause shall be subject to civil liability for any damages resulting from noncompliance. A health care provider who complies with Section 4-7 shall not be deemed to have acted arbitrarily or without reasonable cause.

(e) Unreasonable cause to refuse to honor. It shall be deemed unreasonable for a third party to refuse to honor an Illinois statutory short form power of attorney for property properly executed in accordance with the laws in effect at the time of its execution, if the only reason for the refusal is any of or more than one of the following: (1) the power of attorney is not on a form the third party receiving such power prescribes, regardless of any form the terms of any account agreement between the principal and third party requires; (2) there has been a lapse of time since the execution of the power of attorney; (3) on the face of the statutory short form power of attorney, there is a lapse of time between the date of acknowledgment of the signature of the principal and the date of the acceptance by the agent; (4) the document provided does not bear an original signature, original witness, or original notarization but is accompanied by a properly executed Agent's Certification and Acceptance of Authority, Successor Agent's Certification and Acceptance of Authority, or Co-Agent's Certification and Acceptance of Authority bearing the original signature of the named agent; or (5) the document appoints an entity as the agent. Nothing in this Section shall be interpreted as prohibiting or limiting a third party from requiring the named agent to furnish a properly executed Agent's Certification and Acceptance of Authority, Successor Agent's Certification and Acceptance of Authority, or Co-Agent's Certification and Acceptance of Authority under

this Act.

(f) Reasonable cause to refuse to honor. Reasons for which it shall be deemed reasonable cause for a third party to refuse to honor a power of attorney for property include, but are not limited to, the following:

(1) the refusal by the agent to provide an affidavit or properly executed Agent's Certification and Acceptance of Authority, Successor Agent's Certification and Acceptance of Authority, or Co-Agent's Certification and Acceptance of Authority;

(2) the refusal by the agent to provide a copy of the original document that is certified to be valid by an attorney, a court order, or governmental entity;

(3) the person's good faith referral of the principal and the agent or a person acting for or with the agent to the local adult protective services unit;

(4) actual knowledge or a reasonable basis for believing in the existence of a report having been made by any person to the local adult protective services unit alleging physical or financial abuse, neglect, exploitation, or abandonment of the principal by the agent or a person acting for the agent;

(5) actual knowledge of the principal's death or a reasonable basis for believing the principal has died;

(6) actual knowledge of the incapacity of the principal or a reasonable basis for believing the

principal is incapacitated if the power of attorney tendered is a nondurable power of attorney;

(7) actual knowledge or a reasonable basis for believing that the principal was incapacitated at the time the power of attorney was executed;

(8) actual knowledge or a reasonable basis for believing: (A) the power of attorney was procured through fraud, duress, or undue influence, or (B) the agent is engaged in fraud or abuse of the principal;

(9) actual notice of the termination or revocation of the power of attorney or a reasonable basis for believing that the power of attorney has been terminated or revoked;

(10) the refusal by a title insurance company to underwrite title insurance for a gift of real property made pursuant to a statutory short form power of attorney that does not contain express instructions or purposes of the principal with respect to gifts in paragraph 3 of the statutory short form power of attorney;

(11) the refusal of the principal's attorney to provide a certificate that the power of attorney is valid;

(12) a missing or incorrect signature, an invalid notarization, or an unacceptable power of attorney identification;

(13) the third party: (A) has filed a suspicious activity report as described by 31 U.S.C. 5318(g) with respect to the principal or agent; (B) believes in good

faith that the principal or agent has a prior criminal history involving financial crimes; or (C) has had a previous, unsatisfactory business relationship with the agent due to or resulting in material loss to the third party, financial mismanagement by the agent, or litigation between the third party and the agent alleging substantial damages; or

(14) the third party has reasonable cause to suspect the abuse, abandonment, neglect, or financial exploitation of the principal, if the principal is an eligible adult under the Adult Protective Services Act.

(Source: P.A. 96-1195, eff. 7-1-11; 97-1150, eff. 1-25-13.)