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Drafting and Using Powers of Attorney 2023

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Biography

Mary Jo Corsetti, Esq.

Ms. Corsetti is a member of Williams Coulson in Pittsburgh. Her practice focuses on estates, trusts, Orphans' Court litigation, tax, business organizations, real estate and elder law. Before entering private practice, she served as a law clerk on the Superior Court. Ms. Corsetti has served as an adjunct faculty member of the Duquesne University John F. Donahue Graduate School of Business, where she taught a legal process course which included civil procedure, estates and trusts, and white collar crime. She is a Federal Arbitrator and Mediator, participated in Toastmasters International, and is a member of the National Academy of Elder Law Attorneys. As a guest on WPTT/WMNY, KQV and in other venues, she has spoken on a variety of estate and business law topics. She is a Five Star Best in Client Satisfaction Financial Services Professional, Super Lawyer, and has been AV Preeminent rated in Martindale-Hubbell since 1997.

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Chapter Eight

Drafting and Using Powers of Attorney

Submitted By
Mary Jo Corsetti, Esq.
Williams Coulson Johnson Lloyd Parker & Tedesco,
LLC Pittsburgh

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Chapter Eight
Section 1

Drafting and Using Financial Powers of Attorney

Submitted By
Mary Jo Corsetti, Esq.
Williams Coulson Johnson Lloyd Parker & Tedesco, LLC
Pittsburgh

Drafting and Using Financial Powers of Attorney

Melissa L. Dougherty, Esq.

I. Introduction

a. **Relevant Statutes and Legislation**

i. 20 Pa. C.S. Section 5601 *et seq.*

1. Contains the provisions governing Durable Financial Powers of Attorney.

ii. Act 95 of 2014

1. Pennsylvania Governor Corbett signed House Bill 1429 into law on July 2, 2014, becoming Act 95 of 2014. This law changed the form and execution requirements of the Financial Power of Attorney statutes, as well as the duties of agents acting under Durable Financial Powers of Attorney.

iii. Act 79 of 2016

1. Signed into law on July 8, 2016, Act 79 of 2016 was designed to fix several aspects of Act 95.

iv. Act 103 of 2016

1. Senate Bill 665 was signed into law on October 4, 2016, becoming Act 103 of 2016. This law clarified certain aspects of the changes enacted by Act 95, including the use of attorney acknowledgments and the applicability of agent duties to certain commercial powers of attorney.

v. Senate Bill 320 of 2019

1. Senate Bill 320 was signed in the House on July 8, 2020 and the Senate on July 13, 2020. It was subsequently presented to the Governor for signature on July 13, 2020. Effective 180 days after its enactment, Senate Bill 320 will amend Title 20 to address fiduciary access to digital assets once it is signed into law.

II. Execution of Financial Power of Attorney and Formalities for Execution

a. **Notice Form (20 Pa. C.S. §5601(c))**

i. Located at the beginning of the Financial Power of Attorney.

ii. Must be written in ALL CAPITAL LETTERS.

iii. Must be signed by principal at the bottom of the page.

iv. Without this notice, the agent has the burden to show he/she has the authority to act as the principal's agent.

v. Notice page does not have to be attached to front of commercial powers of attorney and stock powers (*see* 20 Pa. C.S. §5601(e)(1.1)(i), (iii)) (effective as of January 1, 2015).

vi. Required language of Notice (effective January 1, 2015) found on following page:

NOTICE

THE PURPOSE OF THIS POWER OF ATTORNEY IS TO GIVE THE PERSON YOU DESIGNATE (YOUR "AGENT") BROAD POWERS TO HANDLE YOUR PROPERTY, WHICH MAY INCLUDE POWERS TO SELL OR OTHERWISE DISPOSE OF ANY REAL OR PERSONAL PROPERTY WITHOUT ADVANCE NOTICE TO YOU OR APPROVAL BY YOU.

THIS POWER OF ATTORNEY DOES NOT IMPOSE A DUTY ON YOUR AGENT TO EXERCISE GRANTED POWERS, BUT WHEN POWERS ARE EXERCISED, YOUR AGENT MUST USE DUE CARE TO ACT FOR YOUR BENEFIT AND IN ACCORDANCE WITH THIS POWER OF ATTORNEY.

YOUR AGENT MAY EXERCISE THE POWERS GIVEN HERE THROUGHOUT YOUR LIFETIME, EVEN AFTER YOU BECOME INCAPACITATED, UNLESS YOU EXPRESSLY LIMIT THE DURATION OF THESE POWERS OR YOU REVOKE THESE POWERS OR A COURT ACTING ON YOUR BEHALF TERMINATES YOUR AGENT'S AUTHORITY.

YOUR AGENT MUST ACT IN ACCORDANCE WITH YOUR REASONABLE EXPECTATIONS TO THE EXTENT ACTUALLY KNOWN BY YOUR AGENT AND, OTHERWISE, IN YOUR BEST INTEREST, ACT IN GOOD FAITH AND ACT ONLY WITHIN THE SCOPE OF AUTHORITY GRANTED BY YOU IN THE POWER OF ATTORNEY.

THE LAW PERMITS YOU, IF YOU CHOOSE, TO GRANT BROAD AUTHORITY TO AN AGENT UNDER POWER OF ATTORNEY, INCLUDING THE ABILITY TO GIVE AWAY ALL OF YOUR PROPERTY WHILE YOU ARE ALIVE OR TO SUBSTANTIALLY CHANGE HOW YOUR PROPERTY IS DISTRIBUTED AT YOUR DEATH. BEFORE SIGNING THIS DOCUMENT YOU SHOULD SEEK THE ADVICE OF AN ATTORNEY AT LAW TO MAKE SURE YOU UNDERSTAND IT.

A COURT CAN TAKE AWAY THE POWERS OF YOUR AGENT IF IT FINDS YOUR AGENT IS NOT ACTING PROPERLY.

THE POWERS AND DUTIES OF AN AGENT UNDER A POWER OF ATTORNEY ARE EXPLAINED MORE FULLY IN 20 PA.C.S. CH. 56.

IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER OF YOUR OWN CHOOSING TO EXPLAIN IT TO YOU.

I HAVE READ OR HAD EXPLAINED TO ME THIS NOTICE AND I UNDERSTAND ITS CONTENTS.

Date: _____ _____

[NAME], Principal

b. **Execution by Signature or Mark (20 Pa. C.S. §5601(b)(3))**

i. Principal can execute the Financial Power of Attorney by signature or by mark.

ii. If another person is executing the Financial Power of Attorney on the principal's behalf, the document must be executed by that person's signature – execution by mark is no longer permitted in Pennsylvania for this purpose.

c. **Witness Requirements (20 Pa. C.S. §5601(b)(3)(ii))**

i. Financial Power of Attorney must be witnessed by 2 witnesses (effective as of January 1, 2015).

ii. Witnesses must be:

1. 18 years of age or older,

2. Not the agent, notary public, or person signing the Financial Power of Attorney on the principal's behalf, and

a. *Note*: If the spouse is named as an agent in the document, this means the spouses cannot witness each other's Financial Powers of Attorney.

3. Not any "other person authorized by law to take acknowledgements before whom the Financial Power of Attorney is acknowledged." 20 Pa. C.S. §5601(b)(3)(ii).

iii. The requirement that two witnesses witness the power of attorney does not apply to commercial powers of attorney and stock powers (*see* 20 Pa. C.S. §5601(e)(1.1)(i), (iii)).

d. **Notarization (20 Pa. C.S. §5601(b)(3)(i))**

i. The Financial Power of Attorney must be notarized (effective as of January 1, 2015).

ii. The notary public cannot be an agent or a witness.

iii. Alternative: The Financial Power of Attorney can be acknowledged by an attorney using the attorney acknowledgement form.

1. Attorney using the attorney acknowledgment form cannot be one of the two witnesses to the document.

2. Act 103 of 2016 clarified this following the confusion that ensued after Act 95 was enacted.

3. This language appears to be intended to track the language for attorney acknowledgements of self-proving wills set forth in 20 Pa. C.S. Section 3132.1(c).

iv. Commercial powers of attorney <u>do not</u> need to be notarized.

1. Act 103 of 2016 revised Section 5601 to specifically exclude commercial powers of attorney from the notarization and witness requirements. Prior to Act 103 of 2016, commercial powers of attorney were not excluded from the notarization requirements of 20 Pa. C.S. Section 5601(b)(3)(i).

2. However, if a commercial power of attorney is going to be recorded in the Office for the Recorder of Deeds, it must be acknowledged before recording. 20 Pa. C.S. §5601(e.1)(3).

e. **Agent Acknowledgment (20 Pa. C.S. §5601(d))**

i. General Rule:

1. Agent has no authority to act unless they first sign the Agent Acknowledgment form at the back of the Financial Power of Attorney.

ii. Agent Acknowledgment page does not have to be attached to back of commercial powers of attorney or stock powers (*see* 20 Pa. C.S. §5601(e)(1.1)(i), (iii)) (effective as of January 1, 2015).

iii. Agent Acknowledgment must be in "substantially the following form" as is shown on the following page (effective as of January 1, 2015) pursuant to Pa. C.S. §5601(d)):

ACKNOWLEDGMENT

I, [NAME], have read the attached power of attorney and am the person identified as the agent for the principal, [NAME]. I hereby acknowledge that in the absence of a specific provision to the contrary in the power of attorney or in 20 Pa.C.S. when I act as agent:

I shall act in accordance with the principal's reasonable expectations to the extent actually known by me and, otherwise, in the principal's best interest, act in good faith and act only within the scope of authority granted to me by the principal in the power of attorney.

Date: _____, 20___ _____
[NAME]

III. Mandatory Duties of Agent

a. Agent has **three mandatory duties** (subsections 1-3 of 20 Pa. C.S. §5601.3(a)):

   i. Duty to "act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest." (20 Pa. C.S. §5601.3(a)(1)).

      a. This is the idea of "substituted judgment," which is identical to the standard used in 20 Pa. C.S. Section 5401 *et seq*. with respect to health care powers of attorney. The agent has to put himself/herself into the principal's shoes and ask: "What would the principal choose in this situation?"

      b. *Caution:* This is a standard that is not objective or easily definable. It may be necessary to interview the principal at the time the principal executes the Financial Power of Attorney to determine what choices the principal would want to see made in various situations.

   ii. Duty to "act in good faith." (20 Pa. C.S. §5601.3(a)(2)).

   iii. Duty to "act only within the scope of authority granted in the Power of Attorney." (20 Pa. C.S. §5601.3(a)(3)).

b. These three mandatory duties cannot be waived or modified in the Financial Power of Attorney.

c. These mandatory duties are applicable to all Financial Powers of Attorney created before, on, or after January 1, 2015.

d. Mandatory duties do not apply to commercial powers of attorney.

   i. Act 103 of 2016 revised Section 5601.3 to retroactively, specifically provide that commercial powers of attorney are not subject to the mandatory agent duty requirements. Prior to Act 103 of 2016, commercial powers of attorney were subject to the mandatory agent duties under 20 Pa. C.S. 5601.3.

   ii. The term "commercial powers of attorney" here includes but is not limited to:

      1. Powers exclusively granted to facilitate the transfer of stock, bonds and other assets,

2. Voting proxies,

3. Warrants of judgment,

4. Powers contained in the governing document of a corporate entity, and

5. Powers by which a director, shareholder, partner, member or manager authorizes others to do things on behalf of a corporate entity.

e. These mandatory duties do apply to acts or omissions of all agents occurring after January 1, 2015 even if the Financial Power of Attorney under which the agent was acting was executed prior to January 1, 2015.

IV. "Hot Powers" (20 Pa. C.S. §5601.4)

a. "Hot Powers" Generally

i. 20 Pa. C.S. §5601.4(a) lists eight specific powers that must be explicitly written out within the Financial Power of Attorney in order for the agent to exercise the power. If the Financial Power of Attorney does not explicitly state that the agent has any of these eight "Hot Powers," then the agent will not have the ability to exercise such power.

b. List of "Hot Powers"

i. "Create, amend, revoke, or terminate an inter vivos trust other than as permitted under section 5602(a)(2), (3) and (7) (relating to form of power of attorney)." 20 Pa. C.S. §5601.4(a)(1).

ii. "Make a gift." 20 Pa. C.S. §5601.4(a)(2).

iii. "Create or change rights of survivorship." 20 Pa. C.S. §5601.4(a)(3).

iv. "Create or change a beneficiary designation." 20 Pa. C.S. §5601.4(a)(4).

v. "Delegate authority granted under the power of attorney." 20 Pa. C.S. §5601.4(a)(5).

vi. "Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan." 20 Pa. C.S. §5601.4(a)(6).

vii. "Exercise fiduciary powers that the principal has authority to delegate." 20 Pa. C.S. §5601.4(a)(7), and

viii. "Disclaim property, including a power of appointment." 20 Pa. C.S. §5601.4(a)(8).

ix. "Access the electronic communications and digital asset of the principal." 20 Pa. C.S. §5601.4(a)(9) *(proposed legislation pending the Governor's signature, as of July 13, 2020).*

V. Power to Make Gifts

a. "Hot Power":

i. In order for an agent to make gifts under a Financial Power of Attorney, the document must explicitly give the agent the power to do so ("Make a gift"). Gift giving is one of the eight "Hot Powers" listed under 20 Pa. C.S. §5601.4(a).

b. No longer a "Shorthand Power":

i. 20 Pa. C.S. §5602(a) contains several shorthand abbreviations that essentially "link" a phrase in a Durable Financial Power of Attorney to the more comprehensive description of powers in 20 Pa. C.S. §5601 *et seq*.

ii. The shorthand power "To Make Limited Gifts" is no longer included in this list of shorthand powers following Act 79 of 2016.

c. General Rule (20 Pa. C.S. §5601.4(d)):

i. 20 Pa. C.S. §5601.4(d)(1) provides that if a Financial Power of Attorney includes the language "the power to make limited gifts" or other similar language, the agent is authorized to:

1. To make annual exclusion gifts, or

2. With the consent of the principal's spouse, to split annual exclusion amount gifts.

ii. This general rule can be customized within the Financial Power of Attorney (*see* the preamble language of §5601.4(d)(1) "Unless the power of attorney otherwise provides…").

iii. No restrictions on the donee's relationship to the principal for limited gifts (20 Pa. C.S. §5601.4(d)(1)).

1. *Compared* to 20 Pa. C.S. §5603(a)(2) (now repealed), which restricted limited gifts under the prior statute to the principal's spouse, issue, and spouses of issue.

iv. The agent must exercise the power to make gifts in a manner "consistent with the principal's objectives if actually known by the agent." 20 Pa. C.S. §5601.4(d)(2).

1. If the agent does not know the principal's objectives, then the agent must exercise the power to make gifts as the agent determines is consistent with principal's best interest based on all relevant factors, including:

a. The nature and value of the principal's property,

b. The principal's foreseeable obligations and need for maintenance,

c. Minimization of taxes, including income, estate, inheritance, generation-skipping transfer and gift taxes,

d. The principal's eligibility for a benefit, program or assistance under a statute or regulation, and

e. The principal's personal history of making gifts. 20 Pa. C.S. §5601.4(d)(2).

d. Agent Can Only Make Gifts to Herself in Limited Circumstances

i. The restriction set forth in 20 Pa. C.S. §5601.4(b) provides that, absent anything in the Financial Power of Attorney to the contrary, the agent cannot exercise the power to make gifts in favor of the agent unless the agent is an ancestor, spouse, or descendant of the principal.

VI. <u>Power to Operate a Business or Entity</u>

a. "Power to Operate a Business or Entity" is now an enumerated "shorthand" power in Section 5602(a).

b. Greater detail for this power added as Section 5603(u.2):

i. Agent can continue business,

ii. Make decisions regarding finances, employees, and operations,

iii. Change form of ownership of business, initiate or participate in merger or reorganization, and

iv. Compensate an agent for managing the business.

VII. Power to Provide for Personal and Family Maintenance

a. "Power to Provide for Personal and Family Maintenance" is now an enumerated "shorthand" power in Section 5602(a).

b. Greater detail for this power added as Section 5603(u.3):

i. Agent can provide for the "health, education, maintenance, and support, in order to maintain the customary standard of living of the principal's spouse and following individuals:

1. Principal's minor children,

2. Other individuals legally entitled to be supported by the principal, and

3. Individuals whom the principal "customarily supported and intends to support."

ii. When making expenditures the Agent must take into account:

1. The long-term needs of the principal, and

2. Any independent means available to those individuals apart from support by the principal.

iii. This authority is in addition to, and not limited by, the gifting power.

VIII. Power to Change the Principal's Estate Plan

a. Although it is not explicitly a hot power, a recent court ruling suggests that the Financial Power of Attorney must expressly give the Agent the power to change the principal's estate plan when the Agent is seeking to make changes such as specifically excluding one or more of the principal's children as estate beneficiaries.

b. In In Estate of Capobianco, O.C. No. 1371 PR of 2016 (O.C. Phila. Cnty. 2016), the Court recently sustained objections against an agent's accounting because it determined that the Agent exceeded the scope of his authority under the Durable Financial Power of Attorney. Relying upon language in the Financial Power of Attorney that gave the Agent the power to "handle interests in estates and trusts," the Agent created a trust

that would benefit only four of the principal's seven children, and transferred all of the principal's real and personal property to the trust. The Financial Power of Attorney contained no other language granting the Agent the authority to alter or create an estate plan for the principal. The Court ruled that the Financial Power of Attorney did not give the agent the ability to alter the principal's estate plan, as pursuant to 20 Pa. C.S. Section 5603(q), the power to "handle interests in estate and trusts" very clearly related to the power to handle the principal's interest in the estates and trusts of others, not the estate or trust of the principal. The Court further noted that agents have a duty to preserve the principal's estate to the greatest extent possible.

IX. Power to Access Electronic Communications and Digital Assets

a. "Hot Power":

   i. If Senate Bill 320 is signed by Governor Wolf, the power to access electronic communications and digital assets will be the ninth "Hot Power" listed under 20 Pa. C.S. §5601.4(a). Thus, in order for an agent to wield this power under a Financial Power of Attorney, the document must explicitly give the agent the power to do so ("Access the electronic communications and digital asset of the principal").

   ii. "Digital Asset"

      1. In this context, a digital asset is "[a]n electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record." 20 Pa. C.S. §3902.

   iii. "Electronic Communication"

      1. 20 Pa. C.S. §3902 defines electronic communications by referencing 18 U.S.C. § 2510(14), which further defines electronic communications as follows:

"[A]ny transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include—

(A) any wire or oral communication;

(B) any communication made through a tone-only paging device;

(C) any communication from a tracking device (as defined in section 3117 of this title); or

(D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds[.]"

X. Duty of Agent – Disclosure of Transaction Records and Standing to Require Disclosure

a. 20 Pa. C.S. §5601.3(d)(1) provides a general rule effective as of January 1, 2015, regarding the disclosure of transaction records, which can be customized within the Financial Power of Attorney (*See* the preamble language of §5601.3(d)(1) "Except as otherwise provided in the power of attorney….").

b. Default Rule under 20 Pa. C.S. §5601.3(d)(1):

   i. The Agent is only required to disclose receipts, disbursements or transactions if:

      1. Ordered to do so by a court, or

      2. Requested to do so by one of the following individuals or entities:

         a. The Principal,

         b. A Guardian of the principal,

         c. A Conservator of the principal,

         d. Another fiduciary acting for the principal,

         e. A governmental agency having authority to protect the welfare of the principal, or

         f. On the principal's death, the personal representative or successor in interest of the principal's estate.

   ii. Note: This is a pretty limited list – The principal's spouse and children, and heirs of the principal's estate are not on this list.

   iii. Consequence: Only individuals and entities named in 20 Pa. C.S. §5601.3(d)(1) have standing to request these records from the agent. Several recent Orphan's Court cases in various counties have gone a step further and held that beneficiaries of the principal's estate – even the principal's own children - don't have

standing to compel the principal's agent to file accounts during the principal's lifetime or demand that the agent be held accountable for his or her actions. The original, proposed sections of the Uniform Power of Attorney Act would have remedied this, but the final version of Act 95 of 2014 did not use language similar to the Uniform Power of Attorney Act.

1. See In re Mardell Dardarian, 3 Fiduc. Rep. 3d 206 (2013); Golub Trust, 27 Fiduc. Rep. 2d 260, 265 (O.C. Phila. Co. 2006); and In re Estate of Griggs, 2 Fiduc. Rep. 3d 354, 360 Ches. Co. L.R. 266 (2012) for cases in which courts have denied standing to compel the filing of accounts.

2. Possible Solution: Scriveners of Financial Powers of Attorney may want to consider adding language that gives the beneficiaries of the estate or the principal's spouse and children the right to require disclosure of transaction records in order to avoid this standing issue.

c. Timeline for Delivery of Transaction Records:

   i. Within 30 days of receiving the request for records, the agent has to either (i) comply with the request or (ii) respond in writing giving a reason why additional time is needed to comply with the request. If the agent needs additional time, the agent receives an additional 30 days. 20 Pa. C.S. §5601.3(d)(2).

d. Advantages & Disadvantages of Including a More Stringent Transaction Records Requirement in Financial Power of Attorney:

   i. Advantages:

      1. Hold the Agent accountable, and

      2. Receive regular updates on status of assets.

   ii. Disadvantages:

      1. Depending on to whom the transaction records are distributed, the principal's assets are no longer private, and

      2. Can be very burdensome on the agent, particularly if the agent only serves for a limited period of time.

XI. Costs of Agent's Accounting

a. 20 Pa. C.S. Section 5610 provides that a Court may assess the costs of the accounting proceeding as it deems appropriate, including the costs of preparing and filing the account.

b. Court now has greater power to discourage frivolous requests for accountings and to sanction agents that are mismanaging assets.

c. This applies to all Financial Powers of Attorney, regardless of when created.

XII. Third Party Acceptance of Financial Powers of Attorney

a. **Copy of Financial Power of Attorney Has Same Effect as Original**.

i. 20 Pa. C.S. §5602(d) provides that except for recording a Financial Power of Attorney with the Clerk of Orphans' Court, a photocopy of a signed Financial Power of Attorney has the same effect as the original.

b. **20 Pa. C.S. §5608(e): Request For Information**

i. Applicable to all Financial Powers of Attorney, regardless of date of creation.

ii. Summary of Rule:

1. Gives a third party who is asked to accept a Financial Power of Attorney the option to request information, and relieves the third party for any liability for requesting the information.

iii. Information the Third Party Can Request:

1. An agent's certification *under penalty of perjury* of any factual matter concerning the principal, agent, or Financial Power of Attorney, or an affidavit under 20 Pa. C.S. §5606 (relating to proof of continuance of Financial Powers of Attorney by affidavit).

2. An English translation of the Financial Power of Attorney.

3. An "opinion of counsel" regarding whether the agent is acting within the scope of the Financial Power of Attorney, if the third party provides in writing the reason for making this request for a legal opinion. 20 Pa. C.S. §5608(g) provides that the legal opinion will be made at the

principal's expense unless the request is made after more than 7 days.

c. **20 Pa. C.S. §5608(f): Additional Request For Information**

i. Applicable to all Financial Powers of Attorney, regardless of date of creation.

ii. 20 Pa. C.S. §5608(f) provides that a third party who has previously accepted a Financial Power of Attorney and has acted on it will not be precluded from later requesting an agent's certification or legal opinion as described in 20 Pa. C.S. §5608(e), or an affidavit under 20 Pa. C.S. §5606.

d. **20 Pa. C.S. §5608(g): English Translation**

i. Applicable to all Financial Powers of Attorney, regardless of date of creation.

ii. 20 Pa. C.S. §5608(g) provides that an English-language translation of a Financial Power of Attorney will be made at the expense of the principal unless the request is made more than 7 days after the Financial Power of Attorney (or a revision of it) is presented for acceptance (or after a different power is exercised under a previously accepted Financial Power of Attorney).

e. **20 Pa. C.S. §5608(h): Limitations**

i. Applicable to all Financial Powers of Attorney, regardless of date of creation.

ii. 20 Pa. C.S. §5608(h) does not limit the liability of an insurer, indemnitor, or guarantor to indemnify, hold harmless, or defend a third party who has accepted or relied upon a Financial Power of Attorney. 20 Pa. C.S. §5608(h)(3).

iii. Nothing in 20 Pa. C.S. §5608(c) or 20 Pa. C.S. §5608 generally validates a forged instrument conveying an interest in real property, or provides that the recording of a forged instrument is constructive notice of a conveyance.

XIII. Liabilities of Third Parties for Wrongful Refusal of a Financial Power of Attorney

a. **Penalties for Wrongful Refusal of a Financial Power of Attorney (20 Pa. C.S. §5608.1(c))**

i. Applicable to all Financial Powers of Attorney, regardless of date of creation, but does not apply to acts or omissions of third parties occurring prior to July 2, 2014.

ii. 20 Pa. C.S. §5608.1(c) provides that a Third Party is subject to:

1. Civil damages for pecuniary harm to the economic interests of the principal caused by the person's refusal to comply with the agent's instructions, or

2. A court order mandating acceptance of the Financial Power of Attorney.

b. **However, These Penalties Do Not Apply to Financial Powers of Attorney from Another State (§5608.1(d)(1))**

i. 20 Pa. C.S. §5608.1(d)(1) states that the requirements and penalties of 20 Pa. C.S. §5608.1(c) don't apply to a Financial Power of Attorney that is subject to the laws of another state or jurisdiction.

1. *Note*: This appears to mean that if an Agent attempts to use an Ohio Financial Power of Attorney with a financial institution in Pennsylvania and the financial institution wrongfully refuses to accept the Power of Attorney, there are no penalties applicable under the statute because the Power of Attorney is subject to Ohio's laws. *This raises interesting issues of nexus.*

c. **"Organizational Knowledge" Now Defined by Act 95 (20 Pa. C.S. §5608.2)**

i. Applicable to all Financial Powers of Attorney, regardless of date of creation, but does not apply to acts or omissions of third parties occurring prior to July 2, 2014.

ii. 20 Pa. C.S. §5608.2(1) provides that what an organization "knows" is based on what the relevant employee actually knows.

1. *Example*: If the employee sitting at the desk with the agent does not have actual knowledge of something, then the institution is considered to not have actual knowledge of the thing, even though there is another employee in that same financial institution with the actual knowledge – he/she is just not sitting at that desk with the agent.

iii. Employees have actual knowledge if they act with "conscious disregard or willful ignorance" of what they know. 20 Pa. C.S. §5608.2(2).

Chapter Eight
Section 2

Drafting and Using Health Care Powers of Attorney and Related Health Care Documents

Submitted By
Mary Jo Corsetti, Esq.
Williams Coulson Johnson Lloyd Parker & Tedesco, LLC
Pittsburgh

Drafting and Using Health Care Powers of Attorney and Related Health Care Documents

I. Living Wills

A. What is a Living Will?

Living Wills are a statutorily supported means for "competent adults to control their health care through instructions written in advance . . . ." The Pennsylvania General Assembly has found, *inter alia*, that individuals have a "qualified right to makes decisions relating to their own health care." 20 Pa. C.S.A. § 5423.

A Living Will expresses "the wishes of a principal regarding the initiation, continuation, withholding or withdrawal of life-sustaining treatment and may include other specific directions, including, but not limited to, designation of a health care agent to make health care decisions for the principal . . . ." 20 Pa. C.S.A. § 5447

Note: Of particular note when insurance coverage is concerned, the decision to refrain from life-sustaining treatment is not a suicide or homicide. An individual's preference, or lack thereof, for life-sustaining treatment may not be considered in the issuance of life insurance policies. See 20 Pa. C.S.A. §§ 5426-27.

Note: The absence of a Living Will does not create a presumption regarding the principal's disposition towards life-sustaining treatments. 20 Pa. C.S.A. § 5443.

B. How is a Living Will created?

In order to create a Living Will, an individual must be: 1) eighteen years of age or older; 2) a high school graduate; 3) married; or 4) an emancipated minor. 20 Pa. C.S.A. § 5442.

The Living Will itself may be in any written form that expresses "the wishes of a principal regarding the initiation, continuation, withholding or withdrawal of life-sustaining treatment and may include other specific directions, including, but not limited to, designation of a health care agent to make health care decisions for the principal . . . ." 20 Pa. C.S.A. § 5447.

Like other advance health care directives, a Living Will may be in the form of the statutorily provided combined form or any other form that meets the requirements of Subchapter B of Chapter 54. 20 Pa. C.S.A. § 5433.

The Living Will itself must be dated and signed by the principal by signature or mark. If the principal is unable to sign the document, another person can execute the document by signature or by mark on the principal's behalf. This document must be witnessed by two individuals who are at least eighteen years of age.

However, an individual who signs the Living Will on behalf of the principal may not sign as a witness. Health care providers, as well as their agents, that provide health care services for the principal are likewise precluded from being witnesses. 20 Pa. C.S.A. § 5442.

Practice Tip: Using Living Wills executed prior to January 29, 2007 or in another jurisdiction:

Chapter 54 Subchapter B does not limit the validity of Living Wills executed prior to January 29, 2007. It also does not limit the validity of a Living Will executed in compliance with the laws of another state or jurisdiction, provided that the document does not allow a principal to direct procedures inconsistent with Pennsylvania law. 20 Pa. C.S.A. § 5446. However, the current version of the statutory form contains the format and content with which many attending physicians and other health care professionals are likely to be familiar. As a result, if the client is updating other estate planning documents, it may also be prudent to update the Living Will to ensure that the principal's wishes will be carried out without delay or confusion.

C. How is a Living Will used?

A Living Will becomes operative when the document is provided to the attending physician and the following criteria are met: 1) the principal is determined by the attending physician to be incompetent and to have an end-stage medical condition; or 2) the principal is permanently unconscious. The determination that the principal has an end-stage medical condition or is permanently unconscious is to be certified in writing by the attending physician promptly after such a determination. 20 Pa. C.S.A. § 5443.

An individual is "incompetent" if he or she is documented by the health care provider to be (1) unable to understand the potential material benefits, risks and alternatives involved in a specific proposed health care decision; (2) unable to make that health care decision on his or her own behalf; or (3) unable to communicate that health care decision to any other person. 20 Pa. C.S.A. § 5422. The statutory definition expressly acknowledges that an individual may be competent to make certain decisions but not others.

Note that the determination of competency is to be made by the principal's attending physician. It does not require a judicial determination of incapacity.

Practice Tip: Making the Living Will part of the medical record:

It is incumbent upon the principal or individual seeking compliance with a Living Will to provide it to the physician. Chapter 54 explicitly denies that a physician is required to "maintain copies of medical records beyond the requirements otherwise imposed by applicable law and regulation." 20 Pa. C.S.A. § 5434. However, 20 Pa. C.S.A. § 5443 requires that a "health care provider to whom a

copy of a living will is furnished shall make it a part of the medical record of the principal." Consequently, a Living Will provided in advance should be part of the principal's medical record. However, it would be prudent to present the document (or a copy) when it is going to be needed.

Note: Presumption for life-sustaining treatment:

While 20 Pa. C.S.A. § 5443 states that the absence of a Living Will does not create a presumption regarding the principal's disposition towards life-sustaining treatments, 20 Pa. C.S.A. § 5456 provides that "in the absence of a specific, written authorization or direction by a principal to withhold or withdraw nutrition and hydration administered by gastric tube or intravenously or by other artificial or invasive means, a health care agent shall presume that the principal would not want nutrition and hydration withheld or withdrawn." Consequently, in this specific instance, a presumption is created. The presumption is, however, rebuttable when considering the factors listed in § 5456 (discussed below). Of course, if the principal does not want nutrition and hydration, the principal should indicate that decision in a Living Will.

1. *Compliance Exceptions*

   There are certain situations in which a health care provider is not required to comply with the provisions of a Living Will.

   If a health care provider "cannot in good conscience" comply with the decisions contained in the Living Will, the provider must inform the principal, or the principal's agent if the principal is incompetent, of his or her inability to comply with the principal's desires. The provider must then make every "reasonable effort to assist in the transfer of the principal to another physician or health care provider who will comply" with the principal's wishes.

   However, in the event that such a transfer is impossible, the administration of life-sustaining treatment will not subject a health care provider to criminal or civil liability, or administrative sanction for the failure to carry out the provisions of the Living Will. Additionally, employees or staff members of health care providers cannot be forced to participate in the withholding of life-sustaining treatments, and employers cannot discriminate against employees for their preference. 20 Pa. C.S.A. § 5424.

   Another instance in which a principal's wishes to refrain from life-sustaining treatment may not be respected is if the principal is pregnant. If the principal is pregnant, 20 Pa. C.S.A. § 5429(a) requires life-sustaining treatment, nutrition and hydration to be provided regardless of what the Living Will or any other order or direction provides, unless the attending

physician and an obstetrician certify "to a reasonable degree of medical certainty" that the treatment:

a) Will not maintain the pregnant woman in such a way as to permit the continuing development and live birth of the unborn child,

b) Will be physically harmful to the pregnant woman, or

c) Will cause pain to the pregnant woman that cannot be alleviated by medication.

This exception does not require a doctor to verify that a patient is not pregnant before complying with an advance medical directive unless the physician has reason to believe the patient may be pregnant. 20 Pa. C.S.A. § 5429.

If life-sustaining treatment is provided to a pregnant woman contrary to the provisions of the Living Will or any other order or direction, the Commonwealth of Pennsylvania must pay "all usual, customary and reasonable expenses directly, indirectly and actually incurred" by the pregnant woman. In that event, the Commonwealth would have a right of subrogation against any insurance paid by the woman's third-party health insurer. 20 Pa. C.S.A. § 5429(d).

Practice Tip: The principal may wish to review the Living Will with his or her health care provider in advance in order to confirm that the health care provider is willing to comply with the principal's desires.

D. How is a Living Will revoked?

A Living Will is operative until the principal revokes it, regardless of how much time has passed since the Living Will was executed. 20 Pa. C.S.A. § 5443.

The revocation itself may be done "at any time and in any manner by the principal regardless of the mental or physical condition of the principal." This revocation becomes effective when it is communicated to the "attending physician or other health care provider by the principal or a witness to the revocation." This revocation will then become part of the principal's medical record. 20 Pa. C.S.A. § 5444.

A Living Will may be revoked by a later Living Will. To the extent that the newer Living Will conflicts with the older Living Will, the newer document will control. 20 Pa. C.S.A. § 5425.

Drafting Tip: When drafting a Living Will, the scrivener may wish to expressly state that the Living Will revokes any other Living Will previously executed by the principal.

E. Combined Form–Health Care Power of Attorney and Living Will

See statutory form provided at Annex A.

Practice Tip: One Document or Two?

Some practitioners prefer to use the statutory combined form because it follows a model that has been approved by the legislature and provides a more efficient way to address what would ordinarily be two documents in a single execution. However, other practitioners prefer to draft the Living Will and Health Care Power of Attorney as two separate documents to avoid client confusion or in the event the client might not want to address certain matters typically covered by one document or the other.

II. Health Care Powers of Attorney

A. What is a Health Care Power of Attorney?

A Health Care Power of Attorney empowers a principal's agent to "make any health care decision and to exercise any right and power regarding the principal's care, custody and health care treatment that the principal could have made and exercised" such as:

1. The power to authorize admission to a medical, nursing, residential or similar facility,
2. The power to enter into agreements for the principal's care,
3. The power to make anatomical gifts, and
4. The power to dispose of remains and consent to autopsies.

See 20 Pa. C.S.A. § 5456.

B. How is a Health Care Power of Attorney created?

In order to create a Health Care Power of Attorney, an individual must be: 1) eighteen years of age or older; 2) a high school graduate; 3) married; or 4) an emancipated minor. 20 Pa. C.S.A. § 5452.

"A health care power of attorney may be in any written form identifying the principal, appointing a health care agent and declaring that the principal authorizes the health care agent to make health care decisions on behalf of the principal." 20 Pa. C.S.A. § 5465.

This includes the statutorily provided combined form, or any other form that meets the requirements of Subchapter C of Chapter 54. 20 Pa. C.S.A. § 5433.

As a general rule, the Health Care Power of Attorney must:

1. Identify the principal,
2. Appoint the health care agent, and
3. Declare that the principal authorizes the health care agent to make health care decisions on behalf of the principal.

Optional provisions include, *inter alia*, limitations upon the authority of the agent. 20 Pa. C.S.A. § 5453.

Multiple health care agents may be appointed to act jointly, or as successor agents. If more than one agent is listed, they must act jointly unless expressly provided otherwise. 20 Pa. C.S.A. § 5455.

The principal's attending physician, as well as an owner, operator, or employee of a health care provider in which the principal is receiving care, are precluded from serving as the principal's health care agent. 20 Pa. C.S.A. § 5455.

The Health Care Power of Attorney itself must be dated and signed by the principal by signature or mark. If the principal is unable to sign the document, another may do so on his or her behalf. This document must be witnessed by two individuals over the age of eighteen. However, an individual who signs the document on behalf of the principal may not sign it as a witness. Health care providers, as well as their agents, that provide health care services for the principal are likewise precluded from being witnesses. 20 Pa. C.S.A. § 5452.

Practice Tip: Using Health Care Powers of Attorney executed prior to January 29, 2007 or in another jurisdiction:

Chapter 54 Subchapter C does not limit the validity of Health Care Powers of Attorney executed prior to January 29, 2007. It also does not limit the validity of a Health Care Power of Attorney validly executed in another state or jurisdiction, provided it does not allow a principal to direct procedures inconsistent with Pennsylvania law. 20 Pa. C.S.A. § 5464. However, the current version of the statutory form contains the format and content with which many attending physicians and other health care professionals are likely to be familiar. As with a Living Will, if a client is updating other estate planning documents, it may also be prudent to update the Health Care Power of Attorney to ensure that his or her wishes will be carried out without delay or confusion.

C. How is a Health Care Power of Attorney used?

A Health Care Power of Attorney is operative when an attending physician who has been provided a copy of the document determines that the principal is incompetent, unless otherwise specified in the document. Should the principal regain competency, the document would cease to be operative (absent direction in the power of attorney to the contrary). 20 Pa. C.S.A. § 5454.

When making health care decisions for the principal, the agent must gather information about the principal's prognosis and acceptable medical alternatives regarding diagnosis, treatments, and supportive care. There are a number of factors the agent should consider when making health care decisions for the principal, including but not limited to:

1. Any clear written or verbal directions from the principal that cover the situation in question;
2. The principal's preferences and values, including religious and moral beliefs; and
3. The agent's assessment of the principal's best interests, taking into account the following goals and considerations: (a) the preservation of

> life, (b) relief from suffering, and (c) the preservation or restoration of functioning, taking into account any concurrent disease, illness or physical, mental, cognitive or intellectual condition that may have predated the principal's current medical condition.

See 20 Pa. C.S.A. § 5456.

Regardless of the agent's powers, there are specific situations in which the principal can countermand the agent's decisions.

Clearly, if the principal is competent, he or she may countermand any of the agent's decisions. 20 Pa. C.S.A. § 5457. Of course, this is only relevant if the Health Care Power of Attorney specifically allows the agent to make decisions while the principal is competent. See 20 Pa. C.S.A. § 5454 (Health Care Power of Attorney is only operative when the principal is incompetent unless otherwise specified in the document). However, an incompetent principal may not countermand an agent's decision to administer life-sustaining treatment. See 20 Pa. C.S.A. § 5457.

Another instance in which an agent's powers may be curtailed is if a guardian of the person has been appointed for the principal. In that event, the agent is accountable to the guardian as well as the principal. When a court appoints a guardian, it also has the ability to determine to what extent the agent's authority to act remains. 20 Pa. C.S.A. § 5460. However, as the comment to this statute emphasizes, the principal's choice of a health care agent "represents the exercise of a fundamental and highly personal right." Consequently, courts may be unwilling to amend or revoke the agent's powers.

Regarding health care information relating to the principal, the health care agent has the same rights as the principal to "request, examine, copy and consent or refuse to consent to disclosure of medical or other health care information." However, the health care agent may not disclose the principal's health care information except as is necessary to perform his or her duties as agent, or as required by law. 20 Pa. C.S.A. § 5456.

Practice Tip: HIPAA Authorizations:

Even though an agent has the same rights as the principal to request and view health care information pursuant to 20 Pa. C.S.A. § 5456, the principal may wish to sign a HIPAA authorization/release form when executing his or her advance health care directives. An express authorization may further ease the sharing of information with the agent, but can also authorize other permitted recipients of information, such as family members or friends who are not appointed as health care agents.

Drafting Tip: While 20 Pa. C.S.A. § 5454 provides that a Health Care Power of Attorney is only operative if the principal is incompetent (unless otherwise

specified), clients may prefer to include language in the document expressly stating that the document is only operative upon an attending physician finding that the principal is incompetent. This may provide additional peace of mind and assist the principal in understanding that only the principal will have the authority to make health care decisions while he or she is competent.

D. How is a Health Care Power of Attorney revoked?

Unless the Health Care Power of Attorney contains a clause with a predetermined termination date (which is somewhat unusual), the document will remain valid until it is revoked by the principal, by the court, or by the principal's guardian of the person (if so authorized by the court). 20 Pa. C.S.A. § 5454.

The principal may amend his or her Health Care Power of Attorney by a writing executed with the same formalities required for the initial creation of the document, provided he or she is of "sound mind". This amendment may revoke the prior Health Care Power of Attorney in whole or in part. 20 Pa. C.S.A. § 5458.

A revocation, however, can also be effectuated by a principal of "sound mind" by personally informing the attending physician, health care provider, or health care agent that the power of attorney is revoked. The better practice, however, would be to effect a revocation by a document that complies with the same formalities needed to create a Health Care Power of Attorney, provided the principal is still of sound mind. See 20 Pa. C.S.A. § 5459.

E. Combined Form–Health Care Power of Attorney and Living Will

See Annex A.

III. Out-of-Hospital Do-Not-Resuscitate Orders (OOH- DNR)

A. What is an OOH-DNR?

An OOH-DNR allows an individual with an end-stage medical condition to preemptively refuse aid in the event of respiratory or cardiac arrest.

As legislative background, the General Assembly found that cardiopulmonary resuscitation (CPR) rarely leads to prolonged survival when an individual suffers from a terminal illness and, thus, concluded that administering CPR in those circumstances may cause unnecessary pain and suffering. Additionally, the General Assembly found that existing emergency medical service protocols may require medical services personnel to perform CPR on an individual, even though that individual may have an advance health care directive stating he or she does not wish to receive CPR. It found this to offend the dignity of the individual and, thus, created Subchapter E of Chapter 54. 20 Pa. C.S.A. § 5482.

B. How is an OOH-DNR created?

A person who is 1) at least eighteen years old, 2) a high school graduate, 3) married, or 4) an emancipated minor may request that his or her attending physician issue an OOH-DNR. Additionally, a patient's surrogate (health care agent or representative) may request the document if so authorized. The patient seeking the order may also request a bracelet or necklace supplied by the Pennsylvania Department of Health. These allow a patient to readily display to responding emergency personnel that he or she has created an OOH-DNR. 20 Pa. C.S.A. §§ 5483-84.

The attending physician will then issue a form that complies with 20 Pa. C.S.A. § 5484's requirements. Broadly, this requires that an attending physician has certified that the patient either: 1) has an end-stage medical condition; or 2) is permanently unconscious and has a Living Will indicating that the patient does not wish to receive CPR. Both the attending physician and the patient would sign this document. Alternatively, if the patient is not competent, the surrogate may sign.

Note: While CPR is not a defined term in 20 Pa. C.S.A. § 5483, the example order provided in 20 Pa. C.S.A. § 5484 lists "cardiac compression, invasive airway techniques, artificial ventilation, defibrillation and other related procedures" as included in this term. Consequently, an OOH-DNR covers more than just the traditional first aid technique consisting of chest compressions and rescue breathing.

C. How is an OOH-DNR used?

Emergency medical services providers would withhold CPR once they become aware of the existence of an OOH-DNR. This can be achieved by having the principal wear the bracelet or necklace, as well as by providing the order itself to emergency medical services personnel. While the emergency medical services personnel will withhold CPR, they are still permitted to administer other services to alleviate pain and provide comfort. These can include intravenous fluids, medications, oxygen, and other treatments. 20 Pa. C.S.A. § 5487(b).

If the emergency medical service providers, in good faith, are uncertain about the validity or applicability of the order, they are still permitted to render care as if the order did not exist. Emergency medical service providers who act due to this uncertainty will not be criminally or civilly liable, nor will they face administrative sanctions. 20 Pa. C.S.A. § 5487(c).

Practice Tip: While out-of-state OOH-DNRs that are issued consistent with the laws of Pennsylvania are valid pursuant to 20 Pa. C.S.A. § 5487(d), practitioners may wish to recommend that clients having such orders nonetheless adopt an in-state OOH-DNR to ensure that their wishes are fulfilled. All that is required for emergency medical services personnel to render aid as if there is no OOH-DNR is a good faith "uncertainty" about its validity. Although 20 Pa. C.S.A. § 5487(d) instructs emergency medical services personnel to honor "apparently valid" out-of-state OOH-DNR's, it seems prudent to avoid the need to rely upon emergency medical services personnel's particular knowledge of the OOH-DNRs of other states.

D. How is an OOH-DNR revoked?

A patient can revoke an OOH-DNR at any time without regard to his or her physical or mental condition, and in any manner. This includes a verbal revocation, physically destroying the order, necklace, or bracelet, as well as by not displaying the order, necklace, or bracelet. 20 Pa. C.S.A. § 5485.

The patient's surrogate can revoke an OOH-DNR only if the order was originally obtained by the surrogate. If the patient obtained the order, only the patient can revoke the OOH-DNR. 20 Pa. C.S.A. § 5485.

IV. Mental Health Declarations

A. What is a Mental Health Declaration?

A Mental Health Declaration is a document that allows a competent adult to control his or her mental health care through instructions written in advance, as "all capable adults have a qualified right to control decisions relating to their own mental health care." 20 Pa. C.S.A. § 5803. The Mental Health Declaration expresses the wishes of a declarant regarding the initiation, continuation, or refusal of mental health treatment. 20 Pa. C.S.A. § 5823.

B. How is a Mental Health Declaration created?

To create a Mental Health Declaration, an individual must be either eighteen years old or an emancipated minor, and the individual cannot have been deemed incapacitated pursuant to 20 Pa. C.S.A. § 5511 or severely mentally disabled pursuant to Article III of the Mental Health Procedures Act. 20 Pa. C.S.A. § 5822(a).

The Mental Health Declaration must be dated and signed by the declarant with either a signature or a mark. If the declarant is unable to sign the Mental Health Declaration himself or herself, another person may do so at his or her direction. 20 Pa. C.S.A. § 5822(b).

The declaration must also be witnessed by two individuals who are at least eighteen years old, neither of whom is (1) an individual who signed the declaration on behalf of the declarant or (2) a mental health care provider or its agent if the mental health care provider or agent provide mental health services to the declarant. 20 Pa. C.S.A. § 5822(c).

Unlike other documents, such as a Living Will, 20 Pa. C.S.A. § 5807(a)(3) requires an individual to execute or amend his or her Mental Health Declaration at least every two years.

Provided an individual retains capacity to make mental health decisions, the Mental Health Declaration can be amended in a writing that conforms to the same requirements for creating a Mental Health Declaration. 20 Pa. C.S.A. § 5826. If an individual is subject to involuntary treatment pursuant to Article III of the Mental Health Procedures Act, he or she can amend a Mental Health Declaration if the individual is found to be capable of making mental health decisions after examination by a psychiatrist and one of the following: another psychiatrist, a psychologist, a family physician, an attending physician or a mental health treatment professional. 20 Pa. C.S.A. § 5826.

20 Pa. C.S.A. § 5823 provides an example of a form that may be used for this purpose.

C. How is a Mental Health Declaration used?

An individual who creates a Mental Health Declaration has an affirmative responsibility to notify his or her mental health care provider of its existence. Similarly, mental health service providers have a duty to inquire into the existence of a Mental Health Declaration for all of their patients. 20 Pa. C.S.A. § 5807.

Once the Mental Health Declaration is given to the mental health care provider and the conditions stated therein are met, the document becomes operative. Once the mental health care provider has a copy of the declaration, it must be incorporated into the patient's medical record for at least two years after the date of execution. 20 Pa. C.S.A. § 5824.

1. *Compliance Exceptions.*

Attending physicians and mental health care providers are required to comply with the Mental Health Declaration. 20 Pa. C.S.A. § 5804(a). However, there are exceptions to compliance with a Mental Health Declaration just as there are for a Living Will. For instance, "[i]f an attending physician or other mental health care provider cannot in good conscience comply with a declaration or mental health care decision of a mental health care agent because the instructions are contrary to accepted clinical practice and medical standards or because treatment is unavailable or if the policies of a mental health care provider preclude compliance with a declaration or mental health care decision of a mental health care agent," the attending physician need not comply. However, in that event, other obligations arise.

Once an attending physician receives the Mental Health Declaration and knows that he or she will not be able to comply with it, the physician must inform either: 1) the declarant if he or she is competent; 2) the substitute named in the declaration if the declarant is incompetent; 3) the guardian or other legal representative; or 4) the mental health care agent. This duty to inform is imposed as soon as any possibility of noncompliance emerges. 20 Pa. C.S.A. § 5804(a).

In any situation in which noncompliance is a possibility, the attending physician must "make every reasonable effort" to transfer the patient to a physician who will comply. While this transfer is pending, the patient is to be treated consistent with the Mental Health Declaration. 20 Pa. C.S.A. § 5804(b).

D. How is a Mental Health Declaration revoked?

The declarant may revoke the mental health declaration at any time, in whole or in part, either orally or in writing, unless the individual has been found to be

incapable of making mental health decisions or the individual has been involuntarily committed. This revocation becomes effective upon communication to the attending physician or other mental health care provider of the intent to revoke. The attending physician or other mental health care provider must then make the revocation part of the individual's mental health record. 20 Pa. C.S.A. § 5825.

Even if not revoked, the Mental Health Declaration will lapse after two years have passed since its execution unless the document has been invoked and is then in effect. 20 Pa. C.S.A. § 5824. In that event, the Declaration will remain valid until the declarant becomes capable.

V. Mental Health Power of Attorney

A. What is a Mental Health Power of Attorney?

A Mental Health Power of Attorney is a writing made by a principal to designate an agent to make mental health care decisions for the principal. 20 Pa. C.S.A. § 5802.

B. How is a Mental Health Power of Attorney created?

To create a Mental Health Power of Attorney, an individual must be either eighteen years old or an emancipated minor, and the individual cannot have been adjudicated as an incapacitated person pursuant to 20 Pa. C.S.A. § 5511 or found to be severely mentally disabled pursuant to Article III of the Mental Health Procedures Act. 20 Pa. C.S.A. § 5832(a).

A Mental Health Power of Attorney may be in the statutorily provided form or any other written form that: 1) identifies the principal; 2) appoints a mental health care agent; and 3) declares that the principal authorizes the mental health care agent to make mental health care decisions on behalf of the principal. 20 Pa. C.S.A. § 5833(c).

Optional provisions in the Mental Health Power of Attorney include:

1. Limitations upon the authority of the agent;
2. Indication of the principal's intent regarding the initiation, continuation or refusal of mental health treatment,
3. Nomination of a guardian of the person of the principal, and
4. Any other provisions as specified by the principal regarding the implementation of mental health care decisions and related actions by the mental health care agent.

20 Pa. C.S.A. § 5833(b).

Successor mental health care agents may be appointed, and they must act in the order listed unless expressly provided otherwise by the principal. Unless related to the principal by blood, marriage or adoption, the following individuals may not be appointed as agents:

1. The principal's attending physician or other mental health care provider or an employee of the attending physician or other mental health care provider.

2. An owner, operator or employee of a residential facility in which the principal receives care.

20 Pa. C.S.A. § 5835.

Note: A Mental Health Power of Attorney differs substantially from a Health Care Power of Attorney with regard to the presumption concerning multiple and successor agents. A Health Care Power of Attorney presumes multiple listed agents are appointed to act jointly (20 Pa. C.S.A. § 5455) while the corresponding Mental Health Power of Attorney provision presumes multiple listed agents are successor agents (20 Pa. C.S.A. § 5835). Nowhere do the relevant statutes expressly address the appointment of joint agents under a Mental Health Power of Attorney.

The Mental Health Power of Attorney itself must be dated and signed by the declarant by either signature or mark. If the declarant is unable to sign the Mental Health Power of Attorney, another may do so at his or her direction. 20 Pa. C.S.A. § 5832(b).

The Mental Health Power of Attorney must be witnessed by two individuals who are at least eighteen years old and neither of whom is (1) an individual who signed the declaration on behalf of the declarant or (2) a mental health care provider or its agent that provide mental health services to the declarant. 20 Pa. C.S.A. § 5832(c).

Provided an individual retains capacity to make mental health decisions, the Mental Health Declaration may be amended in a writing that conforms to the same requirements for creating one. 20 Pa. C.S.A. § 5840.

Nothing in Subchapter C of Chapter 58 will limit the validity of a Mental Health Power of Attorney created prior to January 31, 2005. Additionally, out-of-state Mental Health Powers of Attorney executed in compliance with that state's laws are valid in Pennsylvania, except to the extent that they allow an agent to make decisions inconsistent with Pennsylvania law. 20 Pa. C.S.A. § 5845.

C. How is a Mental Health Power of Attorney used?

Once an individual has created a Mental Health Power of Attorney, he or she has an affirmative responsibility to notify the relevant mental health care provider of its existence. Similarly, mental health service providers have a duty to inquire into the existence of a Mental Health Power of Attorney for all of their patients. 20 Pa. C.S.A. § 5807.

Once the Mental Health Power of Attorney is given to the mental health care provider and the conditions stated therein are met, the document becomes operative. 20 Pa. C.S.A. § 5834.

Once the Mental Health Power of Attorney becomes operative, "a mental health care agent may make any mental health care decision and exercise any right and power regarding the principal's care, custody and mental health care treatment that the principal could have made and exercised." 20 Pa. C.S.A. § 5836.

The authority of the mental health care agent is limited by statute and may be further limited by the document itself. 20 Pa. C.S.A. § 5836(b) prohibits a mental health power of attorney from conveying the power to relinquish parental rights or consent to psychosurgery. 20 Pa. C.S.A. § 5836(c) prohibits the mental health care agent from consenting to electroconvulsive therapy or to experimental procedures or research, unless the Mental Health Power of Attorney specifically allows for it. The provided form addresses both of these subjects. See 20 Pa. C.S.A. § 5833; Annex B.

When making mental health care decisions for the principal, the agent must gather information on the principal's prognosis and acceptable medical alternatives regarding diagnosis, treatments, and supportive care. The agent must also follow any clear written or verbal directions of the principal that cover the situation in question, as well as the agent's assessment of the principal's preferences. 20 Pa. C.S.A. § 5836(d). If the Mental Health Power of Attorney does not contain instructions for a particular situation, the agent must make mental health care decisions "conforming with the mental health care agent's assessment of the principal's preferences." 20 Pa. C.S.A. § 5836(d).

Regarding health care information relating to the principal, the mental health care agent has the same rights as the principal to "request, examine, copy and consent or refuse to consent to disclosure of medical or other health care information." However, the mental health care agent may not disclose the principal's health care information except as is necessary to perform his or her duties as agent, or as required by law. 20 Pa. C.S.A. § 5836(e).

If the principal is later adjudicated an incapacitated person, the Mental Health Power of Attorney will remain in effect. The preference is to allow the current agent to continue acting as such. If, after thorough examination, the court decides to grant these same powers to a guardian, the guardian will be bound by the same obligations applicable to the agent. 20 Pa. C.S.A. § 5841.

D. <u>How is a Mental Health Power of Attorney revoked?</u>

A Mental Health Power of Attorney can be revoked by the principal at any time, either orally or in writing, in whole or in part, unless the principal has been found to be incapable of making mental health treatment decisions or the principal has been involuntarily committed. If the individual is currently involuntarily committed, he or she may revoke the Mental Health Power of Attorney only if "found to be capable of making mental health decisions after examination by a psychiatrist and one of the following: another psychiatrist, a psychologist, a family physician, an attending physician or a mental health treatment professional." 20 Pa. C.S.A. § 5839.

The revocation should be communicated to the attending physician or other mental health care provider by the principal or a witness to the revocation. The

attending physician or other mental health care provider is then required to make the revocation a part of the principal's medical record. 20 Pa. C.S.A. § 5839.

Even if not revoked, the Mental Health Power of Attorney will lapse after two years have passed since the execution. However, as with a Mental Health Declaration, the document will not lapse if it has been invoked and is in use. 20 Pa. C.S.A. § 5834.

While not a revocation of the Mental Health Power of Attorney, a court may remove the mental health care agent for the following reasons: 1) death or incapacity; 2) noncompliance with the Mental Health Power of Attorney; 3) physical assault or threats of harm; 4) coercion; 5) voluntary withdrawal by the agent; or 6) divorce. Once removed, the successor agent will assume responsibility. If no successor is named, the mental health care provider is required to follow any instructions in the power of attorney. 20 Pa. C.S.A. § 5837. Regarding divorce, a spouse loses his or her designation as a mental health care agent once an action in divorce is filed, not once the divorce is finalized. 20 Pa. C.S.A. § 5838.

Additionally, a later-in-time Power of Attorney having a provision that conflicts with an earlier Mental Health Power of Attorney provision will not negate the older Mental Health Power of Attorney's provision. However, a later-in-time Mental Health Power of Attorney or Mental Health Declaration will control if there is a conflict with an earlier Mental Health Power of Attorney. 20 Pa. C.S.A. § 5844.

Combined Form–Health Care Power of Attorney and Living Will

20 Pa.C.S.A. § 5471

§ 5471. Example

Effective: January 29, 2007

The following is an example of a document that combines a living will and health care power of attorney:

DURABLE HEALTH CARE
POWER OF ATTORNEY AND
HEALTH CARE TREATMENT INSTRUCTIONS
(LIVING WILL)

PART I
INTRODUCTORY REMARKS ON
HEALTH CARE DECISION MAKING

You have the right to decide the type of health care you want.

Should you become unable to understand, make or communicate decisions about medical care, your wishes for medical treatment are most likely to be followed if you express those wishes in advance by:

(1) naming a health care agent to decide treatment for you; and

(2) giving health care treatment instructions to your health care agent or health care provider.

An advance health care directive is a written set of instructions expressing your wishes for medical treatment. It may contain a health care power of attorney, where you name a person called a "health care agent" to decide treatment for you, and a living will, where you tell your health care agent and health care providers your choices regarding the initiation, continuation, withholding or withdrawal of life-sustaining treatment and other specific directions.

You may limit your health care agent's involvement in deciding your medical treatment so that your health care agent will speak for you only when you are unable to speak for yourself or you may give your health care agent the power to speak for you immediately. This combined form gives your health care agent the power to speak for you only when you are unable to speak for yourself. A living will cannot be followed unless your attending physician determines that you lack the ability to understand, make or communicate health care decisions for yourself and you are either permanently unconscious or you have an end-stage medical condition, which is a condition that will result in death despite the introduction or continuation of medical treatment. You, and not your health care agent, remain responsible for the cost of your medical care.

If you do not write down your wishes about your health care in advance, and if later you become unable to understand, make or communicate these decisions, those wishes may not be honored because they may remain unknown to others.

A health care provider who refuses to honor your wishes about health care must tell you of its refusal and help to transfer you to a health care provider who will honor your wishes.

You should give a copy of your advance health care directive (a living will, health care power of attorney or a

document containing both) to your health care agent, your physicians, family members and others whom you expect would likely attend to your needs if you become unable to understand, make or communicate decisions about medical care. If your health care wishes change, tell your physician and write a new advance health care directive to replace your old one. It is important in selecting a health care agent that you choose a person you trust who is likely to be available in a medical situation where you cannot make decisions for yourself. You should inform that person that you have appointed him or her as your health care agent and discuss your beliefs and values with him or her so that your health care agent will understand your health care objectives.

You may wish to consult with knowledgeable, trusted individuals such as family members, your physician or clergy when considering an expression of your values and health care wishes. You are free to create your own advance health care directive to convey your wishes regarding medical treatment. The following form is an example of an advance health care directive that combines a health care power of attorney with a living will.

NOTES ABOUT THE USE OF THIS FORM

If you decide to use this form or create your own advance health care directive, you should consult with your physician and your attorney to make sure that your wishes are clearly expressed and comply with the law.

If you decide to use this form but disagree with any of its statements, you may cross out those statements.

You may add comments to this form or use your own form to help your physician or health care agent decide your medical care.

This form is designed to give your health care agent broad powers to make health care decisions for you whenever you cannot make them for yourself. It is also designed to express a desire to limit or authorize care if you have an end-stage medical condition or are permanently unconscious. If you do not desire to give your health care agent broad powers, or you do not wish to limit your care if you have an end-stage medical condition or are permanently unconscious, you may wish to use a different form or create your own. YOU SHOULD ALSO USE A DIFFERENT FORM IF YOU WISH TO EXPRESS YOUR PREFERENCES IN MORE DETAIL THAN THIS FORM ALLOWS OR IF YOU WISH FOR YOUR HEALTH CARE AGENT TO BE ABLE TO SPEAK FOR YOU IMMEDIATELY. In these situations, it is particularly important that you consult with your attorney and physician to make sure that your wishes are clearly expressed.

This form allows you to tell your health care agent your goals if you have an end-stage medical condition or other extreme and irreversible medical condition, such as advanced Alzheimer's disease. Do you want medical care applied aggressively in these situations or would you consider such aggressive medical care burdensome and undesirable?

You may choose whether you want your health care agent to be bound by your instructions or whether you want your health care agent to be able to decide at the time what course of treatment the health care agent thinks most fully reflects your wishes and values.

If you are a woman and diagnosed as being pregnant at the time a health care decision would otherwise be made pursuant to this form, the laws of this Commonwealth prohibit implementation of that decision if it directs that life-sustaining treatment, including nutrition and hydration, be withheld or withdrawn from you, unless your attending physician and an obstetrician who have examined you certify in your medical record that the life-sustaining treatment:

(1) will not maintain you in such a way as to permit the continuing development and live birth of the unborn child;

(2) will be physically harmful to you; or

(3) will cause pain to you that cannot be alleviated by medication.

A physician is not required to perform a pregnancy test on you unless the physician has reason to believe that you may be pregnant.

Pennsylvania law protects your health care agent and health care providers from any legal liability for following in

good faith your wishes as expressed in the form or by your health care agent's direction. It does not otherwise change professional standards or excuse negligence in the way your wishes are carried out. If you have any questions about the law, consult an attorney for guidance.

This form and explanation is not intended to take the place of specific legal or medical advice for which you should rely upon your own attorney and physician.

PART II
DURABLE HEALTH CARE
POWER OF ATTORNEY

I_____, of _____ County, Pennsylvania, appoint the person named below to be my health care agent to make health and personal care decisions for me.

Effective immediately and continuously until my death or revocation by a writing signed by me or someone authorized to make health care treatment decisions for me, I authorize all health care providers or other covered entities to disclose to my health care agent, upon my agent's request, any information, oral or written, regarding my physical or mental health, including, but not limited to, medical and hospital records and what is otherwise private, privileged, protected or personal health information, such as health information as defined and described in the Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191, 110 Stat. 1936), the regulations promulgated thereunder and any other State or local laws and rules. Information disclosed by a health care provider or other covered entity may be redisclosed and may no longer be subject to the privacy rules provided by 45 C.F.R. Pt. 164.

The remainder of this document will take effect when and only when I lack the ability to understand, make or communicate a choice regarding a health or personal care decision as verified by my attending physician. My health care agent may not delegate the authority to make decisions.

MY HEALTH CARE AGENT HAS ALL OF THE FOLLOWING POWERS SUBJECT TO THE HEALTH CARE TREATMENT INSTRUCTIONS THAT FOLLOW IN PART III (CROSS OUT ANY POWERS YOU DO NOT WANT TO GIVE YOUR HEALTH CARE AGENT):

1. To authorize, withhold or withdraw medical care and surgical procedures.

2. To authorize, withhold or withdraw nutrition (food) or hydration (water) medically supplied by tube through my nose, stomach, intestines, arteries or veins.

3. To authorize my admission to or discharge from a medical, nursing, residential or similar facility and to make agreements for my care and health insurance for my care, including hospice and/or palliative care.

4. To hire and fire medical, social service and other support personnel responsible for my care.

5. To take any legal action necessary to do what I have directed.

6. To request that a physician responsible for my care issue a do-not-resuscitate (DNR) order, including an out-of-hospital DNR order, and sign any required documents and consents.

APPOINTMENT OF HEALTH CARE AGENT

I appoint the following health care agent:

Health care agent:_____ (Name and relationship)

Address:_____

_____

Telephone Number: Home_____ Work_____

E-mail:_____

IF YOU DO NOT NAME A HEALTH CARE AGENT, HEALTH CARE PROVIDERS WILL ASK YOUR FAMILY OR AN ADULT WHO KNOWS YOUR PREFERENCES AND VALUES FOR HELP IN DETERMINING YOUR WISHES FOR TREATMENT. NOTE THAT YOU MAY NOT APPOINT YOUR DOCTOR OR OTHER HEALTH CARE PROVIDER AS YOUR HEALTH CARE AGENT UNLESS RELATED TO YOU BY BLOOD, MARRIAGE OR ADOPTION.

If my health care agent is not readily available or if my health care agent is my spouse and an action for divorce is filed by either of us after the date of this document, I appoint the person or persons named below in the order named. (It is helpful, but not required, to name alternative health care agents.)

First Alternative Health Care Agent: _____ (Name and relationship)

Address:_____

_____

Telephone Number: Home_____ Work_____

E-mail:_____

Second Alternative Health Care Agent: _____ (Name and relationship)

Address:_____

_____

Telephone Number: Home_____ Work_____

E-mail:_____

GUIDANCE FOR HEALTH CARE AGENT (OPTIONAL)

GOALS

If I have an end-stage medical condition or other extreme irreversible medical condition, my goals in making medical decisions are as follows (insert your personal priorities such as comfort, care, preservation of mental function, etc.): _____

_____

SEVERE BRAIN DAMAGE OR BRAIN DISEASE

If I should suffer from severe and irreversible brain damage or brain disease with no realistic hope of significant recovery, I would consider such a condition intolerable and the application of aggressive medical care to be burdensome. I therefore request that my health care agent respond to any intervening (other and separate) life-threatening conditions in the same manner as directed for an end-stage medical condition or state of permanent unconsciousness as I have indicated below.

Initials_____I agree

Initials_____I disagree

PART III
HEALTH CARE TREATMENT INSTRUCTIONS IN THE EVENT OF END-STAGE MEDICAL CONDITION OR PERMANENT UNCONSCIOUSNESS
(LIVING WILL)

The following health care treatment instructions exercise my right to make my own health care decisions. These instructions are intended to provide clear and convincing evidence of my wishes to be followed when I lack the capacity to understand, make or communicate my treatment decisions:

IF I HAVE AN END-STAGE MEDICAL CONDITION (WHICH WILL RESULT IN MY DEATH, DESPITE THE INTRODUCTION OR CONTINUATION OF MEDICAL TREATMENT) OR AM PERMANENTLY UNCONSCIOUS SUCH AS AN IRREVERSIBLE COMA OR AN IRREVERSIBLE VEGETATIVE STATE AND THERE IS NO REALISTIC HOPE OF SIGNIFICANT RECOVERY, ALL OF THE FOLLOWING APPLY (CROSS OUT ANY TREATMENT INSTRUCTIONS WITH WHICH YOU DO NOT AGREE):

1. I direct that I be given health care treatment to relieve pain or provide comfort even if such treatment might shorten my life, suppress my appetite or my breathing, or be habit forming.

2. I direct that all life prolonging procedures be withheld or withdrawn.

3. I specifically do not want any of the following as life prolonging procedures: (If you wish to receive any of these treatments, write “I do want” after the treatment)

heart-lung resuscitation (CPR)_____

mechanical ventilator (breathing machine)_____

dialysis (kidney machine)_____

surgery_____

chemotherapy_____

radiation treatment_____

antibiotics_____

Please indicate whether you want nutrition (food) or hydration (water) medically supplied by a tube into your nose, stomach, intestine, arteries, or veins if you have an end-stage medical condition or are permanently unconscious and there is no realistic hope of significant recovery.

(Initial only one statement.)

TUBE FEEDINGS

_____I want tube feedings to be given

OR

NO TUBE FEEDINGS

_____I do not want tube feedings to be given.

HEALTH CARE AGENT'S USE OF INSTRUCTIONS

(INITIAL ONE OPTION ONLY)

_____My health care agent must follow these instructions.

OR

_____These instructions are only guidance. My health care agent shall have final say and may override any of my instructions. (Indicate any exceptions)

If I did not appoint a health care agent, these instructions shall be followed.

LEGAL PROTECTION

Pennsylvania law protects my health care agent and health care providers from any legal liability for their good faith actions in following my wishes as expressed in this form or in complying with my health care agent's direction. On behalf of myself, my executors and heirs, I further hold my health care agent and my health care providers harmless and indemnify them against any claim for their good faith actions in recognizing my health care agent's authority or in following my treatment instructions.

ORGAN DONATION

(INITIAL ONE OPTION ONLY)

_____I consent to donate my organs and tissues at the time of my death for the purpose of transplant, medical study or education. (Insert any limitations you desire on donation of specific organs or tissues or uses for donation of organs and tissues.)

OR

_____I do not consent to donate my organs or tissues at the time of my death.

SIGNATURE

Having carefully read this document, I have signed it this _____ day of _____, 20_____, revoking

all previous health care powers of attorney and health care treatment instructions.

_____

(SIGN FULL NAME HERE FOR HEALTH CARE POWER OF ATTORNEY AND HEALTH CARE TREATMENT INSTRUCTIONS)

WITNESS:_____

WITNESS:_____

Two witnesses at least 18 years of age are required by Pennsylvania law and should witness your signature in each other's presence. A person who signs this document on behalf of and at the direction of a principal may not be a witness. (It is preferable if the witnesses are not your heirs, nor your creditors, nor employed by any of your health care providers.

NOTARIZATION (OPTIONAL)

(Notarization of document is not required by Pennsylvania law, but if the document is both witnessed and notarized, it is more likely to be honored by the laws of some other states.)

On this_____ day of _____, 20_____, before me personally appeared the aforesaid declarant and principal, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he/she executed the same as his/her free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the County of _____, State of _____, the day and year first above written.

_____

Notary Public

_____

My commission expires

Combined Form–Mental Health Declaration and Mental Health Power of Attorney

20 Pa.C.S.A. § 5808

§ 5808. Combining mental health instruments

Effective: January 31, 2005

(a) General rule.--A declaration and mental health power of attorney may be combined into one mental health document.

(b) Form.--A combined declaration and mental health power of attorney may be in the following form or any other written form which contains the information required under Subchapters B (relating to mental health declarations) and C (relating to mental health powers of attorney):

Combined Mental Health Care Declaration and Power of Attorney Form

Part I. Introduction.

I, _____, having capacity to make mental health decisions, willfully and voluntarily make this declaration and power of attorney regarding my mental health care.

I understand that mental health care includes any care, treatment, service or procedure to maintain, diagnose, treat or provide for mental health, including any medication program and therapeutic treatment. Electroconvulsive therapy may be administered only if I have specifically consented to it in this document. I will be the subject of laboratory trials or research only if specifically provided for in this document. Mental health care does not include psychosurgery or termination of parental rights.

I understand that my incapacity will be determined by examination by a psychiatrist and one of the following: another psychiatrist, psychologist, family physician, attending physician or mental health treatment professional. Whenever possible, one of the decision makers will be one of my treating professionals.

Part II. Mental Health Declaration.

A. When this declaration becomes effective.

This declaration becomes effective at the following designated time:

( ) When I am deemed incapable of making mental health care decisions.

( ) When the following condition is met:

(List condition)

B. Treatment preferences.

1. Choice of treatment facility.

( ) In the event that I require commitment to a psychiatric treatment facility, I would prefer to be admitted to the following facility:

(Insert name and address of facility)

( ) In the event that I require commitment to a psychiatric treatment facility, I do not wish to be committed to the

following facility:

(Insert name and address of facility)

I understand that my physician may have to place me in a facility that is not my preference.

2. Preferences regarding medications for psychiatric treatment.

( ) I consent to the medications that my treating physician recommends.

( ) I consent to the medications that my treating physician recommends with the following exception, preference or limitation:

(List medication and reason for exception, preference or limitation)

The exception, preference or limitation applies to generic, brand name and trade name equivalents. I understand that dosage instructions are not binding on my physician.

( ) I do not consent to the use of any medications.

( ) I have designated an agent under the power of attorney portion of this document to make decisions related to medication.

3. Preferences regarding electroconvulsive therapy (ECT).

( ) I consent to the administration of electroconvulsive therapy.

( ) I do not consent to the administration of electroconvulsive therapy.

( ) I have designated an agent under the power of attorney portion of this document to make decisions related to electroconvulsive therapy.

4. Preferences for experimental studies or drug trials.

( ) I consent to participation in experimental studies if my treating physician believes that the potential benefits to me outweigh the possible risks to me.

( ) I have designated an agent under the power of attorney portion of this document to make decisions related to experimental studies.

( ) I do not consent to participation in experimental studies.

( ) I consent to participation in drug trials if my treating physician believes that the potential benefits to me outweigh the possible risks to me.

( ) I have designated an agent under the power of attorney portion of this document to make decisions related to drug trials.

( ) I do not consent to participation in any drug trials.

5. Additional instructions or information.

Examples of other instructions or information that may be included:

Activities that help or worsen symptoms.

Type of intervention preferred in the event of a crisis.

Mental and physical health history.

Dietary requirements.

Religious preferences.

Temporary custody of children.

Family notification.

Limitations on the release or disclosure of mental health records.

Other matters of importance.

C. Revocation.

This declaration may be revoked in whole or in part at any time, either orally or in writing, as long as I have not been found to be incapable of making mental health decisions.

My revocation will be effective upon communication to my attending physician or other mental health care provider, either by me or a witness to my revocation, of the intent to revoke. If I choose to revoke a particular instruction contained in this declaration in the manner specified, I understand that the other instructions contained in this declaration will remain effective until:

(1) I revoke this declaration in its entirety;

(2) I make a new combined mental health declaration and power of attorney; or

(3) two years after the date this document was executed.

D. Termination.

I understand that this declaration will automatically terminate two years from the date of execution unless I am deemed incapable of making mental health care decisions at the time that this declaration would expire.

(Specify date)

E. Preference as to a court-appointed guardian.

I understand that I may nominate a guardian of my person for consideration by the court if incapacity proceedings are commenced under 20 Pa.C.S. § 5511. I understand that the court will appoint a guardian in accordance with my most recent nomination except for good cause or disqualification. In the event a court decides to appoint a guardian, I desire the following person to be appointed:

(Insert name, address, telephone number of the designated person)

( ) The appointment of a guardian of my person will not give the guardian the power to revoke, suspend or terminate this declaration.

( ) Upon appointment of a guardian, I authorize the guardian to revoke, suspend or terminate this declaration.

Part III. Mental Health Power of Attorney.

I, _____, having the capacity to make mental health decisions, authorize my designated health care agent to make certain decisions on my behalf regarding my mental health care. If I have not expressed a choice in this document or in the accompanying declaration, I authorize my agent to make the decision that my agent determines is the decision I would make if I were competent to do so.

A. Designation of agent.

I hereby designate and appoint the following person as my agent to make mental health care decisions for me as authorized in this document. This authorization applies only to mental health decisions that are not addressed in the accompanying signed declaration.

(Insert name of designated person)

Signed:

(My name, address, telephone number)

Witnesses' signatures:

(Insert names, addresses, telephone numbers of witnesses)

Agent's acceptance:

I hereby accept designation as mental health care agent for

(Insert name of declarant)

Agent's signature:

(Insert name, address, telephone number of designated person)

B. Designation of alternative agent.

In the event that my first agent is unavailable or unable to serve as my mental health care agent, I hereby designate and appoint the following individual as my alternative mental health care agent to make mental health care decisions for me as authorized in this document:

(Insert name of designated person)

Signed:

(My name, address, telephone number)

Witnesses' signatures:

(Insert names, addresses, telephone numbers of witnesses)

Alternative agent's acceptance:

I hereby accept designation as alternative mental health care agent for (Insert name of declarant)

Alternative agent's signature:

(Insert name, address, telephone number of alternative agent)

C. When this power of attorney become effective.

This power of attorney will become effective at the following designated time:

( ) When I am deemed incapable of making mental health care decisions.

( ) When the following condition is met:

(List condition)

D. Authority granted to my mental health care agent.

I hereby grant to my agent full power and authority to make mental health care decisions for me consistent with the instructions and limitations set forth in this document. If I have not expressed a choice in this power of attorney or in the accompanying declaration, I authorize my agent to make the decision that my agent determines is the decision I would make if I were competent to do so.

(1) Preferences regarding medications for psychiatric treatment.

( ) My agent is authorized to consent to the use of any medications after consultation with my treating psychiatrist and any other persons my agent considers appropriate.

( ) My agent is not authorized to consent to the use of any medications.

(2) Preferences regarding electroconvulsive therapy (ECT).

( ) My agent is authorized to consent to the administration of electroconvulsive therapy.

( ) My agent is not authorized to consent to the administration of electroconvulsive therapy.

(3) Preferences for experimental studies or drug trials.

( ) My agent is authorized to consent to my participation in experimental studies if, after consultation with my treating physician and any other individuals my agent deems appropriate, my agent believes that the potential benefits to me outweigh the possible risks to me.

( ) My agent is not authorized to consent to my participation in experimental studies.

( ) My agent is authorized to consent to my participation in drug trials if, after consultation with my treating physician and any other individuals my agent deems appropriate, my agent believes that the potential benefits to me outweigh the possible risks to me.

( ) My agent is not authorized to consent to my participation in drug trials.

E. Revocation.

This power of attorney may be revoked in whole or in part at any time, either orally or in writing, as long as I have not been found to be incapable of making mental health decisions.

My revocation will be effective upon communication to my attending physician or other mental health care provider, either by me or a witness to my revocation, of the intent to revoke. If I choose to revoke a particular instruction contained in this power of attorney in the manner specified, I understand that the other instructions contained in this power of attorney will remain effective until:

(1) I revoke this power of attorney in its entirety;

(2) I make a new combined mental health care declaration and power of attorney; or

(3) two years from the date this document was executed. I understand that this power of attorney will automatically terminate two years from the date of execution unless I am deemed incapable of making mental health care decisions at the time that the power of attorney would expire.

I am making this combined mental health care declaration and power of attorney on the (insert day) day of (insert month), (insert year).

My signature:

(My name, address, telephone number)

Witnesses' signatures:

(Names, addresses, telephone numbers of witnesses).

If the principal making this combined mental health care declaration and power of attorney is unable to sign this document, another individual may sign on behalf of and at the direction of the principal.

Signature of person signing on my behalf:

(Name, address, telephone number)

Chapter Eight
Section 3

Ethical Considerations in Drafting Powers of Attorney

Submitted By
Mary Jo Corsetti, Esq.
Williams Coulson Johnson Lloyd Parker & Tedesco, LLC
Pittsburgh

Ethical Considerations in Drafting Powers of Attorney[1]

I. The Basics

The guidance given to the practitioner herein is based on the Pennsylvania Rules of Professional Conduct and selected Ethics Opinions issued by the Pennsylvania Bar Association and Philadelphia Bar Association. Additional ethics topics covered in depth and other references can be found in the appendices to these materials.

1. What are the Rules of Professional Conduct?

   The Rules of Professional Conduct, promulgated by the Pennsylvania Supreme Court, first took effect on April 1, 1988, and have been revised and updated several times since then. The Rules are based on the ABA Model Rules of Professional Conduct and replaced Pennsylvania's Code of Professional Responsibility.

2. Where can the Rules be found?

   The Rules can be found at 204 Pa. Code §81.1 et seq., as an appendix to Title 42 of Purdon's Consolidated Statutes, as well as in books containing the Pennsylvania Rules of Court and at *www.padisciplinaryboard.org*. Selected Rules are also reproduced as an appendix to these materials.

3. How detailed and helpful are the Rules?

   In most circumstances, the Rules are not detailed enough to serve as "black letter" rules. Furthermore, they seem more applicable to litigation and other clearly adversarial proceedings than an estate planner's typical situation. It is quite difficult to generalize about appropriate resolutions of ethical dilemmas because ethical questions are usually quite fact-specific. Even more challenging, many Rules require the lawyer to engage in a subjective analysis of the situation, particularly in conflict issues. Over time, though, frequent reading and discussion of the Rules help the lawyer become more sensitive to the "red flags" that frequently fly, usually sufficiently in advance, to steer the lawyer clear of problems.

4. How may I get help with interpreting the Rules?

   The Pennsylvania Bar Association and several county bar associations[2] each have an ethics "hotline." The Pennsylvania Bar Association number is 1-800-932-0311, extension

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[1] These materials are adapted from the excellent materials found in PBI's Drafting Wills and Trusts in Pennsylvania (First Edition), by Martin J. Hagan, Esquire, which built upon the earlier (and also excellent) work of Jonathan Ellis, Esquire, and J.E. (Jeb) Bell, Jr., Esquire.

[2] The Philadelphia Bar Association's professional guidance hotline number is 1-215-238-6328. The Allegheny County Bar Association (ACBA) has "Ethics Duty Officers" who provide advice to inquiring attorneys. The names of these officers can be found by calling the ACBA at (412) 261-6161.

2214. These bar associations also have committees that issue written opinions. The identity of the inquiring lawyer is not disclosed. The Pennsylvania Bar Association's committee is the Committee on Legal Ethics and Professional Responsibility. The Philadelphia Bar Association's committee is the Professional Guidance Committee.

II. Diligence and Care

Diligence and Care Situations: From time to time, a client places the lawyer in situations that make it very difficult for the lawyer to practice law the way he or she should and would prefer.

1. On a very busy day, one of your most valued clients calls to tell you that he and his wife are going to be leaving on vacation the next day and they need to sign some "simple" powers of attorney "in case something happens". How do you respond?

2. Another valued client calls and asks you to prepare a general power of attorney for her aged parent, whom you have never met. She wants the document hand-delivered to her so that she can take it to her parent in a nursing home to have it signed over the weekend. Do you do it?

3. A new client has asked you to prepare financial and health care powers of attorney as well as a Mental Health Power of Attorney. You have prepared plenty of financial and health care powers of attorney over the years but never a Mental Health Power of Attorney. What do you do?

4. Because of the other demands of your practice, your paralegal usually drafts these documents. Is that a problem?

Response:

All lawyers who have practiced for any length of time have faced undue pressure from important clients to do things that may skirt the bounds of ethical conduct. Apart from common sense, and logical concerns of potential malpractice, all such situations implicate Rule 1.1, which reminds us that we must have the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Rule 1.3 provides that we must also "act with reasonable diligence" in representing the client.

1. **On a very busy day, one of your most valued clients calls to tell you that he and his wife are going to be leaving on vacation the next day and they need to sign some "simple" powers of attorney "in case something happens". How do you respond?**

If a client places us under such pressure that we cannot properly obtain the necessary information and discuss issues thoroughly with that client, we should not undertake the assignment. With cell phones, e-mail, computers and fax machines, we can do things much faster today, but these wonderful technologies may still not put us in a position to help the client adequately. If the client is unsure about aspects of the documents, there is the temptation to agree with the client that the documents are "only temporary," but what if the client becomes incapacitated in the meantime? The "temporary" documents may well be the "permanent" ones. Even an attempt to reduce to writing the "temporary" nature of the assignment and the effort to limit the scope of responsibility is not appropriate. If there is insufficient time to handle the matter properly, we lawyers are best advised not to start the project or at least tailor the project to what can be accomplished within the bounds of legal ethics. In the specific context of powers of attorney, you may very well be able to assist the client in the above example and meet your ethical obligations. What if the client says that they are leaving later that day? What if he also needs other estate planning documents?

2. **Another valued client calls and asks you to prepare a general power of attorney for her aged parent, whom you have never met. She wants the document hand-delivered to her so that she can take it to her parent in a nursing home to have it signed over the weekend. Do you do it?**

If you frequently handle estate planning matters, you will undoubtedly get this call, or at least one that is very similar. Who is your client here? The request by a client to prepare a general power of attorney for another person, typically the client's parent, is not at all unusual. However, the lawyer should consider the client in that situation to be the person for whom the document is being prepared. Rule 1.4(b) requires that we "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation," and Rule 1.2(a) requires us to "abide by a client's decisions concerning the objectives of representation" and to "consult with the client as to the means by which they are to be pursued." Quite obviously, a lawyer who prepares documents for someone the lawyer does not meet may inadvertently become a party to overreaching or fraud. Also, it is important to remember that in this context, the client's parent is the client for purposes of the document that is being prepared. Therefore, it is

important for the lawyer to meet or at least speak with the parent to make sure he or she understands each document and that it reflects his or her wishes.

3. **A new client has asked you to prepare financial and health care powers of attorney as well as a Mental Health Power of Attorney. You have prepared plenty of financial and health care powers of attorney over the years but never a Mental Health Power of Attorney. What do you do?**

   Many of us have been asked by clients to prepare documents with which we are not familiar. Quite often we do not have the luxury of a mentor or another person in the law firm to guide us. Rule 1.1, and the comments thereto, make it clear however, that we may undertake the assignment if the necessary level of competence can be achieved by reasonable preparation. If the assignment is beyond us, and we know we will not be able to obtain the competency within a reasonable period of time, then we do have an obligation to refer the matter to other counsel or promptly associate with a lawyer who has established competence in the field.

4. **Because of the other demands of your practice, your paralegal usually drafts these documents. Is that a problem?**

   As long as the lawyer provides continuing and appropriate supervision pursuant to Rules 5.3 and 5.5, the paralegal may draft the documents. Of course, the lawyer must thoroughly review the documents prior to presenting them to the client for execution.

III. Fee Issues

Questions:

1. What, if anything, do the Rules of Professional Conduct say about the amount we can charge for estate planning services?[3]

2. How should we provide information to our clients about our charges for estate planning services?

3. Another valued client calls in advance of the appearance of her adult child, who would be a new client, to say that she is going to pay the charge for the child's planning? What if the client tells you that her corporation is going to pay the bill for her own planning?

4. A potential client calls you and asks you to prepare Financial Powers of Attorney, Living Wills and Health Care Powers of Attorney for herself and for her husband, but you simply do not have the time. Can you refer it to another attorney and ask for a modest referral fee without meeting with the client or doing any of the drafting yourself?

[3] These materials acknowledge that ethical issues arising in an estate planning context are not necessarily unique to a specific document. Powers of attorney often represent just one portion of the planning services being provided by the attorney, and concerns arising from one portion of the attorney's services may affect the attorney's ability to provide other services as well.

Response:

As we all know, the matter of fees is among the items that we should always discuss with our clients during the first meeting. One of the most significant and frequent complaints from clients relates to fees. Timely and comprehensive fee letters, or even fee agreements, reduce the possibility of, and provide a defense against, such complaints.

1. **What, if anything, do the Rules of Professional Conduct say about the amount we can charge for estate planning services?**

   Rule 1.5 is the basic rule that governs issues pertaining to fees. Rule 1.5(a) states that we lawyers cannot charge an "illegal or clearly excessive fee," without precisely defining what that is, but it does cite factors to consider when determining the appropriateness of a fee. Rule 1.5(b) states that when we have "not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation."

2. **How should we provide information to our clients about our charges for estate planning services?**

   Most experienced practitioners send a brief letter after the initial consultation summarizing the discussion, the documents to be prepared, other issues, such as potential conflicts when representing a married couple, and the fee estimate or basis of calculating it. Only rarely can a lawyer advise a client about fees in advance of the first meeting, because little is known about what services will be needed.

3. **Another valued client calls in advance of the appearance of her adult child, who is a new client, to say that she is going to pay the charge for the child's planning? What if the client tells you that her corporation is going to pay the bill for her own personal planning?**

   A lawyer may accept payment from a third party when rendering services to a client. According to Rule 1.8(f), however, before accepting compensation from the other party, the lawyer must make certain that the client consents, there is no interference with the lawyer's independence of professional judgment or with the client/lawyer relationship, and the information relating to the representation of the client is kept confidential. Rule 5.4(c) is even more direct. It states that "[a] lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." An informal opinion of the American Bar Association (86-1517) provides that a corporation may pay the estate planning bill for an employee as long as the bill rendered to the corporation makes it clear that the statement is rendered for those services. On that basis, the lawyer in this example should be able to bill the corporation, provided the bill makes clear the nature of the legal services.

4. **A potential client calls you and asks you to prepare a Living Will and Health Care Power of Attorney for herself and for her husband, but you simply do not have the time. Can you refer it to another attorney and ask for a modest referral fee without meeting with the client or doing any of the drafting yourself?**

Rule 1.5(e) permits the lawyer to accept a referral fee from the lawyer to whom the matter is sent as long as the client is aware of the referral fee, does not object to it, and the total fee of the two lawyers is neither illegal nor clearly excessive for the services. It is important to note that the Pennsylvania Rules of Professional Conduct allow the acceptance of a referral fee even when the referring lawyer provides no services. (The rule as adopted in most states requires the compensation shared to reflect the actual division of services performed by the lawyers. The rationale for the Pennsylvania version is that the inexperienced or unskilled lawyer is more likely to refer matters rather than retain them if he or she is not required to contribute any services.) Note that the Rule does not appear to state expressly that the attorneys must disclose the fee sharing allocation to the client.

IV. Conflicts of Interest

Questions:

1. Generally speaking, is there any problem representing both spouses for estate planning purposes? What if the clients appear to be a happily married couple, both married for the first time, who have accumulated assets together in joint names from their respective earnings and inheritances. Or what if both parties have been previously married and have their own children and their own assets? Or what if the lawyer has represented both the husband and the wife for years but has just discovered that their marriage is rocky? What if the spouses want to appoint different agents in their respective powers of attorney?

2. What if your valued client brings in his second wife, an unsophisticated and independently wealthy 22-year old, and asks you to prepare powers of attorney appointing your client as her agent? Another valued client, who has two siblings, brings to your office her wealthy and aged parent and suggests provisions for a power of attorney that gives your client complete control. The parent, while present, listens to the requests passively and makes no comment. Do you undertake the representation of that unsophisticated spouse or the parent?

Response:

1. **Generally speaking, is there any problem representing both spouses for estate planning purposes? What if the clients appear to be a happily married couple, both married for the first time, who have accumulated assets together in joint names from their respective earnings and inheritances. Or what if both parties have been previously married and have their own children and their own assets? What if the spouses want to appoint different agents in their respective powers of attorney?**

   There is nothing wrong with the joint representation of husband and wife, just as there is no problem with jointly representing unrelated parties as partners or co-shareholders in business transactions. In fact, marriage does not necessarily, by itself, place limitations on our duties of independent judgment and loyalty, and the lawyer need not assume that a troublesome conflict exists or will exist in the conventional representation of a husband and wife. However, there is potential in some marital relationships for a conflict that would pose a substantial risk that our representation of either spouse would be materially and adversely affected (1) by our own interest, or (2) by our duties to another client or former client, or (3) by our duties to a third person as referred to in Rule 1.7.

   We must always be alert to, and prepare our clients at the outset for, that possibility and what may occur if the possibility becomes a reality. We should also discuss their waiver of the attorney/client privilege. If there is no discussion about the potential conflict, or agreement about how to resolve it, it is generally felt that the representation is truly joint, which conforms to the usual client expectations, and that we and our clients must expect that there will be no secrets, and that the assets, intentions, and expectations of both husband and wife will be known to one another as well as to us. At the first meeting and in a follow-up letter, we should alert the clients to the potential for a conflict, that there can be no secrets, and that if we learn something from one spouse that is significant but that he or she does not want us to share with the other, we may have to withdraw from the representation of both parties as estate planning clients. A sample joint representation engagement letter with conflict waiver language is provided below at Appendix 3 of this chapter.

   There are some practitioners who take the approach that the representation of the husband and wife should be separate, and not joint, and that one spouse may convey to the lawyer confidences of a certain minimal level that the lawyer need not share with the other spouse and that would not give rise to a conflict. This kind of understanding, preferably reduced to writing, is quite practical when dealing with a parent and child, but is not as helpful when representing husband and wife. Whichever approach is taken, the hope is that the warning of the consequence of a potential conflict will discourage the couple from conveying information to the lawyer that would require withdrawal from the representation of both.

   Spouses very often want to designate each other as agent in their financial and health care powers of attorney, particularly if it is a first marriage for each. In subsequent marriages, it is still common for spouses to designate each other as agent, but it is also common for their wishes to diverge regarding the appointment of successor agents. This does not

necessarily present a conflict of interest if both spouses agree to those appointments. However, if one spouse disagrees with the other spouse's appointment of particular agents, the attorney should consider the possible impact on the attorney's obligations to the clients.

2. **What if your valued client brings in his second wife, an unsophisticated and independently wealthy 22-year old, and asks you to prepare powers of attorney appointing your client as her agent? Another valued client, who has two siblings, brings to your office her wealthy and aged parent and suggests provisions for a power of attorney that gives your client complete control. The parent, while present, listens to the requests passively and makes no comment. Do you undertake the representation of that unsophisticated spouse or the parent?**

There is another form of Rule 1.7 conflict that frequently arises when the powerful, valued client brings in a spouse, child, or parent. It is often called a Rule 1.7(a) or "situational" conflict. In these situations, the lawyer is so close to and anxious to please one client, and possibly even likely to be governed by the wishes of that client, that it is very difficult or even impossible to provide the independent judgment and loyalty for the other client, the unsophisticated spouse, child, or parent in his or her dotage, that is required. In these situations, the lawyer must make a determination early on whether it is even worth the risk to represent the other party. The analysis may become easier when the lawyer remembers that if an eruption between the two clients occurs, the lawyer is in danger of having to withdraw from the representation of both. Obviously, it is safer at the outset to refrain from representing the other party so the representation of the valued client is preserved—assuming we can make that client understand just why we should not represent the spouse, child, or parent.

V. The Self-Interest of the Lawyer

Questions:

1. Financial powers of attorney often grant an agent the power to make gifts that might be desirable for estate planning purposes. Should you prepare a financial power of attorney that would allow an agent to make gifts to you or to a member of your immediate family?

2. What if the client asks you to insert a provision in a financial power of attorney directing the agent to retain you as counsel if she becomes unable to manage her affairs?

3. What if the client wants you to serve as the agent?

4. You have a close working relationship with a local bank (or broker, investment advisor, insurance agent, financial planner, etc.) that consistently refers a client to you whenever you refer a client to them. What, if anything, should you say to the client when you recommend that the bank or other referral source be used or retained by the client?

5. May you accept a referral fee from a broker, investment advisor, insurance agent, or financial planner to whom you refer your client?

Response:

1. **Financial powers of attorney often grant an agent the power to make gifts that might be desirable for estate planning purposes. Should you prepare a financial power of attorney that would allow an agent to make gifts to you or to a member of your immediate family?**

   Rule 1.8(c) says:

   > A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close familial relationship.

   At first, it might appear that Rule 1.8(c) does not apply because, in this example, the instrument does not itself require or effectuate the gift; it merely allows a third party (i.e., the agent) to make such a gift in his or her discretion. While this example is arguably not covered by the express language of the Rule, an attorney should find little comfort in such a narrow analysis. Fortunately, the situation described in the example is unlikely to arise except in the case of a family member, and Rule 1.8(c) expressly carves out an exception for such gifts.

   Note also that Rule 1.10(e) provides that the lawyer's partners would be disqualified for the same reasons because the relationship is imputed to them. However, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, in its Formal Opinion 88-156, has opined that the disqualification of a partner may be waived in writing pursuant to Rule 1.7(b) if that partner's representation will not be adversely affected by the relationship with the first lawyer and if the client knowingly waives the conflict.

2. **What if the client asks you to insert a provision in a financial power of attorney directing the agent to retain you as counsel if she becomes unable to manage her affairs?**

   This situation can be analyzed by reference to the law applicable to wills. Fiduciaries cannot be bound to retain a lawyer or law firm by the terms of a will. *Estate of Younger*, 461 A.2d 259 (Pa. Super. 1983), *Worley Estate*, 6 Fiduc. Rep.2d 207 (O.C. Adams 1986), and *Kreider Estate*, 42 Pa.D.&C.2d 46 (C.P. Lebanon 1966). There is no prohibition against inserting a *suggestion* that the lawyer be retained, however, as long as it the client who suggests it and not the attorney. Since the clause is not enforceable in a will in the first place, it is generally not a good idea to include it in a will unless the client specifically requests it. This would also seem to be prudent in the context of a financial power of attorney.

3. **What if the client wants you to serve as the agent?**

A lawyer's suggestion that he or she be named as the agent is not appropriate and is a breach of Rules 1.7(a) and 1.8. If it is done at the client's suggestion, however, there is nothing unethical about it. The lawyer should have the client sign a letter or statement giving the reasons for the choice and showing that other options were considered.

4. **You have a close working relationship with a local bank (or broker, investment advisor, insurance agent, financial planner, etc.) that consistently refers a client to you whenever you refer a client to them. What, if anything, should you say to the client when you recommend that the bank or other referral source be used or retained by the client?**

The reciprocal referral issue is a subtle one, and implicates the Rule 1.7(a), or "situational," conflict involving the lawyer's self-interest. The lawyer can avoid the conflict by referring the client to competent people and institutions, being open with the client about the relationship with the bank (or other referral sources), and by providing other options for the client. Ideally, this should be done in writing.

5. **May you accept a referral fee from a broker, investment advisor, insurance agent, or financial planner to whom you refer your client?**

The self-interest issue has become more vexing with the issuance of Joint Formal Opinion 2000-100 by the Pennsylvania and Philadelphia Bar Associations. The opinion allows lawyers to accept referral fees from an insurance agent, investment advisor, or other person who provides a product or service to the client for referring a client to that service provider, once the lawyer satisfies both Rule 1.7(b) (circumstances under which representation permitted even if concurrent conflict of interest) and Rule 1.8(f) (circumstances under which attorney can receive compensation from person other than client). However, the opinion concludes by noting:

> A lawyer should exercise extreme caution when offered a referral fee by a service provider. Before accepting a referral fee, the lawyer must reasonably believe that accepting the fee will not interfere with the lawyer's exercise of independent professional judgment and duty of loyalty, and the client must consent to payment of the fee only after full disclosure and consultation. *In many cases, the above analysis will lead the lawyer to conclude that the lawyer may not accept the fee or should rebate the fee to the client.*

(Emphasis added.)

VI. The Incapacitated Client

Questions:

1. What do you do if that valued client asks you to meet with her parent to prepare a power of attorney and other documents and tells you that the parent has "good days and bad days" and "memory lapses from time to time"?

2. What if you find the parent is totally mentally incapacitated as a result of Alzheimer's disease? If you decide not to proceed with the drafting assignment after meeting with that parent, what, if any, additional steps can or should you take?

Response:

1. **What do you do if that valued client asks you to meet with her parent to prepare a power of attorney and other documents and tells you that the parent has "good days and bad days" and "memory lapses from time to time"?**

   In the course of the session with the parent, if it appears the communications are satisfactory and the parent understands what is going on, we may rightly conclude that the client is adequately informed and can participate in the representation pursuant to Rules 1.2 and 1.4, that we can be appropriately diligent as required by Rule 1.3, and that we can be thorough as required by Rule 1.1. We may then proceed with the representation. Experienced practitioners are aware that clients can demonstrate various degrees of capacity, and there are great differences in capabilities required of a client in the estate planning context depending on the complexity of the document or the decisions that the client must make.

   If there is a concern in this regard, the lawyer should preserve evidence of the client's mental capacity. This may include preparing a detailed execution memorandum and retaining superseded wills that show the consistency of the testator's wishes. The cases uniformly give great weight to the scrivener's observations of the testator's mental condition as of the time the documents were signed—even more so than the testimony of medical experts and psychiatrists based on postmortem analysis.

   The lawyer must also be on guard against either being governed by the family member who brought him or her to the aging parent or becoming an unwitting enabler in a situation where the procuring client is exerting undue influence on the parent to obtain an *inter vivos* or testamentary gift. (In Pennsylvania, only three facts need to be proved to raise the presumption of undue influence: the receipt of a substantial gift from one with a weakened intellect with whom one has had a confidential relationship.)

2. **What if you find the parent is totally mentally incapacitated as a result of Alzheimer's disease? If you decide not to proceed with the drafting assignment after meeting with that parent, what, if any, additional steps can or should you take?**

   If the parent appears to be totally incapacitated, the lawyer is governed by Rule 1.14. As far as reasonably possible, the lawyer should attempt to maintain a normal client/lawyer relationship with the client. Only if the client cannot adequately act in the client's own interest may the lawyer seek the appointment of a guardian or take other protective action with respect to the client. PBA Informal Opinion 88-72 recommends such action when a lawyer fears a relative of a client is taking advantage of that client, and PBA Informal Opinion 90-89 states that a lawyer may "initiate" guardianship proceedings for a client, where the attorney believes the client in a civil case has become incompetent. See also PBA Informal Opinion 91-36.

VII. Confidentiality

Questions:

1. You have been practicing for many years, but in the course of one week, you receive a series of disconcerting telephone calls from three clients who, along with their spouses, have been long-time estate planning clients. The first comes on a Monday when one client discloses that he recently had an affair. A second client calls to say that she would like you to help her change the beneficiary of one of her significant life insurance policies from her husband to her golf pro. The final call, this one late in the day Friday, is a request that you prepare a codicil naming the client's nurse, with whom he has become "involved," as a beneficiary of a large cash bequest. What if the final call is a request to change the appointment of agents under her powers of attorney because she "has become concerned" about her spouse's judgement? The spouse is also your client, and you have no reason to doubt his capacity.

2. You have just prepared a power of attorney for the child of a valued and very wealthy client, and that client calls the next day to see if she has been named the agent as promised by her child. What do you say?

3. The agent for your totally incapacitated client calls and asks for a copy of the client's will that you prepared years ago. After the death of the client, who leaves her estate in equal shares to her two adult children, Child 1 calls you, dissatisfied with the manner in which Child 2 handled your client's affairs as her agent. Child 1 wants you to send to her any relevant records that you might have. Do you send the documents as requested?

Response:

1. **You have been practicing for many years, but in the course of one week, you receive a series of disconcerting telephone calls from three clients who, along with their spouses, have been long-time estate planning clients. The first comes on a Monday when one client discloses that he recently had an affair. A second client calls to say that she would like you to help her change the beneficiary of one of her significant life insurance policies from her husband to her golf pro. The final call, this one late in the day Friday, is a request that you prepare a codicil naming the client's nurse, with whom he has become "involved," as a beneficiary of a large cash bequest. What if the final call is a request to change the appointment of agents under her powers of attorney because she "has become concerned" about her spouse's judgement? (The spouse is also your client, and you have no reason to doubt his capacity.)**

   News from a client about the client's affair is the last thing a lawyer wants to hear, especially when the lawyer also represents the spouse. It may make no difference that the possibility of a conflict was discussed with the two clients or even confirmed in writing and that the lawyer has made it clear there is a joint representation with no secrets or separate representation permitting the keeping of some confidences from the spouse. The extremely important obligation of a lawyer to retain a confidence, set forth in Rule 1.6, can cause an excruciating dilemma for the lawyer. If the behavior is aberrational, it is arguably possible to both retain the client's confidence without any duty of reporting to the other spouse and maintain the representation of both spouses. If the news demonstrates a likely permanent disruption of the relationship with the spouse, and, particularly, shows that the client is intent upon diverting assets from the spouse or otherwise hurting the spouse financially, the lawyer has no option but to quietly withdraw from the representation of both clients. The lawyer has obtained knowledge that affects the ability to properly represent the other spouse-client, yet it is impossible to impart that knowledge to the other spouse-client because of the duty to maintain the confidence reposed by the first. Above all, the lawyer may not take action that will in any way be to the detriment of the other spouse-client, such as assisting with the change in the insurance beneficiary designation or the preparation of the requested codicil, and must counsel the client about the lawyer's obligations in this situation pursuant to Rule 1.4(a)(5). Withdrawal is always required when there is a significant Rule 1.6/1.7 dilemma.

   In the last example, is the change of agents under a power of attorney detrimental to the other client-spouse such that the lawyer cannot assist? At first, this may appear to be a closer call. On the whole, however, attorneys should make every effort to avoid being placed in a situation in which one spouse-client expects the attorney to keep confidences from the other spouse-client. In this instance, the attorney should advise the client of the lawyer's obligations and decline to make the change.

2. **You have just prepared a power of attorney for the child of a valued and very wealthy client, and that client calls the next day to see if she has been named the agent as promised by her child. What do you say?**

As discussed above, even though a client-parent has asked the lawyer to prepare a document for a child, and may have even paid for it, the duties of loyalty, independence, and confidence still attach to the representation of the child. The lawyer may not give any information to the parent about the representation of the child unless the child permits it. This goes back to the Rule 1.7(a) "situational" conflict issue that we lawyers often face—the situation that places pressure on the lawyer to bend to the will of the more powerful client. It is best to tell the powerful client at the outset that no information about the representation of the child may be given without the permission of the child.

In some circumstances, the lawyer may anticipate that the parent will make such a request, and sharing information about the representation may even be acceptable to the child. In such event, the lawyer can consider including in the latter's engagement letter a statement such as: "Client hereby consents to sharing with Parent any and all information about the representation as Parent may request." Note, however, that such sharing will likely waive the attorney-client privilege.

3. **The agent for your totally incapacitated client calls and asks for a copy of the client's will that you prepared years ago . After the death of the client, who leaves her estate in equal shares to her two adult children, Child 1 calls you, dissatisfied with the manner in which Child 2 handled your client's affairs as her agent. Child 1 wants you to send to her any relevant records that you might have. Do you send the documents as requested?**

The duty to keep things confidential continues even after the client becomes incapacitated or dies. See Rule 1.6(a) and (e). However, if the power of attorney expressly authorizes the agent to make the request and access such information, isn't the disclosure "impliedly authorized in order to carry out the representation" per Rule 1.6(a)? If so, then disclosure is permitted. Certainly, the lawyer should never release a client's estate planning documents or file to a client's agent if the lawyer believes that doing so may harm the client's interests.

With respect to a deceased client's records, the privilege continues to apply. For example, Ethics Opinions 86-41 and 91-4 issued by the Philadelphia Bar Association's Professional Guidance Committee conclude that a scrivener cannot voluntarily release or reveal the contents of an earlier will to the decedent's children. See also Informal Opinion 1293 issued by the ABA on June 17, 1974. Substantive law may permit the personal representative to waive the attorney/client privilege, however. In the absence of a waiver by the personal representative or a court order, however, the attorney cannot and should not release the client's records to the estate beneficiary in this example or disclose their content.

VIII. After the Documents are Signed

Questions:

1. May the lawyer retain the client's powers of attorney and other estate planning documents? What obligations does the lawyer have to the client if the lawyer does so? Are there practical problems associated with holding powers of attorney for a client?

2. After the documents are executed, does the lawyer have an obligation to keep the client informed of changes in tax and other applicable laws?

3. May a lawyer send letters to his or her friends and neighbors telling them about his or her skills as a lawyer?

Response:

1. **May the lawyer retain the client's powers of attorney and other estate planning documents? What obligations does the lawyer have to the client if the lawyer does so? Are there practical problems associated with holding powers of attorney for a client?**

Many lawyers who concentrate their practice in estate planning prefer to keep the client's estate planning documents. Such safekeeping can assure that the documents can be readily located when needed and eliminates the possibility that the client will lose or inadvertently destroy them or that others may destroy or improperly revise them. Those possibilities increase as the client ages and moves into a nursing home and into the care of his or her family and others. However, a lawyer may not pressure the client to allow the lawyer to retain the documents. That would constitute a violation of Rule 1.8.

PBA Formal Opinion 2001-300 provides important guidance for practitioners. First, it concludes that the Rules of Professional Conduct do not bar us from holding such documents upon the client's request. We are, of course, under the usual duty to exercise reasonable care when storing and transferring such documents, pursuant to Rule 1.15. The opinion also makes it clear that while the client must affirmatively request that we act as custodian, there is no ethical problem with our explaining to the client the advantage of our retention of the documents. The opinion concludes by saying that the lawyer should send a letter to the client confirming that the documents are in his or her possession, and the lawyer must affirmatively state three things: first, that the original documents are being retained upon the client's specific, unsolicited request; second, that the documents are safe and secure but readily accessible to the client and that the client has the right to request and promptly receive those documents at any time; and third, with respect to a will, that the will shall be made available to the named executor after the client's death and that the executor will be free to select any lawyer to assist in administering the estate.

Be aware of the disadvantages of retention, however. There is a cost to providing a safe and effective document storage and retrieval system. There is also a great probability of ending up with "orphan" documents that the lawyer may have to retain for decades.

Another practical retention problem arises from the very nature of powers of attorney, which are typically intended to be used only if the client lacks competency. For example, if a financial power of attorney is effective on its face (i.e., without first requiring a finding that the principal is not competent), the principal may want the attorney to hold this "live" document until it is needed. In that event, how will the attorney know that it is safe to release the document to the agent? If the document is to be released only if the client is incompetent, how will the attorney know that the condition has been satisfied absent an adjudication of incapacity, which the use of powers of attorney is intended to obviate? If the attorney is to retain powers of attorney under these circumstances, the attorney should require the client to sign a clear letter of instruction directing the attorney to hold the documents and describing the circumstances under which the attorney must release them (e.g., upon the client's own request or upon the receipt of a written

confirmation from the client's attending physician that the client is unable to manage his or her own affairs).

If the lawyer, upon the client's written and unsolicited request, retains the client's original will and other estate planning documents, the lawyer should keep such client property safe (i.e., client property as defined under Rule 1.15) until the client requests the return of the documents, a request by the nominated executor of a deceased client that the will be made available to him or her, or as suggested by PBA Formal Opinion 99-120, until the client's death plus the probate period after which time the lawyer (and only the lawyer) may destroy such original will. Note that a lawyer must exercise extreme caution and diligence in destroying client property, considering any relevant statutes of limitations, substantive laws, the nature of a particular matter, and the nature of a client's particular needs.

In PBA Formal Opinion 2021-300, the PBA's Committee on Legal Ethics and Professional Responsibility concluded that under Rule 1.15 a lawyer may not ethically dispose of original, signed wills whose testators' locations and/or circumstances are unknown. Rather, a lawyer who retains an original will must continue to do so until (1) the lawyer provides the will to the client, the client's executor or some other person authorized to possess the will, (2) the lawyer is notified that the client no longer needs the will to be stored (such as when a client drafts a new will), or (3) the lawyer is authorized to dispose of the will by statute, rule or some other procedure.

The Committee recommended (but did not require) that lawyers currently storing signed wills and other original documents should (1) promptly review their files, (2) confirm that they have current contact information for every client and, if not, take reasonable steps to obtain the information, (3) notify clients, when appropriate, that they possess their wills and other documents, (4) notify clients if their offices have relocated or their contact information has changed, and (5) request guidance from the client as to whether to continue storing the documents, return them to the client, or meet with the client to review and revise them.

2. **After the documents are executed, does the lawyer have an obligation to keep the client informed of changes in tax and other applicable laws?**

The lawyer may also have continuing obligations toward a client after the planning project has concluded. Although the commentaries on the Rules of Professional Conduct prepared by the American College of Trust and Estate Counsel (ACTEC) say the lawyer/client relationship in these situations is "dormant," that can change, depending on the relationships the lawyer maintains with a client. If the lawyer retains a document, does not send a letter formally terminating the relationship, and sends reminder letters or estate planning information letters periodically, a continued client relationship may be implied. Indeed, PBA Informal Opinion 93-111 provides that the mere retention of a will implies a continued relationship. That can impose a burden of keeping a client informed pursuant to Rule 1.4(a), and unduly restrict the lawyer with respect to accepting any clients who may have a matter adverse to the planning client.

This latter concern may arise even in the case of "one-off" engagements such as those described in some of the earlier examples. In these analyses, the client's perception of the attorney relationship is at least as relevant as the attorney's own perception. Accordingly, the potential for such conflicts further increases the consideration that an attorney should give to advising a client that the representation has concluded following the execution of the documents.

3. **May a lawyer send letters to his or her friends and neighbors telling them about his or her skills as a lawyer?**

Rule 7.3 permits written communications to prospective clients by lawyers including targeted, direct-mail advertisements. The Rule does prohibit sending such mail to a prospect who cannot exercise reasonable judgment in employing a lawyer, or where the lawyer knows the person does not wish to receive such communications, or where the communication involves coercion, duress, or harassment. Rule 7.4 prohibits a lawyer from stating that he or she is a "specialist" in estate planning or some other legal discipline. However, the written communication may state that the lawyer does prepare wills, trust agreements, powers of attorney, and other estate planning documents and represents clients in estate planning matters.

Chapter Eight
Appendices

Appendices

Submitted By
Mary Jo Corsetti, Esq.
Williams Coulson Johnson Lloyd Parker & Tedesco, LLC
Pittsburgh

Appendix 1: Recommended Reading

ABA/BNA *Lawyers' Manual on Professional Conduct*

American College of Trust and Estate Counsel, *Commentaries on Model Rules of Professional Conduct* (4th ed. 2006)

American Law Institute, *Restatement (Third) of the Law: The Law Governing Lawyers* (2000)

Luther J. Avery, *The Rules of Professional Conduct for Lawyers are Confusing*, 131 Tr. & Est. 8 (1992)

Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (2d. ed. 1990 and supp. 1993)

Bruce A. Green and Nancy Coleman, *Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 961 (1994)

Developments Regarding The Professional Responsibility of the Estate Planning Lawyer: The Effect of the Model Rules of Professional Conduct, 22 Real Prop. Prob. & Tr. J. 1 (1987) and 26 Real Prop. Prob. & Tr. J. 1 (1991)

Report of the Special Study Committee of Professional Responsibility of the Section of Real Property, Probate and Trust Law of the ABA, 28 Real Prop. Prob. & Tr. J. 765 (1994)

Opinions of the Pennsylvania Bar Association's Committee on Legal Ethics and Professional Responsibility and the Philadelphia Bar Association's Professional Guidance Committee

Pennsylvania Ethics Handbook, 2008 Edition, PBI No. 2008-4723

Estate Planning in Pennsylvania, Revised Edition, PBI No. 2007-4461

Elder Law in Pennsylvania, Second Edition, PBI No. 2007-4882

William G. McGovern, Jr., *Undue Influence and Professional Responsibility*, 28 Real Prop. Prob. & Tr. J. 643 (1994)

Donaldson, *The Ethical Considerations of Representing the Elderly*, 130 Tr. & Est. 18 (1991)

Frank Johns, *Fickett's Thicket: The Lawyer's Expanding Fiduciary and Ethical Boundaries When Serving Older Americans of Moderate Wealth*, 32 Wake Forest L. Rev. 445 (1997)

Simon J. Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 Geo. J. Legal Ethics 45 (1992)

Appendix 2: Excerpts from the Pennsylvania Rules of Professional Conduct

(As revised, including amendments through February 24, 2021)

Note: The explanatory comments to the Rules, omitted here because of space limitations, can be very helpful in interpreting the Rules and should always be consulted.

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) A lawyer may counsel or assist a client regarding conduct expressly permitted by Pennsylvania law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer in private practice shall inform a new client in writing if the lawyer does not have professional liability insurance of at least $100,000 per occurrence and $300,000 in the aggregate per year, subject to commercially reasonable deductibles, retention or co-insurance, and shall inform existing clients in writing at any time the lawyer's professional liability insurance drops below either of those amounts or the lawyer's professional liability insurance is terminated. A lawyer shall maintain a record of these disclosures for six years after the termination of the representation of a client.

Rule 1.5 Fees

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. The factors to be considered in determining the propriety of a fee include the following:

(1) whether the fee is fixed or contingent;

(2) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(3) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(4) the fee customarily charged in the locality for similar legal services;

(5) the amount involved and the results obtained;

(6) the time limitations imposed by the client or by the circumstances;

(7) the nature and length of the professional relationship with the client; and

(8) the experience, reputation, and ability of the lawyer or lawyers performing the services.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A lawyer shall not divide a fee for legal services with another lawyer who is not in the same firm unless:

(1) the client is advised of and does not object to the participation of all the lawyers involved, and

(2) the total fee of the lawyers is not illegal or clearly excessive for all legal services they rendered the client.

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another;

(3) to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to secure legal advice about the lawyer's compliance with these Rules;

(6) to effectuate the sale of a law practice consistent with Rule 1.17;

(7) to detect and resolve conflicts of interest from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client; or

(8) to comply with other law or court order.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(e) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent.

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in a cause of action that the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Rule 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.14 Client with Diminished Capacity

(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.

Rule 1.15 Safekeeping Property

(a) The following definitions are applicable to Rule 1.15:

(1) *Eligible Institution*. An Eligible Institution is a Financial Institution which has been approved as a depository of Trust Accounts pursuant to Pa.R.D.E. 221(h).

(2) *Fiduciary*. A Fiduciary is a lawyer acting as a personal representative, guardian, conservator, receiver, trustee, agent under a durable power of attorney, or other similar position.

(3) *Fiduciary Funds*. Fiduciary Funds are Rule 1.15 Funds which the lawyer holds as a Fiduciary. Fiduciary Funds may be either Qualified Funds or Non-Qualified Funds.

(4) *Financial Institution*. A Financial Institution is an entity which is authorized by federal or state law and licensed to do business in the Commonwealth of Pennsylvania as one of the following: a bank, bank and trust company, trust company, credit union, savings bank, savings and loan association or foreign banking corporation, the deposits of which are insured by an agency of the federal government, or as an investment adviser registered under the Investment Advisers Act of 19401 or with the Pennsylvania Securities Commission, an investment company registered under the Investment Company Act of 1940,2 or a broker dealer registered under the Securities Exchange Act of 1934.3

(5) *Interest On Lawyer Trust Account (IOLTA) Account*. An IOLTA Account is an income producing Trust Account from which funds may be withdrawn upon request as soon as permitted by law. Qualified Funds are to be held or deposited in an IOLTA Account.

(6) *IOLTA Board*. The IOLTA Board is the Pennsylvania Interest On Lawyers Trust Account Board.

(7) *Non-IOLTA Account*. A Non-IOLTA Account is an income producing Trust Account from which funds may be withdrawn upon request as soon as permitted by law in which a lawyer deposits Rule 1.15 Funds. Only Nonqualified Funds are to be held or deposited in a Non-IOLTA Account. Non-IOLTA Account shall be established only as:

(i) a separate client Trust Account for the particular client or matter on which the net income will be paid to the client or third person; or

(ii) a pooled client Trust Account with sub-accounting by the Eligible Institution or by the lawyer which will provide for computation of net income

earned by each client's or third person's funds and the payment thereof to the client or third person.

(8) *Nonqualified Funds*. Nonqualified Funds are Rule 1.15 Funds, whether cash, check, money order or other negotiable instrument, which are not Qualified Funds.

(9) *Qualified Funds*. Qualified Funds are Rule 1.15 Funds which are nominal in amount or are reasonably expected to be held for such a short period of time that sufficient income will not be generated to justify the expense of administering a segregated account.

(10) *Rule 1.15 Funds*. Rule 1.15 Funds are funds which the lawyer receives from a client or third person in connection with a client-lawyer relationship, or as an escrow agent, settlement agent or representative payee, or as a Fiduciary, or receives as an agent, having been designated as such by a client or having been so selected as a result of a client-lawyer relationship or the lawyer's status as such. When the term "property" appears with "Rule 1.15 Funds," it means property of a client or third person which the lawyer receives in any of the foregoing capacities.

(11) *Trust Account*. A Trust Account is an account in an Eligible Institution in which a lawyer holds Rule 1.15 Funds. A Trust Account must be maintained either as an IOLTA Account or as a Non-IOLTA Account.

(b) A lawyer shall hold all Rule 1.15 Funds and property separate from the lawyer's own property. Such property shall be identified and appropriately safeguarded.

(c) *Required records*. Complete records of the receipt, maintenance and disposition of Rule 1.15 Funds and property shall be preserved for a period of five years after termination of the client-lawyer or Fiduciary relationship or after distribution or disposition of the property, whichever is later. A lawyer shall maintain the writing required by Rule 1.5(b) (relating to the requirement of a writing communicating the basis or rate of the fee) and the records identified in Rule 1.5(c) (relating to the requirement of a written fee agreement and distribution statement in a contingent fee matter). A lawyer shall also maintain the following books and records for each Trust Account and for any other account in which Fiduciary Funds are held pursuant to Rule 1.15(l):

(1) all transaction records provided to the lawyer by the Financial Institution or other investment entity, such as periodic statements, cancelled checks in whatever form, deposited items and records of electronic transactions; and

(2) check register or separately maintained ledger, which shall include the payee, date, purpose and amount of each check, withdrawal and transfer, the payor, date, and amount of each deposit, and the matter involved for each transaction; provided, however, that where an account is used to hold funds of more than one client, a lawyer shall also maintain an individual ledger for each trust client, showing the source, amount and nature of all funds received from or on behalf of the client, the description and amounts of charges or withdrawals, the names of all persons or entities to whom such

funds were disbursed, and the dates of all deposits, transfers, withdrawals and disbursements.

(3) The records required by this Rule may be maintained in hard copy form or by electronic, photographic, or other media provided that the records otherwise comply with this Rule and that printed copies can be produced. Whatever method is used to maintain required records must have a backup so that the records are secure and always available. If records are kept only in electronic form, then such records shall be backed up on a separate electronic storage device at least at the end of any day on which entries have been entered into the records. These records shall be readily accessible to the lawyer and available for production to the Pennsylvania Lawyers Fund for Client Security or the Office of Disciplinary Counsel in a timely manner upon a request or demand by either agency made pursuant to the Pennsylvania Rules of Disciplinary Enforcement, the Disciplinary Board Rules, the Pennsylvania Lawyers Fund for Client Security Board Rules and Regulations, agency practice, or subpoena.

(4) A regular trial balance of the individual client trust ledgers shall be maintained. The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of moneys received in trust for the client, and deducting the total of all moneys disbursed. On a monthly basis, a lawyer shall conduct a reconciliation for each fiduciary account. The reconciliation is not complete if the reconciled total cash balance does not agree with the total of the client balance listing. A lawyer shall preserve for a period of five years copies of all records and computations sufficient to prove compliance with this requirement.

(d) Upon receiving Rule 1.15 Funds or property which are not Fiduciary Funds or property, a lawyer shall promptly notify the client or third person, consistent with the requirements of applicable law. Notification of receipt of Fiduciary Funds or property to clients or other persons with a beneficial interest in such Fiduciary Funds or property shall continue to be governed by the law, procedure and rules governing the requirements of confidentiality and notice applicable to the Fiduciary entrustment.

(e) Except as stated in this Rule or otherwise permitted by law or by agreement with the client or third person, a lawyer shall promptly deliver to the client or third person any property, including but not limited to Rule 1.15 Funds, that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding the property; Provided, however, that the delivery, accounting and disclosure of Fiduciary Funds or property shall continue to be governed by the law, procedure and rules governing the requirements of Fiduciary administration, confidentiality, notice and accounting applicable to the Fiduciary entrustment.

(f) When in possession of funds or property in which two or more persons, one of whom may be the lawyer, claim an interest, the funds or property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or property, including Rule 1.15 Funds, as to which the interests are not in dispute.

(g) The responsibility for identifying an account as a Trust Account shall be that of the lawyer in whose name the account is held. Only a lawyer admitted to practice law in this jurisdiction or a person under the direct supervision of the lawyer shall be an authorized signatory or authorize transfers from a Trust Account or any other account in which Fiduciary Funds are held pursuant to Rule 1.15(l).

(h) A lawyer shall not deposit the lawyer's own funds in a Trust Account except for the sole purpose of paying service charges on that account, and only in an amount necessary for that purpose.

(i) A lawyer shall deposit into a Trust Account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the client gives informed consent, confirmed in writing, to the handling of fees and expenses in a different manner.

(j) At all times while a lawyer holds Rule 1.15 Funds, the lawyer shall also maintain another account that is not used to hold such funds.

(k) All Nonqualified Funds which are not Fiduciary Funds shall be placed in a Non-IOLTA Account or in another investment vehicle specifically agreed upon by the lawyer and the client or third person which owns the funds.

(l) All Fiduciary Funds shall be placed in a Trust Account (which, if the Fiduciary Funds are also Qualified Funds, must be an IOLTA Account) or in another investment or account which is authorized by the law applicable to the entrustment or the terms of the instrument governing the Fiduciary Funds.

(m) All Qualified Funds which are not Fiduciary Funds shall be placed in an IOLTA Account.

(n) A lawyer shall be exempt from the requirement that all Qualified Funds be placed in an IOLTA Account only upon exemption requested and granted by the IOLTA Board. If an exemption is granted, the lawyer must hold Qualified Funds in a Trust Account which is not income producing. Exemptions shall be granted if:

(1) the nature of the lawyer's practice does not require the routine maintenance of a Trust Account in Pennsylvania;

(2) compliance with this paragraph would work an undue hardship on the lawyer or would be extremely impractical, based either on the geographical distance between the lawyer's principal office and the closest Eligible Institution or on other compelling and necessitous factors; or

(3) the lawyer's historical annual Trust Account experience, based on information from the Eligible Institution in which the lawyer deposits funds, demonstrates that the service charges on the account would significantly and routinely exceed any income generated.

(o) An account shall not be considered an IOLTA Account unless the Eligible Institution at which the account is maintained shall:

(1) Remit at least quarterly any income earned on the account to the IOLTA Board;

(2) Transmit to the IOLTA Board with each remittance and to the lawyer who maintains the IOLTA Account a statement showing at least the name of the account, service charges or fees deducted, if any, the amount of income remitted from the account, and the average daily balance, if available; and

(3) Pay a rate of interest or dividends no less than the highest interest rate or dividend generally available from the Eligible Institution to its non-IOLTA customers when the IOLTA Account meets the same minimum balance or other eligibility qualifications, and comply with the Regulations of the IOLTA Board with respect to service charges, if any.

(p) A lawyer shall not be liable in damages or held to have breached any fiduciary duty or responsibility because monies are deposited in an IOLTA Account pursuant to the lawyer's judgment in good faith that the monies deposited were Qualified Funds.

(q) There is hereby created the Pennsylvania Interest On Lawyers Trust Account Board, which shall administer the IOLTA program. The IOLTA Board shall consist of nine members who shall be appointed by the Supreme Court. Two of the appointments shall be made from a list provided to the Supreme Court by the Pennsylvania Bar Association in accordance with its own rules and regulations. With respect to these two appointments, the Pennsylvania Bar Association shall submit three names to the Supreme Court, from which the Court shall make its final selections. The term of each member shall be three years and no member shall be appointed for more than two consecutive three year terms. The Supreme Court shall appoint a Chairperson. In order to administer the IOLTA program, the IOLTA Board shall promulgate rules and regulations consistent with this Rule for approval by the Supreme Court.

(r) The IOLTA Board shall comply with the following:

(1) The IOLTA Board shall prepare an annual audited statement of its financial affairs.

(2) The IOLTA Board shall submit to the Supreme Court for its approval a copy of its audited statement of financial affairs, clearly setting forth in detail all funds previously approved for disbursement under the IOLTA program and the IOLTA Board's proposed annual budget, designating the uses to which IOLTA Funds are recommended.

(3) Upon approval of the Supreme Court, the IOLTA Board shall distribute and/or expend IOLTA Funds.

(s) Income earned on IOLTA Accounts (IOLTA Funds) may be used only for the following purposes:

(1) delivery of civil legal assistance to the poor and disadvantaged in Pennsylvania by non-profit corporations described in section 501(c)(3) of the Internal Revenue Code of 1986, as amended;

(2) educational legal clinical programs and internships administered by law schools located in Pennsylvania;

(3) administration and development of the IOLTA program in Pennsylvania; and

(4) the administration of justice in Pennsylvania.

(t) The IOLTA Board shall hold the beneficial interest in IOLTA Funds. Monies received in the IOLTA program are not state or federal funds and are not subject to Article VI of the act of April 9, 1929 (P.L. 177, No. 175) known as The Administrative Code of 1929, or the act of June 29, 1976 (P.L. 469, No. 117).

(u) Every attorney who is required to pay an active annual assessment under Rule 219 of the Pennsylvania Rules of Disciplinary Enforcement (relating to annual registration of attorneys) shall pay an additional annual fee of $30.00 for use by the IOLTA Board. Such additional assessment shall be added to, and collected with and in the same manner as, the basic annual assessment. All amounts received pursuant to this subdivision shall be credited to the IOLTA Board.

(v) Unclaimed or Unidentifiable IOLTA Funds

(1) When a lawyer or law firm cannot, using reasonable efforts for a minimum of two (2) years, identify or locate the owner of funds in either its Pennsylvania IOLTA account or the Pennsylvania IOLTA account of a deceased lawyer whose estate is represented by the lawyer or law firm, it shall pay the funds to the Pennsylvania IOLTA Board. At the time such funds are remitted, the lawyer or law firm shall submit to the IOLTA Board the name and last known address of each person appearing from the lawyer's or law firm's records to be entitled to the funds, and the amount of unclaimed funds to which each owner is entitled, if known; the amount of any unidentifiable funds; and a description of the efforts undertaken to identify and locate the owner(s).

(2) If, after making a payment of unclaimed or unidentifiable funds to the Pennsylvania IOLTA Board, the lawyer or law firm identifies and locates the owner of funds paid, the IOLTA Board shall refund the sum to the lawyer or law firm. The lawyer or law firm shall submit to the IOLTA Board a verification attesting that the funds have been returned to the owner. The IOLTA Board shall review claims submitted by purported owners of funds when the lawyer or law firm that originally remitted the funds to the IOLTA Board is no longer available. The IOLTA Board shall maintain a sufficient reserve to pay all claims for such funds.

(3) Should the Pennsylvania Lawyers Fund for Client Security pay an award to a former client of a lawyer, law firm, or deceased lawyer who has remitted funds under this Rule to the IOLTA Board, the Pennsylvania Lawyers Fund for Client Security may

pursue a reimbursement of such award from unclaimed funds remitted by the lawyer, law firm, or deceased lawyer to the IOLTA Board in which the former client held an ownership interest. In no event would a reimbursement to the Pennsylvania Lawyers Fund for Client Security exceed the amount of funds remitted to the IOLTA Board by the subject lawyer, law firm, or deceased lawyer.

(4) A lawyer shall not be liable in damages or held to have breached any fiduciary duty or responsibility as a result of his or her good faith adherence to the unclaimed or unidentifiable IOLTA fund requirements in this subsection.

Rule 5.3 Responsibilities Regarding Non-lawyer Assistants

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) a partner and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.

(b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and in either case knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.4 Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation which fairly represents the services rendered by the deceased lawyer;

(3) a lawyer or law firm may include non-lawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement;

(4) a lawyer or law firm may purchase the practice of another lawyer or law firm from an estate or other eligible person or entity consistent with Rule 1.17; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for profit, if:

(1) a non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a non-lawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation;

(3) a non-lawyer has the right to direct or control the professional judgment of a lawyer; or

(4) in the case of any form of association other than a professional corporation, the organic law governing the internal affairs of the association provides the equity owners of the association with greater liability protection than is available to the shareholders of a professional corporation.

Subparagraphs (1), (2) and (4) shall not apply to a lawyer employed in the legal department of a corporation or other organization.

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules, Pa.B.A.R. 302 or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may, subject to the requirements of Pa.B.A.R. 302, provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission, except that this paragraph (d) does not authorize a lawyer who is not admitted in this jurisdiction and who is employed by the Commonwealth, any of its political subdivisions or any of their organizational affiliates to provide legal services in this jurisdiction; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Rule 5.7 Responsibilities Regarding Nonlegal Services

(a) A lawyer who provides nonlegal services to a recipient that are not distinct from legal services provided to that recipient is subject to the Rules of Professional Conduct with respect to the provision of both legal and nonlegal services.

(b) A lawyer who provides nonlegal services to a recipient that are distinct from any legal services provided to the recipient is subject to the Rules of Professional Conduct with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(c) A lawyer who is an owner, controlling party, employee, agent, or is otherwise affiliated with an entity providing nonlegal services to a recipient is subject to the Rules of Professional Conduct with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(d) Paragraph (b) or (c) does not apply if the lawyer makes reasonable efforts to avoid any misunderstanding by the recipient receiving nonlegal services. Those efforts must include advising the recipient that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the provision of nonlegal services to the recipient.

(e) The term "nonlegal services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.

Appendix 3: Sample Joint Representation Engagement Letter Excerpt Regarding Waiver of Conflicts of Interest

Married couples often use the same law firm to assist them in their estate planning. Nevertheless, the Rules of Professional Conduct of the Supreme Court of Pennsylvania limit a lawyer's ability to represent multiple clients under certain circumstances.

Under the Rules, a lawyer or law firm may not represent multiple clients who have conflicting interests without their informed written consent. A lawyer or law firm is permitted to represent multiple clients who do not have conflicting interests, of course, but we must advise such clients of any actual or reasonably foreseeable adverse effects that might arise from the representation and then obtain the clients' consent.

Because the two of you do not have actual conflicting interests or goals at this time, but instead have only potential conflicts, we may represent the two of you jointly. However, certain adverse effects arising from our representation of both of you may result and are reasonably foreseeable. Accordingly, we wish to advise you, as follows:

- Matters that one of you might discuss with us would not be protected by the attorney/client privilege from disclosure to the other. We cannot agree with either of you to withhold information from the other. Of course, anything either of you discusses with us is privileged from disclosure to third parties.
- If the two of you have different opinions about your proposed estate plan, we can point out the pros and cons of such differing opinions. However, we cannot advocate one of your positions over the other.
- After our initial efforts on your behalf, either of you might desire to change your particular arrangements without informing the other. In this event, we might be precluded from further representation because of our past representation of both of you.
- We may discuss with you statutory and common-law spousal rights, such as the right of the surviving spouse to take an elective share of the deceased spouse's estate and the right of the surviving spouse to claim a minimum prescribed benefit from any qualified retirement plan or IRA of the deceased spouse. The most common way that a spouse may preclude the other spouse from exercising such rights is by signing a contract often called a premarital or post-marital agreement. Neither of you has asked to prepare such a document and you do not contemplate the preparation of such an agreement in the course of this representation.

Acknowledgment:

We each have read the foregoing discussion of conflicts, understand it, and consent to having you represent both of us. We understand that, between the two of us, with respect to information that either of us provides you, there shall be no confidential communications.

_____ _____

Date

_____ _____

Date

Chapter Eight
Supplement

Drafting and Using Financial Powers of Attorney 2023 Supplement

Submitted By
Mary Jo Corsetti, Esq.
Williams Coulson Johnson Lloyd Parker & Tedesco, LLC
Pittsburgh

DRAFTING AND USING FINANCIAL POWERS OF ATTORNEY

2023

I. LEGISLATIVE UPDATE

A. In Senate Bill 506, Section 5512.1 is proposed to specifically refer to health care powers of attorney, health care representatives, and financial powers of attorney as less restrictive alternatives to guardianship. The proposed amendment is as follows.

§ 5512.1. Determination of incapacity and appointment of guardian.

(a) Determination of incapacity.--In all cases, the court shall consider and make specific findings of fact concerning:

(1) The nature of any condition or disability which impairs the individual's capacity to make and communicate decisions.

(2) The extent of the individual's capacity to make and communicate decisions.

(3) The need for guardianship services, if any, in light of such factors as the availability of family, friends and other supports to assist the individual in making decisions and in light of the existence, if any, of [advance directives such as durable powers of attorney or trusts.] less restrictive alternatives. The court shall make specific findings of fact based on the evidentiary record of the absence of sufficient family, friends or other supports and of the insufficiency of each less restrictive alternative before ordering guardianship. Less restrictive alternatives include, but are not

limited to:

(i) Advance directives such as durable power of attorney or trusts.

(ii) Living wills.

(iii) Health care powers of attorney.

(iv) Health care representatives.

(v) Financial powers of attorney.

(vi) Trusts, including special needs trusts.

(vii) Representative payees for individuals receiving Social Security benefits.

(viii) Pennsylvania Achieving a Better Life Experience accounts.

(ix) Mental health advance directives.

The Bill was referred to the Judiciary Committee on March 7, 2023.

B. The Pennsylvania Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), was signed into law on July 23, 2020.

RUFADAA is now Chapter 39 of Title 20 of the Pennsylvania Consolidated Statutes. Financial powers of attorney should contain a provision authorizing the agent to access digital assets as described in RUFADAA. The pertinent sections pertaining to powers of attorney are as follows:

§ 3909. Disclosure of content of electronic communications of principal.

To the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a custodian shall disclose to the agent the content of an electronic communication if the agent gives the custodian:
(1) a written request for disclosure in physical or electronic form;

(2) an original or a copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal;
(3) a certification by the agent, under penalty of perjury, that the power of attorney is in effect; and
(4) if requested by the custodian:
(i) any number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or
(ii) evidence linking the account to the principal.

§ 3910. Disclosure of other digital assets of principal. Unless otherwise ordered by the court, directed by the principal or provided by a power of attorney, a custodian shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalog of electronic communications sent or received by the principal and any digital assets other than the content of electronic communications of the principal if the agent gives the custodian:
(1) a written request for disclosure in physical or electronic form;
(2) an original or a copy of the power of attorney that gives the agent specific authority over digital assets or general authority to act on behalf of the principal;
(3) a certification by the agent, under penalty of perjury, that the power of attorney is in effect under section 5606 (relating to proof of continuance of powers of attorney by affidavit); and
(4) if requested by the custodian:
(i) any number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or
(ii) evidence linking the account to the principal.

An example of the "content of electronic communications" in Section 3909 is a bank statement. An example of a "catalog" in Section 3910 is the principal's inbox.

The agent's ability to access digital assets is the ninth and latest "hot power" under Chapter 56, Section: 5601.4:

§ 5601.4. Authority that requires specific and general grant of authority.
(a) General rule.--An agent under a power of attorney may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not

otherwise prohibited by another agreement or instrument to which the authority or property is subject:

(1) Create, amend, revoke or terminate an inter vivos trust other than as permitted under section 5602(a)(2), (3) and (7) (relating to form of power of attorney).

(2) Make a gift.

(3) Create or change rights of survivorship.

(4) Create or change a beneficiary designation.

(5) Delegate authority granted under the power of attorney.

(6) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.

(7) Exercise fiduciary powers that the principal has authority to delegate.

(8) Disclaim property, including a power of appointment.

(9) Access the electronic communications and digital assets of the principal. As used in this paragraph, the following words and phrases shall have the meanings given to them in this paragraph unless the context clearly indicates otherwise:

"Digital asset." As defined in section 3902 (relating to definitions).

"Electronic communication." As defined in section 3902.

[Emphasis added.]

Section 3902 provides in pertinent part as follows:

"CATALOG OF ELECTRONIC COMMUNICATIONS." Information which identifies:

(1) each person that has had an electronic communication with a user;

(2) the time and date of the electronic communication; and

(3) the electronic address of the person under paragraph (1).

"CONTENT OF AN ELECTRONIC COMMUNICATION." Information concerning the substance or meaning of the electronic communication which:

(1) has been sent or received by a user;

(2) is in electronic storage by a custodian providing an electronic communication service to the public or is carried or maintained by a custodian providing a remote computing service to the public; and

(3) is not readily accessible to the public.

"CUSTODIAN." A person that carries, maintains, processes, receives or stores a digital asset of a user.

******

"DIGITAL ASSET." An electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic ***record.*** [Emphasis added.

"ELECTRONIC." Relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.

"ELECTRONIC COMMUNICATION." As defined in 18 U.S.C. § 2510(12) (relating to definitions).

Section 3902 does not contain a definition of the term "record." Therefore, this term is left to the imagination of the agent and Custodian.

C. House Bill 438 is proposed to include agents as those who are potential perpetrators of exploitation of Older Adults.

Section 103 of the Pennsylvania Older Adults Protective Services Act is proposed to be amended as follows:

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Exploitation." An act or course of conduct by a caretaker or other person, including an individual who is acting under a power of attorney, against an older adult or an older adult's resources, without the informed consent of the older adult or with consent obtained through misrepresentation, coercion or threats of force, that results in monetary, personal or other benefit, gain or profit for the perpetrator or monetary or personal loss to the older adult.

This Bill was referred to the House Aging and Older Adult Services Committee on March 15, 2023.

D. House Bill 1212 is proposed to add new provisions for Pennsylvania Orders for Life-Sustaining Treatment ("POLSTs").

The Memorandum to House Bill 1212 states that:

"A Pennsylvania Order for Life-Sustaining Treatment (POLST) is a ***patient-directed*** healthcare order that is part of advanced care planning for patients with serious illnesses. These orders specify a ***patient's request at the end of life*** and are based on a patient's health condition and treatment choices as established through conversations between the patient or a healthcare decision-maker and a healthcare professional.

POLST forms ensure that a patient's care aligns with their wishes regarding life-sustaining treatments in emergencies. These forms will create a ***standard of care across all care settings***. POLST forms will also provide much-needed peace of mind to patients and give healthcare professionals clear guidelines for care.

…. updating and revising Pennsylvania law (Title 20) to include the codification of "Pennsylvania Orders for Life-Sustaining Treatment (POLST)" to be used by healthcare professionals across all settings for patients who ***voluntarily wish to execute a POLST order***. ***POLST orders convert an individual's wishes regarding health care into a medical order that is immediately actionable and applicable across all health care settings.***

This legislation will formally update Chapter 54 of Title 20 to recognize POLST orders. In 2006, Title 20 was amended by Act 169 to update the procedures for living wills, health care powers of attorney, and out-of-hospital do not resuscitate (OOH-DNR) orders. ***However, Act 169 did not include using a POLST form as a healthcare order.***

The legislation will also create a ***new Subchapter F known as the Pennsylvania Order for Life-Sustaining Treatment Act*** that will set regulations and standards surrounding POLST forms for insurers, providers, and patients and create a POLST Advisory Committee headed by the Secretary of Health to advise DOH on POLST-related matters, including but not limited to the ***format and content of the POLST form and education about POLST orders.***

Individuals should have the right to make end-of-life decisions. ***POLST forms allow patients to make their end-of-life decisions clear to healthcare professional***s. Both professional medical and nurse practitioner organizations support this legislation." Emphasis added.

A summary of this Bill is as follows.

What is a POLST. A Pennsylvania order for life-sustaining treatment, or POLST, differs from an advanced health care directive. A POLST converts an individual's wishes regarding health care into a medical order that is immediately actionable and applicable across all health care settings. Proposed 20 Pa. C. S. A. 5492(3).

Why a POLST? Advance directives only name a surrogate decision maker or lack specificity as to the principal's goals and preferences for a medical condition that subsequently develops because it was not foreseen by the principal. *Id* at (5). Existing medical orders frequently are ineffective when the patent is transferred from one care setting to another because the procedures, forms, and requirements at each care setting may be different. *Id* at (6). Existing emergency medical services protocols may require emergency medical services personnel to proceed to cardiopulmonary resuscitation (CPR) when an individual is found in cardiac and respiratory arrest, even if the individual had completed an advance directive or has otherwise clearly indicated that the individual does not wish to receive CPR. *Id* at (7).

For whom is a POLST appropriate. A POLST is appropriate for seriously ill or frail patients if their health care practitioner would not be surprised if they died within the next year. Proposed 20 Pa. C. S. A. 5492 (11). A POLST is not recommended for individuals with stable, even chronic, medical conditions with years of life expectancy. *Id* at (11).

What is the process for entering a POLST. A POLST is appropriately entered following a shared decision-making process that facilitates patient consent that is voluntary, educated, collaborative and thoughtful, including a discussion of the patient's current clinical status, treatment, options, and likely outcomes, together with the patient's goals of care, preferences and values. *Id* at 15.

When the use of a POLST becomes appropriate, an existing advance health care directive will help shape the choices of the patient or the patient's surrogate decision maker when discussing a POLST with a health care provider. *Id* at 19.

Subchapter F is intended to provide a framework and legal authority for a POLST to be valid and portable across all care settings, …. *Id* at 20.

Standardized POLST form. If enacted the Department of Health will develop, adopt and periodically update a standardized POLST form for healthcare practitioners to issue a POLST with the voluntary consent of the patient or an authorized surrogate decision maker. Proposed 20 Pa. C. S. A. 5498(a). The POLST form will include options for a set of medical orders for cardiopulmonary resuscitation and other medical interventions that are determined to be appropriate for a POLST. *Id* at (b)(1).

The POLST form may include options for nutrition and hydration administered by gastric tube or intravenously or by other medically administered means. If the consent is provided by a surrogate decision maker, the requirements of Section 5464, relating to the Decisions by a Health Care Representative, and 5462, certification and duties of attending physician and health care provider(s), must be met.

The POLST form must clearly and conspicuously state that it may only be issued with the voluntary consent of the patients of the patient's authorized surrogate decision maker. Proposed Section 5498 ©(1). The POLST form must include instructions for its completion, which shall clearly convey the sections required to be completed for the POLST to be valid. *Id* at (e).

To be valid, a POLST shall require each of the following.

(1)Use of the POLST form ….
(2)Completion of the section regarding CPR.
(3)Completion of the section documenting preferences regarding hospitalization and preferred level of care.
(4)The date and signature of a health care practitioner in accordance with 5498.6 (allowing for signature options, i.e., patient may sign my mark or patient may specifically direct another individual to sign the POLST for the patient). Signature of health care provider may be electronic if authorized by policies and procedures of the facility . A health care provider is defined as a physician, physician assistant, or certified registered nurse practitioner acting in accordance with applicable law.
(5) The date and signature of the patient or a surrogate decision maker….

Verbal POLSTs. Verbal orders are valid under certain conditions and timeframes. Proposed Section 5498.2. A verbal order (presumably by a patient) is effective from the date given without countersignature by a health care practitioner until the expiration of the time frame in which the order must be countersigned in accordance with any applicable laws and regulations governing the health care facility. *Id* at (b)(2). If no law or regulation governing the health care facility establishes such a time limit in which the verbal POLST must be countersigned, then the POLST must be countersigned by the health care practitioner within seven days. *Id* at (b)(3).

A health care practitioner's verbal order for a POLST is deemed to meet the requirements of the POLST form relating to cardiopulmonary resuscitation, under Section 5498.2(a)(2), if the order is entered for a patient receiving care from a health care facility, and the order is documented on the POLST form and countersigned by the health care practitioner in accordance with any applicable laws and regulations governing the health care facility, including a time frame in which the order may be countersigned. If no law or regulation establishes a time limit in which the order must be countersigned, the order must be countersigned by the health care practitioner within seven days.

Portability of POLST. A POLST executed in accordance with Subchapter F will be valid anywhere in the Commonwealth of Pennsylvania, including all health care facilities, the patient's residence and other care settings outside of a health care facility, and while the patient is in transit from one health care facility or care setting to another. Section 5498.3(a).

Moreover, a valid Subchapter F POLST will be valid in a health care facility regardless of whether the health care practitioner who signed the order has clinical privileges with that facility. *Id* at (b). A health care facility is any facility that is licensed as such by the Department of Health. Section 5493.

Obligations of Emergency Medical Services Providers. Emergency medical services provider shall comply with a do not resuscitate order in a POLST if made aware of the order. Once made aware of the DNR order in the POLST, EMS providers must withhold CPR or

discontinue CPR if the EMS provider is presented with a DNR in a POLST after initiating CPR. Section 5498.12.

Effect on Out of Hospital-Do Not Resuscitate orders. If enacted, the POLST will replace the OOH-DNR. Proposed Section 5489 provides that an OOH-DNR may not be executed on or after the date that the department adopts an initial POLST form. However, previously executed OOH-DNR orders, bracelets and necklaces may continue to be recognized as valid.

Revocation of POLST. A patient or a surrogate decision maker acting with a decision-making authority may revoke consent to all or part of a POLST at any time and in any manner that communicates an intent to revoke. Section 5498.8(a). A health care provider or surrogate decision maker who is informed of a revocation shall promptly communicate the fact of the revocation to any attending health care provider and to any health care facility from which the patient is receiving care. *Id* at (b).

Conflict between POLST and advance health care directive. If there is a conflict between a POLST and an advanced health care directive, the provision of the instrument latest in date of execution controls to the extent of the conflict.

E. HOUSE BILL NO. 543, Session of 2023, Compassionate Aid in Dying.

The Memorandum Note to this legislation states that:

Advancements in modern medicine have been able to extend the lives of our loved ones by leaps and bounds. However, many individuals with terminal illnesses feel that this extension merely prolongs unnecessary suffering when pain management becomes impossible.

In ten states (including New Jersey in 2019) and D.C., **death with dignity laws offer terminally ill adults who meet specific, well-defined criteria the option to end their life peacefully and on their own terms**. The vast majority of persons who have used compassionate assisted dignified death in other states are already enrolled in hospice and have exhausted other palliative care options.

Our legislation would follow these states in legalizing compassionate aid in dying for terminally ill Pennsylvanians. **These individuals, facing unbearable and unrelieved suffering in their final days, would be able to request a prescription that would end their life in a dignified, humane manner that respects the individual's autonomy and self-determination**.

Modeled after Oregon's Death with Dignity Act, **our legislation also includes protections to ensure that patients remain the driving force behind end-of-life care discussions and can rescind their decision at any time**.

Unlike in Canada, where many feel that medical aid-in-dying measures lack basic protections and may jeopardize the lives of people with disabilities and their families, **this bill respects the lives of those with disabilities and contains over a dozen safeguards to prevent abuse**.

This bill protects patients from coercion and has strict eligibility requirements that are

only open to patients who are terminally ill with less than six months to live and prohibits use for patients requesting due to non-terminal mental health or other physical health issues, including but not exclusive to issues around disability, finances, housing, benefits, age, race, or gender.

We cannot begin to fathom the pain and hardship an individual with terminal illness faces – pain that often lasts until their final day. Pennsylvanians in this position deserve the ability to choose to end their life on their terms in a safe, medically approved way.

[Other comments omitted.]
HB 543 would be Chapter 54B in Title 20.

HB 543 does not provide for the Agent under advance directive or healthcare power of attorney to make the decision regarding end-of-life medication. The Qualified Patient makes that decision and administers the end-of-life medication to himself or herself, or through his or her Attending Provider. 54B07. However, the agent has certain abilities to facilitate the Qualified Patient's decision, as discussed below.

OVERVIEW

Section 54B02, "Qualified Patient" provides that "To qualify to receive *end-of-life medication* under this chapter, a patient must:

(1) Have a *terminal illness*, as determined by an *attending provider* and a *consulting provider*.
(2) Be *capable* of making an *informed decision*, as determined under sections 54B07 (relating to attending provider responsibilities and 54B8(3) (relating to *confirmation of terminal illness*).
(3) Be a resident of this Commonwealth.

Emphasis Added. The italicized terms are defined terms in the statute and are italicized here for convenience.

A "terminal illness" is an incurable and irreversible illness that will, within reasonable medical judgment, produce death within six months. 54B01.

A "Provider" is a licensed doctor of medicine or osteopathy, or an advanced practice registered nurse practitioner. 54B01.

This is a two-provider process that involves a timeline. Under Section 54B03, the attending provider is the primary care provider. The Qualified Patient makes an initial oral request for end-of-life medication to his or her attending provider. The Qualified Patient may reiterate the oral request by making a second oral request no less than 15 days after making the initial oral request. After making the second oral request, the Qualified Patient may make a written request to the attending provider via a standardized form provided in Section 54B05. At least 48 hours must elapse between the written request and the Attending Provider's writing of a prescription of end-of-life medication. 54B06. Immediately prior to writing a prescription

for end-of-life medication, the Attending Provider must verify that the patient is making an informed decision. 54B07(8).

The Attending Provider informs the patient of the medical risks and consequences of end-of-life medication 54B07.

The request for end-of-life medication may be rescinded at any time and in any manner, without regard to mental state. 54B04. The Attending Provider has the responsibility of informing the patient of the right to rescind. 54B07.

The Form of written request is found in 54B05. It must be witness by two individuals, one of whom *cannot* be:

a relative of the Qualified Patient by blood, marriage, or adoption;

be someone with whom the qualified patient has had a significant relationship;

an individual who, at the time that the request is signed, would be entitled to a portion of the estate of the qualified patient upon death under a will or by operation of law; [*Will this require the rendering of an opinion by estate counsel……stay tuned! Record keeping and document retention will be more important than ever.]*

an owner, operator or employee of a health care facility where the qualified patient is receiving medical treatment or is a resident;

the Attending Provider or Consulting Provider, or an individual who has conducted an evaluation of the Qualified Patient at the time of the request.

One of the witnesses must be an individual designated by a long-term care facility designated by the facility who has the qualifications required by the Department of Health by rule. In other words, facilities will have their own designated witness.

Once the Qualified Patient makes the request, the Attending Provider refers the patient to a Consulting Provider for medical confirmation of the diagnosis of terminal illness and for a determination that the patient is capable and acting voluntarily. 54B07(a)3). A confirmation of terminal illness must be received (presumably by the Attending Provider) before a patient is determined to be a Qualified Patient. The Consulting Provider performing the confirmation of the terminal illness must physically examine a patient who has requested end of life medication and must examine the patient's relevant medical records in order to confirm the Attending provider's diagnosis that the patient is suffering from the terminal illness. 54B08.

The Attending Provider must *recommend* that the Qualified Patient notify his or her next of kin or an individual with whom the Qualified Patient has a significant relationship of the Qualified Patient's request for end-of-life medication. However, the Attending Provider may not deny a request solely because the Qualified Patient declines or is unable to notify the next of kin or person with whom the Qualified Patient has a significant relationship. 54B10.

ROLE OF AGENT UNDER ADVANCE DIRECTIVE OR HEALTHCARE POWER OF ATTORNEY

Assisting with Communication:

To be "capable" is "[T]he ability of a patient to make and communicate informed health care decisions without impaired judgment to health care providers, including communication through individuals familiar with the patient's manner of communicating, as determined by a court or a patient's attending provider, consulting provider, mental health care professional or clinical social worker.

This is one of the areas in which the agent under an advance directive or health care power of attorney might enter into the picture. The health care Agent could be, but would not under this Bill necessarily be, the person to assist the attending provider and consulting provider with the patient's "manner of communicating" his or her decision regarding the request for end-of-life medication.

Receipt of End-of-Life Medication from pharmacist and transmit it to the Qualified Patient:

If the Qualified patient fulfills all of the requirement for end of life medication, it is the Attending Provider who approves the request and either dispenses the end of life medication directly to the patient, or, with the patient's written consent, contacts a pharmacist and delivers the prescription to the pharmacist, who dispenses the end of life medication to the qualified patient, the Attending Provider, **or an expressly identified agent of the qualified patient.** 54B07(11). Such agent would logically be the agent named in an advance directive and/or healthcare power of attorney.

DISCUSSION POINTS FOR ADDITIONAL THOUGHT:

Amendment of Chapter 56: a new Hot Power for receipt of end-of-life medications and medications attendant to the same.

Discussion with the client as to choice of agent. Given that this would be a power, whether the client would choose a person who would be willing to facilitate his or her decision for end-of-life medication.

EFFECT ON CONSTRUCTION OF WILLS AND BUSINESS ARRANGEMENTS

Under 54B13(a), No provision in a contract, will or other agreement, whether written or oral, shall be valid to the extent that the provision would condition or restrict an individual's decision to make or rescind a request for end-of-life medication.

Likewise, sales, etc. of life insurance policies or annuities or the rates charged thereon cannot be conditioned upon or affected by the making or rescinding of a request for end-of-life medication. 54B13.

Acts taken under the proposed new Chapter shall not constitute suicide, assisted suicide, mercy killing or homicide. 54B17.

IMMUNITIES: REQUEST CANNOT BE THE SOLE BASIS FOR APPOINTMENT OF GUARDIAN

Individuals may not be subject to civil or criminal liability or professional disciplinary action for participating in good faith in compliance with the proposed Chapter. 54B18(1).

Providers may not be subject to censure, discipline, suspension, loss of license, privileges, or membership, or other penalty for participating in good faith or refusing participate under the proposed Chapter. 54B18(2).

Neither the request for end-of-life medication nor the provision of the same by an Attending Provider constitutes negligence for any purpose of law. 54B18.

A request by a patient cannot provide the sole basis for the appointment of a guardian or conservator. 54B18.

Under 54B19, there is no immunity for:

(a) An individual who without authorization of the patient, willfully alters or forges a request for end-of-life medication or conceals or destroys a recission of the request with the intent or effect of causing the patient's death.
(b) An individual, including the Attending Provider, who coerces or exerts undue influence on a patient to request end of life medication for the purpose of ending the patient's life or to destroy a recission of a request.
(c) Persons, including the Attending Provider, who are negligent or intentional regarding misconduct or coercion. Such persons are liable for civil damages.

PROHIBITIONS AND PENALTIES

Under 54B20(a), termed "Intent to hasten death," the following describes a felony of the first degree. An individual who, without authorization of the patient, willfully alters, forges, conceals or destroys an instrument, the reinstatement or revocation of an instrument or any other evidence or document reflecting the patient's desires and interests with the intent and effect of causing a withholding or withdrawal of life-sustaining procedures or of artificially administered nutrition and hydration which hastens the death of the patient commits a felony of the first degree.

Under 54B20(b), termed "Intent to affect health care decision," except as provided in subsection (a), an individual who, without authorization of the patient, willfully alters, forges, conceals or destroys an instrument, the reinstatement or revocation of an instrument, or any other evidence or document reflecting the patient's desires and interests with the intent or effect of affecting a health care decision commits a misdemeanor of the first degree.

NB: Attorney document retention practices, record keeping, and retrieval availability, will be more important than ever if this Bill is enacted.

II. RECENT CASES AND CASES OF NOTE

A. *Rega v. A Bridge to Independence*, Unpublished Non-Precedential Decision, 151 WDA 2021, 260 A.3d 107 (Pa.Super. 2021)

Power of Attorney contained material deficiencies regarding the statutorily mandated text and form of the notice under 10 Pa. C. S. A. 5601(c). Superior Court found that:

Upon review, we find no merit to Appellant's claims. It is undisputed that the POA was not executed in compliance with 20 Pa.C.S.A. 5601(c) and (d), and Appellant failed to meet his burden to prove the POA complied with the POA Code. ***See id.*** § 5601(c) ("In the absence of a signed notice, upon a challenge to the authority of [a purported] agent to exercise a power under the power of attorney, the agent shall have the burden of demonstrating that the exercise of [ ] authority is proper."); ***accord Vine v. Commonwealth***, 607 Pa. 648, 9 A.3d 1150, 1162 (Pa. 2010) ("In its official comment regarding [the pre-amendment version of subsection 5601(c)], the Legislature specified that a primary purpose of the notice requirement is to protect the principal; it was not evidently aimed at protecting third parties." (superseded by statute)).")

Moreover, "…where a third party accepts a purported agent's directives under an invalid POA, nothing precludes it from subsequently challenging the documents validity." *Rega*, *supra* at 6.

B. *Trembley Agent for Lasser*, 10 Fiduc. Rep. 3d, 229 (O.C. Chester 2020); involves question of "another agreement or instrument to which the [agent's] authority …is subject….

The Orphans' Court Division of the Court of Common Pleas of Chester County ordered a reversal of a beneficiary designation on a retirement plan owned by the principal. Wife/agent was ordered to redistribute retirement proceeds in an amount not less than $210,492.44 in equal one third shares to the principal's (by that time decedent's) three children from his first marriage. *Trembley Agent for Lasser*, 10 Fiduc. Rep. 3d, 229 (O.C. Chester 2020).

Wife/agent used principal/decedent's retirement plan proceeds to reimburse herself for money spent on caregivers due to principal's suffering from ALS, while wife/agent worked a five day workweek. In a prior Property Settlement Agreement from principal's first marriage, retirement funds were earmarked for payment of children's college educations. Principal/Husband's Will referenced specific provision for children via "a certain beneficiary directed account."

The Court also gave Petitioners the opportunity to submit a petition for an award of counsel fees within thirty days of the date of the Order and allowed Respondent thirty days after the filing of the fee request in which to file a response. Regarding appealability, the Court also added in its Order, "To avoid confusion, that future decision – not this one – will be the final order for purposes of any appeal to a higher court." One could argue that the Court's pronouncement conflicts with Pa. R. A. P. 342 (5) and (6) and does not override those provisions for final orders.

The Pennsylvania Probate, Estates and Fiduciaries Code Annotated, Fifth Edition (2020) reports this case as follows: " In holding that agent-second wife did not have authority under decedent's power of attorney to retitle his retirement account, court reviewed PEF Code section 5601.4 in conjunction with PEF Code section 5603(q) and determined that under the property settlement agreement executed in conjunction with decedent's prior divorce he was obligated to use the assets in the retirement account to pay college tuitions for his three children, and the agent-second wife knew of this obligation; agent-wife ordered to redistribute the retirement assets in equal one-third shares to decedent's children: Trembley, Agent for Lasser, 10 Fiduc. Rep. 3d 229, aff'd, 1690 EDA 2020 (Pa. Super. July 8, 2021) (non-precedential)."

C. *Waite Estate*, 9 Fiduc. Rep. 3d 75, 81 (O.C. Jefferson County 2019); daughter – in – law ordered to return funds but could remain Will beneficiary.

Ex-daughter – in – law/agent (Lisa) was Ordered to return funds in Credit Union checking and savings accounts that passed to her via joint tenancy. Father – in – law/Principal (Mr. Waite) apparently transferred the funds to joint name himself, not via Agent. "Mr. Wait, not Lisa, then directed the teller to remove ….and add Lisa as both POA and designated beneficiary, and only after he had done so did he involve his daughter in law in that transaction." *Waite Estate*, 9 Fiduc. Rep. 3d 75, 81 (O.C. Jefferson County 2019). It is not clear from the Opinion whether Mr. Wait added Lisa's name as a joint tenant, made the account transfer on death, or made it transferable by operation of law by some other means.

However, the Court found that Lisa abused her authority under an attorney-drafted Power of Attorney that Mr. Waite signed on the same day and immediately prior to making Lisa the designated Power of Attorney that her father – in – law executed prior to the trip to the Credit Union during which Mr. Waite made Lisa his "designated beneficiary."

The Court reasoned that "What Lisa unquestionably knew…was that her being Mr. Waite's designated beneficiary did not comport with the terms of the will he had executed just five weeks before. She had read that will only days before taking her father – in – law to the credit union and thus knew that he only planned to leave her a third of his assets and wanted to divide the other two-thirds between James and Whitney. Yet she chose to remain silent…knowing that all the money would eventually be hers, was content to see the balance of Mr. Waite's accounts increase month by money, knowing the money would eventually be hers…." *Waite* at 82.

Even though Lisa was ordered to return the Credit Union funds to Mr. Waite's probate estate, the Court did not eliminate her as a one third beneficiary of his Will, finding that "Even were the Court permitted to rewrite a person's will based on a "reasonable assumption" as to what he would have done under difference circumstances, therefore, the evidence in this case is such that rewriting Mr. Waite's will to eliminate Lisa as a beneficiary would be entirely speculative."

D. *Tyreman Estate*, 8 Fid. Rep. 3d 66, 69 (O.C. Monroe County 2018). Language in Power of Attorney "to make gifts, including gifts to my agent," deemed to be indicative of one of many or one of all possible gifts, not authority to make gifts to agent only.

Objector claimed that Respondent only had the authority to make gifts to himself, not others. *Tyreman* at 69. All parties and donees were collateral relatives. The Court found that "Objector's argument would have rendered the gifting provision essentially meaningless, as the only person who would be allowed to receive gifts was Respondent as her agent. If that were the case, Respondent would have simply stated "the right make gifts to my agent," and not "to make gifts, including to my agent. *Tyreman* at 69.

E. Power of Attorney authorized comingling of gifted funds, which combined with transfers to joint names results in litigation. *Miller Estate*, 7 Fiduc. Rep. 3d. 195 (O.C. Cumberland County 2017).

Father operated a farm with two sons. There were 4 children in all. Farm proceeds were deposited into Father's Citizens Bank account. Son G alone, using Power of Attorney, opened separate "Farm Account" in joint names of Dad, G, and Son C, and transferred thirty thousand dollars from the Citizens Account to the Farm Account. Son G also transferred maturing Certificates of Deposit to the Farm Account.

Power of Attorney provided "..my Agents must act jointly, not individually, for all gifting." Power of Attorney also provided that "I specifically and expressly waive any requirement in effect now and in the future to have my assets kept separate from my Agent's assets." The Agent's acknowledgment stated that " I shall keep the assets of the principal separate from my assets (except where a gift of assets may be titled jointly in the names of Principal and Agent)."

The other two children, sisters, filed a Petition to Compel the Filing of an Account against Sons G and C, seeking the return of the Farm Account and other accounts to the (by then) Decedent's probate estate. The Court granted the Petition. Noting that "the clearest evidence of Father's intent is that he wanted all four siblings to agree as to the disposition of his estate, which was not done with the Farm Account." *Miller Estate,* at 199.

The Court found that the transfers to the Farm Account failed if considered a gift due to lack of unanimous consent. *Miller Estate* at 199. If not considered a gift, the establishment of the Farm Account must fail as an improper commingling of assets and not reflective of father's intent. *Miller Estate* at 200.

F. *In re Estate of Edward L. Irwin, Jr., also known as Edward L. Irwin; Appeal of Roxanne Rothberger,* 1125WDA 2015; 2016 WL 6727172. Non-Precedential Pennsylvania Superior Court Decision.

Daughter, acting as Decedent's attorney-in-fact, created Trust for Decedent's benefit. Superior Court found that based on 20 Pa. C. S. A. 5603, daughter as agent, lacked authority to include a provision in the Trust instrument which permitted the Trust to survive Decedent's death.

Section 5603(b) provides that:

(b) POWER TO CREATE A TRUST. A power "to create a trust for my benefit" shall mean that the agent may execute a deed of trust, designating one or more persons (including the agent) as original or successor trustees and transfer to the trust any or all property owned by the principal as the agent may decide, subject to the following conditions:

(1) The income and corpus of the trust shall either be distributable to the principal or to the guardian of his estate, or be applied for the principal's benefit, and upon the principal's death, any remaining balance of corpus and unexpended income of the trust shall be distributed to the deceased principal's estate.

(2) The deed of trust may be amended or revoked at any time and from time to time, in whole or in part, by the principal or the agent, provided that any such amendment by the agent shall not include any provision which could not be included in the original deed.

In a follow up case reported in the Pennsylvania Probate, Estates and Fiduciaries Code Annotated, Fifth Edition (2020), "Relying upon an unreported Superior Court decision, In re: Estate of Irwin, No. 1125 WDA 2015 (Pa. Super. Nov. 15, 2016), court held that if the trust in dispute was found to have been established solely by decedent's daughter acting in her capacity as agent under a power of attorney, then trust would not be voided, but dispositive provisions would be reformed to comply with PEF Code section 5603(b)(1): Altemose Trust, 8 Fiduc. Rep. 3d 119."

G. Agent who tries to undo beneficiary designation change not permitted to do so. *Scutchall Estate*, 5 Fid. Rep. 3d 311 (O.C. Franklin County 2015).

Agent used Power of Attorney to make changes to principal's annuity contracts without consulting with counsel . Agent only consulted with principal's financial advisor. Therefore, the Court concluded that Agent made changes to the annuity contracts without considering principal's testamentary intent at the time of his decision to change the annuity beneficiaries.

The Court found that the language in the Power of Attorney "to exercise any rights which I have respect to any policies of insurance on my life of which I am the owner or in which I have any rights, including , but not limited to the following for which there are additional specified actions that can be construed" to equal the "to engage in insurance transactions" language of the statute, 20 Pa. C. S. A. 5603 (p)(3).

The opposing party was the Attorney General of the Commonwealth of Pennsylvania. The Court stated that "While it is noble that [the Agent] may have sought to undo that which he had done once he obtained a copy of her will following her death, to seek relief from this Court solely on the notion of equity is not authorized statutorily or in equity. In fact, his request undermines the

very notion of the finality of contracts and third part reliance upon actions of agents under a validly executed durable power of attorney.

At the time, Section 5603(p)(3), Power to Engage in Insurance Transactions, in effect from December 27, 2010 through December 31, 2014, stated that…

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…An agent and a beneficiary of life insurance policy shall be liable as equity in justice may require to the extent that, as determined by the Court, a beneficiary designation made by the agent is inconsistent with the known or probably intent of the principal.

III. OBSERVATIONS, PRACTICE AND DRAFTING NOTES

In practice, problems occur from not following execution protocols: defective Notice provision, lack of notarization and/or witnesses, or witnesses who are also named as agents.

Execute more than one original. Some financial institutions insist on seeing, or keeping, the original. If you have only one, then your client is without an original.

Some financial institutions still refuse to honor old Powers of Attorney as stale.

Whether the drafter should include the entire text of specific powers or only captions/titles/abbreviations. Including the entire text results in a longer but arguably more understandable document.

Example: “To engage in real property transactions” (Section 5602(a)(10)) vs. the entire text and description of such power under 5603(b)(i).