

POWER WITH PURPOSE: UNDERSTANDING THE NEW MICHIGAN UNIFORM POWER OF ATTORNEY ACT

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THE PLAN:

- **POWERS OF ATTORNEY BASICS**
- **WHAT IS THE UPOAA**
- **UPOAA V. EPIC**
- **PRACTICAL TIPS**



Power of Attorney Basics

Patient Advocate Designation

- Enables the person named in the document (“Patient Advocate”) to make **medical decisions** for you if you are unable to make those decisions for yourself.
- Can include “living will” guidelines - your preferences for whether life support can be administered or continued if you are in a dire circumstance with no chance of recovery to a meaningful life.
- May contain provisions related to paying for medical care.
- Can include directions for organ donation.
- IS NOT A DNR.

Financial Power of Attorney

A document that enables the person named as Agent to handle your financial matters, including the ability to:

- Pay bills and taxes.

- Manage investments.

- Purchase or sell assets.

Avoids probate proceedings to appoint a conservator.

May be effective immediately or on disability.

May be “Durable” – meaning the Agent’s Authority does not change if you become incapacitated.

Agent must act in good faith and use reasonable care.

What is the MI UPOAA?

UPOAA Basics

- This law DOES NOT affect patient advocate designation documents or any forms authorizing anyone to exercise powers you have as a parent or guardian regarding the care, custody or property of a minor child or ward.
- POAs enacted prior to the Act are referred to as “vintage” and governed by the rules of EPIC (Estates and Protected Individuals Code) that applied prior to the Act. **Enacted July 1, 2024.**

UPOAA Basics

- MCL 556.201 et seq.
- UPOAA codifies state legislative trends across the United States and creates a cohesive set of best practices for drafting and utilizing POAs. To date, a version of the UPOAA has been enacted in at least **31 states**.
- UPOAA (the “Act”) applies to all Powers of Attorney (“POA”), even those executed prior to the Act – which is effective as of July 1, 2024.
 - **As long as your POA was validly executed at the time it was signed, your POA will remain valid.**

Valid Exercise to be Durable

A POA created on or after Act effective date, when executed in accordance with 556.205, is DURABLE unless it expressly provides that it is terminated by incapacity of principal.

What does “executed in accordance with 556.205” mean?

1. Must be signed by principal, or someone directed by principal to sign if principal is there and aware.
2. Must be notarized, OR two witnesses (both are not necessary, unless the Principal is signing by mark or directing someone else to sign);
3. Agent cannot be a witness.

If it is notarized, signature is presumed valid! Best practice is to have signature notarized, BUT THIS IS NOT REQUIRED.

UPOAA Basics

Default Rules of POAs, continued

- Unless specified otherwise, Agents are NOT liable for the acts of a predecessor, BUT – if a successor Agent knows about a breach of fiduciary duty by a prior Agent, they have a duty to inform the principal and take action to protect the principal's best interests.
- Incapacity = inability of an individual to manage property or business affairs for either of the following reasons:
 - The individual has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance.
 - The individual is missing, detained (or incarcerated), or outside the US and unable to return.

It promotes uniform acceptance of notarized POAs.

- Third parties (e.g., banks) are not permitted to refuse to accept a validly executed POA simply because the document didn't clear the entity's legal department.
- The UPOAA provides penalties for persons or entities who refuse to accept an acknowledged POA. “Acknowledged” means verified before a notary public (or other individual authorized to take acknowledgements).
- You cannot require someone to sign a new POA form if they have an existing POA that complies with the UPOAA.

It provides protection for third parties who rely on notarized POAs.

- The UPOAA is designed to protect third parties who accept a notarized POA in *good faith*, and also provides clear circumstances where acceptance of a POA can and should be denied.
- If there is any doubt, the third party can request a certification or opinion of counsel as to the validity of the POA within a seven-day window of the presentment of the document, and once acknowledged, the third party has five days to accept the POA.

It promotes accessibility and frees up judicial resources.

- Michigan has had a statutory form Will and statutory form Designation of Patient Advocate for some time.
- Now, there is a statutory form Power of Attorney. The purpose of the form is to give the public easy access to creating POAs, which will decrease the necessity of guardianships and conservatorships. However, as clearly stated on the form, because of the important authority granted in POAs, individuals should use caution in preparing these important forms without the assistance of counsel

UPOAA v. EPIC

Durability

Under EPIC (pre-July 2024):

A POA is not durable unless it says explicitly in the document that it survives the incapacity of the principal.

Under UPOAA (after July 2024):

A POA is presumed durable if the POA was validly exercised (witnessed and notarized) unless POA states otherwise. In addition, if the POA is signed but not properly witnessed and notarized, it is effective just not durable.

In other words, previous POAs created prior to July 2024 were durable “if”, post July 1, 2024 POAs are durable “unless”

Third Party Acceptance

Under EPIC:

A third party is not liable to the principal or any other person if the third party requires an attorney-in-fact to execute the proper acknowledgment before recognizing the durable power of attorney. MCL 700.5501 (5).

Under UPOAA:

A third party must accept a POA or request a certification or opinion of counsel as to the validity of the POA within a seven-day window of the presentment of the document, and once the documentation is provided, the person must accept the power within five business days, absent certain circumstances (knowledge of termination of Agent, financial exploitation or abuse concerns, violations of federal laws, etc).

Third Party Liability

Under EPIC, no recourse for clients whose banks required additional documentation.

Under UPOAA:

“A person that refuses to accept an acknowledged power of attorney in violation of the UPOAA is subject to a court order mandating acceptance of the power and liability for reasonable attorney fees and costs incurred in any action or proceeding that confirms the validity of the power or mandates acceptance of the power.” MCL 556.220.

We have yet to see court opinions on this (yet), so it seems the threat of litigation has worked – eventually – in most cases. Several attorneys have threatened, and so far, the threat of invoking our new statute works.

Liability of Agents

Under EPIC:

The attorney-in-fact may be liable for any damage or loss to the principal and may be subject to any other available remedy for breach of fiduciary duty owed to the principal

Under UPOAA:

There are teeth to a breach of duty claim: An agent who violates the UPOAA is liable for the amount required to restore the value of the principal's property to what it would have been had the violation not occurred, including attorney fees and costs. MCL 556.217(1). An agent is liable for three times the value of the property if the agent embezzles or converts the principal's property or refuses to transfer possession of the principal's property to the principal on demand. MCL 556.217(2).



Practical Tips for those who deal with Agents

A Power of Attorney ends when:

- Principal dies;
- Principal becomes incapacitated IF the POA is not durable;
- Principal revokes the POA;
- Terms of the POA dictate termination on happening of certain event;
- The agent dies, becomes incapacitated, or resigns; or
- In case of marriage between Agent and Principal, upon the separation of the two.

When can you reject a POA?

- If you have ACTUAL knowledge of any of the previous factors; or
- If you have reported the principal for possible financial exploitation as a vulnerable adult, then pending the results of the investigation, you do not have to honor the POA document.

Trust Accounts:

Under MCL 556.311, the agent will not have authority over accounts held in trust unless specifically granted such power.

Gifting by Agent:

Unless the POA specifically limits gifts, the agent has general authority to make outright gifts to a person or persons that the agent determines is consistent with the principal's objectives or in the principal's best interests (includes divesting of assets for nursing care, history of making gifts, etc; and recipient can include Agent unless limited in POA).

Practical Tips

Educate as often as you can!!!

Attorneys know that our clients should not sign another POA without consulting their attorney, but do you know why we say that?

Every choice a client makes on a POA form may have unintended consequences, may interfere or directly conflict with their current estate planning and may have a significant effect on your client's ability to do engage in Medicaid planning to protect assets.

Practical Tips

Talk with your local branch managers

- Find out how the branch intends to address POAs.
- How can you advise your clients to work with their attorneys?
- Multiple institutions have indicated that they are aware the law has changed, but they are not going to change their own policies – this is an issue and can open up a channel for litigation.

We advise clients to provide a copy of the POA to all financial institutions to confirm their approval of their existing documents BEFORE Agents need to act on behalf of your client.

Practical Tips to share with your Clients

- If the POA is not notarized, may want to re-execute the document before a notary to garner the additional protections that the UPOAA provides to acknowledged POAs.
- **Please don't sign anything you don't understand.** We are seeing clients come in with forms they printed from the internet and in 3 out of 4 cases, the forms are not completed, or not validly exercised, and/or are in direct conflict with what the client thinks they signed.
- Contact the client's legal professional or trusted advisor for assistance.

Practical Tips

Be informed:

- Contact your back office/legal department for guidance.
- DO NOT ASSUME A POA IS INVALID IF DATED PRIOR TO JULY 1, 2024.
- Remember that a POA is **presumed valid** if notarized.
- POAs do not expire until death of the Principal unless the documents says otherwise.

Will your office be providing a statutory form?

- DO NOT PROVIDE LEGAL ADVICE! Offer training to client facing service providers.
- **If your office rejects a valid POA, or requests a different form, you could be responsible for attorney fees and costs of a court order mandating acceptance (MCL 556.220)**

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