AGENDA

TO: Trust and Estate Section — Orange Book Forms Committee
FROM: Frank Lynch
DATE: December 28, 2010

AGENDA FOR JANUARY 20, 2011 MEETING, 12:15-1:30 pm

1. **Welcome and Call to Order**
   A. Introductions
   B. Attendance Sheet
   C. Reminder to receive complimentary supplement, must attend 5 meetings
   D. Approval of Minutes of the December 16 meeting
   E. Reminder to return extra copies

2. **Chairperson's Report**
   A. Legislative Liaison position report-Susan Boothby
   B. Federal Estate Tax Legislation Report-Eugene Zuspann
   C. Other matters

3. **Committee Reports**

   A. ACTIVE CONSIDERATION

1. New Form- Stand-alone HIPAA release. Michael Kirtland. Potential new form for Orange Book Forms. 12/17/2009 – *Final revisions to be presented in January 2011* **VOTE will occur**

2. New Form- Non-Married Couples Engagement Letter. Barbara Cashman Hahn, Bette Heller, Justin Jaeger, Josie Faix. 04/15/10 – *Final revisions to be presented in January 2011* **VOTE will occur**

3. Form 1A- General Durable Power of Attorney-Standing. David Kirch. Revise current form to adhere to new statutes enacted in 2009. 12/17/2009- *To be presented in January 2011* **VOTE will occur- vote will be an "approved" or "not approved"**

4. Gifting Tab, Tab D. David Kirch. Revise current tab to adhere to new statutes enacted in 2009. 12/17/2009- *To be presented in January 2011* **VOTE will occur- vote will be an "approved" or "not approved"**

   B. IN-PROGRESS

1. New Form- Joint Trust for Community Property – Dennis Whitmer. 09/2008- *To be presented in February 2011, but full committee to answer pending questions in January 2011*

2. Form 9- Marital Deduction Will- at paragraph 4.5 – Sonny Wiegand. Sonny Wiegand asked whether or not the death taxes for the surviving spouse, referenced in paragraph 4.5 of Form 9, were pro-rated. After checking the Note on Use, it was decided to return to this issue in the future. 04/16/09 *To be presented in March 2011*

3. New Form- Trust Funding Letter –Susan Boothby, Michelle Mieras, Bette Heller, Randy Robida. The sub-committee will decide if there anything to pursue then report to the committee. If they answer "yes" a decision needs to be made as to what to focus upon. 01/01/10. The decision was reached to focus on guidelines to the trustee rather than assignment issues. 09/2007. Connie and Susan would like to know if the committee wants to give them more guidance in light of the CBA/CLE publication "*Funding the Revocable Trust*." 04/16/09-*To be presented in April 2011*

4. New Form- Designated Beneficiary Agreement Form-Barbara Hahn. Suggested in February 2010. *To be presented in May 2011*

C. INACTIVE

1. New Form- Acceptance of Office Form for Powers of Attorney. Michael Kirtland. Should this potential new form pass, should it be added to Orange Book Forms? 12/17/2009

2. Federal tax legislation issue. Darla Daniel, Sonny Wiegand, Michelle Mieras. 01/21/10 A small committee will be needed to review the book if federal tax legislation is enacted.

3. POA. No chair. Create alternatives in Notes on Use if statue regarding the Acceptance of Office form for powers of attorney passes. 01/21/10 (Frank Lynch)

4. Tab D at 3) Durable Power of Attorney – Mike Holder. Review. 04/16/09 Looks like a check box form. Wait for POA form and create POA subcommittee.

5. QDot Review – Peggy Gardner, Michelle Mieras. There has been a slight modification to the language. A revised draft of the provision was sent out to the subcommittee. There was a discussion that if there currently isn't any QDot language in the Orange Book Forms, there should be. 09/2007. Joyce Sanchez agreed to contact Peggy for an update. 04/16/09

6. Orange Book Forms Review. Dave Johns, Laurie Hunter, Gordon Williams. 02/18/10 Ms. Hunter also noted that a new law will permit notarized wills without witnesses and wondered if the committee needed to address this issue. There was discussion of forming a subcommittee to go through the forms and find problems.

D. DEFUNCT

1. By Representation as Definition – Mike Holder. Review appropriate locations. 04/16/09 Needed if will goes to another state.

2. Rule Against Perpetuities Language – Eugene Zuspann. Eugene Zuspann stated that the purpose of this committee was to modify the language. He will continue to work on this project. Mr. Zuspann will contact Kevin Millard to see if Mr. Millard has any language for Mr. Zuspann to review. 09/2007

3. Uni-Trust Language – Eugene Zuspann. Eugene Zuspann stated that he has language ready and will continue to work on this project. 09/2007. Mike Holder will contact Gene for an update. 04/16/09

4. Revisions to Notes on Use to Form 17, § 6.2 (Common Trust for Descendants) – Carolyn Clawson. 09/2008

5. Form 7A–Will with Contingent Trust – Not Assigned. The committee discussed drafting a group trust to cover someone who becomes disabled, and decided to add the issue of harmonizing paragraphs 4.1 and 8.8 in Form 7A for 2009-2010.

6. Form 7A Will with Contingent Trust, Para. 8.9 – Not Assigned. Permits a guardian or conservator to act for a beneficiary but does not mention an agent under a power of attorney. This is a general administrative provision. Perhaps adding a POA should also be considered?

7. Form 7B, Will with Contingent Trust-Not Assigned. Discuss modifications 05/18/2008:

- Paragraph 4.3 on page 4 "Descendents by representation of that parent of the beneficiary who was a child of mine" Is to be reviewed by Gordon Williams.
- Paragraph 9.1 may need to be reviewed if the tax apportionment act passes.
- Paragraph 9.2 dealing with joint returns and signatures needs to be addressed
- Committee usage of "by representation" when statute defaults to "per capita at each generation."
- Paragraph 10.5 dealing with "offers classes on campus" may be issue as online courses are utilized.

5. New Matters & Announcements

6. Adjournment

MINUTES OF THE MEETING HELD ON DECEMBER 16, 2010

TO: Trust and Estate Section — Orange Book Forms Committee
FROM: Lisa Travis Fischer and Susan Hoyt
DATE: December 21, 2010

1. At approximately 12:20 p.m., Frank Lynch, brought the committee to order with a loud bang of the gavel. The committee was again reminded that they should return their extra copies for reuse/recycling. Introductions followed as the attendance sheet was passed around. The minutes of the November 18, 2010 meeting were unanimously approved.

2. Susan Boothby, the legislative liaison, was absent, but Eugene Zuspann gave a report on the status of the federal estate tax. It passed out of the senate. It seems that the biggest problem with it as proposed is that you can't make a generation-skipping gift in trust. **[NOTE: The tax bill was amended later in the day, and this problem no longer exists.]**.

3. Laurie Hunter reported that the POA subcommittee met that day and will meet again on January 4. They made changes to Form 1 and Tab D. They will get the revised form to Lisa Travis Fischer and she will send it to the full committee around January 7th. **The full committee will have only one week to make comments and suggestions and send them to David Kirch at dkirch@dwkpc.net.** Dave Johns kindly noted that the POA committee's progress was due in large part to the vast amount of work that Ms. Hunter did on the project.

4. Michael Kirtland then presented his stand-alone HIPAA release. He noted that he believes it would be helpful to include in the Orange Book Forms book, and there was general agreement among the committee members. Barb Hahn thought that mental health providers might object to this particular form. Sonny Wiegand suggested adding a Note on Use regarding the fact that practitioners might want to use other releases for other purposes. Mr. Kirtland suggested perhaps having two alternatives. Ms. Hunter said that maybe in the Notes on Use we could give examples of specific purposes for which and by whom this release could be used, like an agent under a medical durable power of attorney. Ms. Hunter offered to send Mr. Kirtland some proposed language regarding specific authorizations.

5. The committee made many changes to the Release form, such as: they decided to change the word "release" to "authorization" every time it appears in the form; they decided to change the word "medical" to

"health" in every place it appears; the title of the form was changed to "Authorization for Release of Protected Health Information"; the lines for "To:" and "Date" at the top were removed; the last sentence of the first paragraph was changed to read "This Authorization applies to all medical, dental, psychiatric, and other protected health information in the health care provider(s) possession"; the word "better" was removed from the third paragraph; the words "and unless otherwise" were changed to "until" in the fourth paragraph; a sentence was added to the effect of "I understand that this information may be subject to redisclosure and no longer protected"; the signature lines for witnesses were removed; and Notes on Use were suggested to track Note 7 for Form 4 and regarding notarization. Mr. Weigand moved that the committee return the form to Mr. Kirtland for him to make these changes, which motion passed unanimously.

6. Attention then turned to Ms. Hahn's suggested estate planning engagement letter for non-married couples. There was some immediate contention regarding whether it was necessary or advisable to remove the information about the basis of the fee from the letter. After a straw vote, the committee decided to leave the info in, as an attorney could easily delete that part when using the form. Mr. Wiegand noted that the form goes back and forth between use of singular and plural, and should be changed to plural throughout. This will have to be changed in the married couple letter too. Mike Holder noted that "partner" is a contentious term and should be changed to "significant other" throughout the form in order to match the language in the estate planning questionnaires.

7. Mr. Wiegand noted that most of the language in the deleted paragraph on the first page should still be included, as it is still pertinent. The language about spouses will be removed and the rest will be added back in to the form. In paragraph 1, the words "beneficial and" were deleted. In the new paragraph 4, the word "doctrine" was added in the second sentence for consistency. In the paragraph following #4, the file retention language was changed to 10 years. This will have to be changed in the married couple letter as well.

8. Gordon Williams really thought that designated beneficiary agreements needed to be acknowledged in the form, in place of the paragraph regarding spousal rights that was deleted. A straw vote showed that only Mr. Williams and Frank Hill believed that it was necessary to discuss DBAs, so they were not included.

9. Mr. Wiegand once again moved to return the form to its author for amendment and to have the committee vote on it when the changes were made. This passed unanimously. Ms. Hahn then briefly addressed the Notes on Use, where she took out all the married language and

added some references to articles and programs on non-married couples.

10. At approximately 1:30, the meeting was adjourned with another sharp rap of the gavel.

This is a suggested fee and engagement letter for use by an attorney in representing non-married couples who wish to be jointly represented.

Before this form is used, the caveats at the beginning of the book and all Notes on Use for this form should be carefully read.

See Notes on Use 14 and 15 ESTATE PLANNING JOINT REPRESENTATION LETTER TO NON-MARRIED COUPLES

Dear New Clients:

See Note on Use 1 This letter confirms the terms of our representation with respect to the estate planning for which you have recently engaged us. Under the terms of our engagement, the scope of representation shall include **[**insert description of work to be completed**]**.

Our representation under this agreement will be limited to the above described scope of representation. Estate planning involves a variety of techniques, and unless specifically agreed to, our representation will not include: __________________.

See Note on Use 2 The fee for these services shall be **[**insert a description of the manner in which the fees will be charged and the amount of the fees to be charged**]**.

See Notes on Use 3 and 4 As a couple in a committed relationship, you have a special and unique connection and generally share mutual goals and aspirations. Accordingly, it may be appropriate to employ the same law firm to assist you in planning your estate. However, future circumstances could arise in which your separate financial or legal interests may diverge. We may not, for example, jointly represent a couple whose interests are directly adverse, unless (1) we reasonably believe our services will not adversely affect our representation of either party, and (2) both parties consent after consultation regarding the advantages and risks involved. It is possible that our joint representation of both of you together could require us to withdraw as your counsel and recommend that each of you consult separate counsel in the future. This is consistent with our professional ethics.

See Note on Use 5 We have discussed with you the differences between “joint” and “separate” representation, including the fact that if you were represented separately you would each have an advocate for your position and information given to your own lawyer would remain confidential and unobtainable by your spouse.

See Notes on Use 6, 7, 8, and 10 Significant others can have differing, and sometimes conflicting, interests and objectives regarding their estate planning. For example,

they may have different views on how property should pass after the death of one or both of them.

See Note on Use 9 Since the information you have provided so far suggests no indication of differences that would result in a conflict, we agree to represent you jointly, with the understanding that the following ethical considerations will apply:

1) In a joint representation, we cannot serve as advocate for one of you against the other. When we represent you jointly, matters that either of you discuss with our firm are not protected by the attorney/client privilege from disclosure to your significant other. In order to properly represent you both, therefore, we cannot agree with one of you to withhold information from the other. We will assist both of you jointly to develop a coordinated estate plan that is acceptable to both of you. Generally, matters that you discuss with us will be protected from disclosure to third parties, except with your consent or as we may be required to disclose by law or rules governing professional conduct. For instance, in the event of a will contest, we may be required to testify regarding the communications and circumstances surrounding the making or execution of your will.

2) If there are differences of opinion between you about your proposed estate plan, we may point out the pros and cons of such differences; however, the ethical rules prohibit us, as the lawyers for you both, from advocating one of your positions over the other.

3) If a conflict between you does arise that, in our judgment, renders it impossible for us to continue to represent you jointly, we must withdraw as your joint attorney and advise you to obtain separate counsel.

4) ***See Note on Use 10*** Details of conversations between spouses may be protected from disclosure by the spousal privilege doctrine. Because you are not married, the spousal privilege doctrine does not apply to you, and details of your private conversations may be compelled in a subsequent legal proceeding.

See Note on Use 11 In addition to the above ethical considerations, please be aware that we do not keep original estate planning documents in our files. Original documents will be returned to you. We may keep a paper copy or a scanned copy of your file; however, please understand that such copies may be destroyed **[**ten**]** years after completion of the work stated in this agreement.

See Note on Use 12 Once your estate planning documents have been executed, our representation of you with respect to the scope of work we have identified in this communication will come to an end. We will, of course, be pleased to have the opportunity to represent you again if the need arises. You should be mindful of the fact that the nature

and extent of your assets will change in the future. The services we are providing you as described above will be based on your current estate planning goals and the present state of the law. However, the tax laws may change in the future, in which case your estate planning documents may need to be revised. Although we may, from time to time, send you general updates regarding changes in the law, because of the large number of clients we represent, we cannot undertake to advise you if changes in the law occur that affect your specific estate plan, nor will we review your file annually or on any other regular basis. Accordingly, we recommend that you call us or another attorney if your estate changes in size or type of assets, if your estate planning goals change, or if you read about changes in the law you think may affect you. We will then be happy to advise you if we think changes are called for.

Please review this letter carefully and if there is anything that is unclear, please let us know so we can discuss it. If the terms outlined above are satisfactory to you, then we would appreciate your signing and returning the enclosed copy of this letter as acknowledgment that you have read and understood it and wish us to proceed to jointly represent you.

Sincerely,

____

See Note on Use 13 We have read the foregoing letter and we consent to your jointly representing us on the terms and conditions described. We understand the discussion of conflicts set forth above and agree that between us, with respect to information either of us provides to you, there shall be no confidential communications.

___________________, 20___   _________________________
New Client

___________________, 20___   _________________________
New Client

***** End of Form *****

NOTES ON USE

1) It is recommended that the list of duties undertaken and the matters that are excluded from representation be as specific as possible to avoid misunderstanding and potential liability on the part of the attorney. The responsibilities of the attorney and those of the client should be specified. Some examples of services that an attorney may want to specifically identify as being excluded from the representation (to the extent applicable) are: funding of a trust, preparation of tax returns, income tax advice, contested issues or litigation, asset protection services such as domestic asset protection trusts or off-shore trusts, Medicaid planning, review of business entity documents, or other services that a client may expect to be included in the engagement.

2) Colorado Rule of Professional Conduct (Colo. RPC or Rule) 1.5(b) requires that, if an attorney has not regularly represented a client, the basis or rate of the attorney's fee must be communicated in writing to the client. It may be wise to list all factors upon which the fee is based in order to establish the reasonableness of the fee, for instance, whether the fee is hourly based or a flat fee. Rule 1.5 lists factors that will be considered in determining the reasonableness of a fee, which factors include the time and labor required, the novelty or difficulty of the questions involved, and the skill necessary to perform the legal service. If it is anticipated that the firm or attorney will raise rates over the life of the engagement, this information must be disclosed. Except as provided in a written fee agreement, any actual material changes to the basis or rate of the fee are subject to Rule 1.8(a), which requires the client to give informed consent, in writing, of any transaction with the attorney. Further, Colorado law requires that if any third party will be attempting to collect the fee owed to the attorney, any interest, charge, or expense incidental to the principal obligation (such as charges for copies, faxes, and telephone calls) must be expressly authorized by the agreement creating the debt or obligation. *See* C.R.S. § 12-14-108(1).

3) The adoption of the ABA Model Rules of Professional Conduct by the Colorado Supreme Court has prompted Colorado estate planning lawyers to examine their practices, especially as to the representation of a husband and wife for estate planning legal services. The rules of conduct mandate that the client be informed in writing of the basis or rate of the attorney's fee. This writing need not take the form of an engagement letter (*see* Colo. RPC 1.5, Comment [2]), nonetheless, a letter explaining potential conflicts of interest is required before engaging to represent multiple clients whose interests may turn out to be adverse. *See* Colo. RPC 1.7 and Note on Use 6, below.

   The rules of conduct that are most relevant to the subject of estate planning for spouses are set forth below. For the full text of the rules and the committee comments, see *Colorado Ethics Handbook*, Fifth Ed. (CLE in Colo., Inc. 2007). *See also ACTEC Commentaries on the Model Rules of Professional Conduct*, 4th ed.

(ACTEC Foundation 2006); "Lawyers' Responsibilities and Lawyers' Responses," 107 *Harvard L. Rev.* 1547 (May 1994).

Some resources specifically pertinent to the representation of non-married couples include:

- Wendy S. Goffe, "Estate Planning for the Unmarried Couple/Non-Traditional Family" (ALI-ABA course materials, June 3, 2005), *available at* www.actec.org/Documents/misc/GoffeNon-TradCouples. pdf-2005-06-03;
- Kathleen Ford Bay, "Estate Planning for Unmarried Couples: What's Different and What's the Same?" at 3 (ACTEC Annual Meeting, March 10-15, 2004), *available at* www.actec.org/Documents/CLEMaterials/ShermanFinalEstPlanUnmarrCouples.pdf; and
- Constance Tromble Eyster, "Engagement Letters and Common Conflicts of Interest in Joint Representation," 38 *Colo. Law.* 43 (Feb. 2009).

4) Estate planning for the non-married couple is becoming a more common practice. Like married couples, non-married couples may seek estate planning with their significant others. The possible lawyer/client representations for a non-married couple are the same as outlined in Note on Use 5 below and the same conflict analysis should be made.

5) A married couple seeking legal advice for estate planning may encounter three possible lawyer/client arrangements for such services:

a) Separate Representation—An arrangement that contemplates that each client will be represented by a different lawyer. This form of representation is not very cost effective, but is best used where conflicting interests of the parties render joint representation impossible or unworkable.

b) Joint Representation—An arrangement that contemplates that both clients will be represented together by the same lawyer. This form of representation is usually less costly, since only one lawyer is involved, and may be used if there are no conflicts between the significant others or if both significant others have consented to joint representation despite minor conflicts between them.

c) Simultaneous Representation—An arrangement that contemplates that both significant others will be represented by the same lawyer simultaneously but separately. The ethical authority for this form of representation is unclear and for this reason it is not recommended.

The representation letter provided here is intended for use in a joint representation of a non-married couple.

6) Colo. RPC 1.7 is the basic rule governing the concurrent representation of clients with potentially adverse or conflicting interests. Comment [27] to Rule 1.7 acknowledges that conflicts may arise in estate planning, where for example, "A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present." The general rule prohibits the representation of a client if the representation of (a) one client will be directly adverse to another client or (b) if the representation may be materially limited by the lawyer's responsibilities to another client, unless (1) the lawyer reasonably believes the representation will not be adversely affected, (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, confirmed in writing.

Comments [18] and [19] to Rule 1.7, as well as Rule 1.0, state that informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. In particular, when jointly representing multiple clients, the attorney must provide the clients with information explaining the implications of the common representation, including possible effects on loyalty, confidentiality, and the attorney-client privilege.

The comments to Rule 1.7 squarely address the ability of a client to waive a conflict that might arise in the future. Comment [22] provides that the effectiveness of the waiver is determined by the client's understanding of the material risks that the waiver entails. A comprehensive, detailed explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of the representations make it more likely that the client will make a valid waiver of a future conflict. Factors such as the client's familiarity with the type of conflict, the specificity of the consent, and the client's level of sophistication can impact the effectiveness of the waiver. In no circumstances, however, can a waiver of a future conflict be effective if circumstances materialize that would make the conflict nonconsentable under Rule 1.7(b). Whether a conflict is consentable depends on the circumstances. If the clients are generally aligned in interest, a common representation is permissible despite some difference in interest between them. Colo. RPC 1.7, Comment [28].

7) C.R.S. § 14-10-113(7)(a) provides that, for the purpose of division of marital property in a dissolution proceeding, gifts of property (with the exception of nonbusiness tangible personal property) from one spouse to another, whether in trust or not, shall be presumed to be marital property and not separate property. This presumption may be rebutted by clear and convincing evidence. Some practitioners feel that, as a result of this statute, transfers of marital property for estate planning purposes between spouses does not create a conflict because by statute such transfer is presumed not to convert the transferred property into the separate property of the

donee spouse. Accordingly, in applicable circumstances, an attorney might consider deleting the last two sentences of the sixth paragraph of the Engagement Letter.

8) This form letter acknowledges the lawyer's perception, after the initial meeting with the clients, that no significant adversity or conflict is apparent between the parties. It is intended to inform the clients of the ethical ground rules that will govern the representation from this point forward. This letter does not request that clients waive conflicts that might arise in the future. If, during the initial meeting or any subsequent meeting, a conflict does develop that may still allow the joint representation to continue after consultation and consent within the guidelines of Colo. RPC 1.7, then the lawyer should consider documenting the specific nature of the conflict and the consent of the parties after consultation in some different form of memorandum or letter signed or initialed by the parties. However, if a waiver of the conflict is not obtained, or if the conflict is so severe so as to preclude waiver of it under Rule 1.7, then joint representation may not continue and the lawyer ordinarily must withdraw from representing either party in matters which are in conflict. *See* Colo. RPC 1.7, Comment [29].

9) As stated in Comment [32] to Rule 1.7, it is important when representing clients jointly to make clear that the attorney's role is not one of partisanship that would normally be expected in other circumstances. Jointly represented clients may be required to assume greater responsibility for decisions than if such clients were separately represented.

This letter also makes it clear that when jointly representing non-married clients, the lawyer cannot agree with one client to withhold confidential information from the other. The receipt of confidential information by the lawyer from one client in a joint representation of a non-married couple intending that it be kept confidential from the other presents the greatest threat to the lawyer's independent judgment and to the continued representation of both clients. Comment [31] to Rule 1.7 provides that the attorney's duty of loyalty to each client almost certainly prohibits continued common representation if one client asks the lawyer not to disclose to the other client information relevant to the common representation. At the outset of the representation, therefore, the comment suggests that the attorney should advise each client that information will be shared among the jointly represented clients. The "Report of the Special Study Committee," cited above, discusses three broad categories of confidences that may cause the lawyer to conclude that the differences between the spouses make their interests adverse and may require the lawyer to either disclose the confidence or withdraw from the joint representation. *See* "Report" at 784. *See also* Collett, "Disclosure, Discretion, or Deception: the Estate Planner's Ethical Dilemma From a Unilateral Confidence," 28 *Real Prop. & Prob. J.* 683 (Winter 1994), in which the author concludes that the lawyer must disclose confidential information to the nonconfiding client under certain circumstances.

Practitioners should be aware that, after the death of a client, the attorney-client privilege may be waived when heirs or devisees make a claim through the decedent. *Swindler & Berlin v. U. S.*, 524 U.S. 399, 404-05 (1998). Although Colorado has not yet codified this testamentary exception, Colorado courts have recognized such an exception to the attorney-client privilege as early as 1905 in the case of *Estate of Shapter*, 85 P. 688 (Colo. 1905). In that will contest dispute, the trial court permitted the attorney who drafted the will to testify as to the circumstances surrounding the will execution. This ruling was upheld in *Denver National Bank v. McLagan*, 298 P.2d 386 (Colo. 1956), in which the drafting attorney was permitted to testify as to "all matters leading up to the execution of the will including statements of the testator [and] his mental condition, and to facts relating to the issue of undue influence and other matters affecting the validity of the will." *See also Glover v. Patten*, 165 U.S. 394, 407-08 (1897); *Wesp v. Everson*, 33 P.3d 191, 200 (Colo. 2001); "Wills and the Attorney-Client Privilege," 14 *Ga. L. Rev*. 325, 334 (1980).

10) If the non-married couple has executed Designated Beneficiary Agreements, naming their significant others as Designated Beneficiaries, this may affect property distribution at the death of one significant other. It does not, however, invoke the spousal privilege doctrine.

11) Because of the nature of estate planning work, the issue of file retention presents practical problems regarding the nature and length of storage of a client's file. Accordingly, attorneys may wish to include language in their engagement letter that discloses their office policy regarding file retention and reserves the right to discard client files a certain number of years after the representation has ended or documents have been signed. Such language may help obviate the need to contact clients/former clients if and when an attorney wants to cull files.

    There is no bright-line rule delineating how long attorneys should or must keep copies of executed wills, or mandating that files be destroyed within a certain period following representation. However, Colo. RPC 1.15(j) requires attorneys to keep copies of accounting records, including the engagement letter/fee agreement, for at least seven years following the termination of representation of a client. Accounting records that are required to be kept for this period also include copies of those portions of each client's case file "reasonably necessary for a complete understanding of the financial transactions pertaining thereto." Colo. RPC 1.15(j)(8). In the case of an estate planning attorney, this may mean keeping a copy of all final documents produced for the client (to show the work produced for the fee charged) for a minimum of seven years following the termination of representation. What an attorney does with these records after the seven-year period is not limited by outright ethical or legal duties, other than the duty to safeguard the client's interests. Practical considerations, such as the statute of limitations on malpractice, should be taken into consideration.

The following articles may provide additional guidance on file retention issues: Doris B. Truhlar & Joseph N. de Raismes, "Coping with the Avalanche: A Survey on the Disposition of Client Files," 16 *Colo. Law.* 1787 (Oct. 1987); Raymond P. Micklewright, "Understanding File Retention: Developing an Ethical Policy and Plan," 30 *Colo. Law.* 147 (Oct. 2001).

As of May 2011, the Colorado Bar Association's Ethics Committee is reviewing the Rules of Professional Conduct regarding file retention. Although Colo. RPC 1.15(j) states that files must be retained for seven years, it is generally acknowledged that the Ethics Committee believes that files should be retained for ten years. The Ethics Committee is expected to issue a Formal Opinion regarding file retention, but has not as of May 2011. For the most up-to-date information on this topic, please consult the Colorado Rules of Professional Conduct and the Ethics Committee's webpage, www.cobar.org/index.cfm/ID/20202/CETH/Ethics-Committee.

12) During the active part of the representation, an attorney must keep the client reasonably informed regarding developments in the law that might affect the client. *See* Colo. RPC 1.1, "Competence," and Colo. RPC 1.3, "Diligence." Specific language in an engagement letter regarding the termination of an attorney's representation clarifies that an attorney does not have an ongoing responsibility to inform the client of changes in the law after the client's estate planning documents have been signed. More information on the termination of an attorney's representation can be found in Chapter 2, "The Client-Lawyer Relationship," of *Lawyers' Professional Liability in Colorado*, 2nd ed. (Michael T. Mihm ed., CLE in Colo., Inc. Supp. 2008).

13) As provided in Colo. RPC 1.5, a client must be informed in writing of the basis or rate of the attorney's fee. Consent in writing is not required unless there is a material change to the basis or rate of the fee or unless the client is required to give informed consent to a conflict of interest. Without a signed engagement letter, however, it is more difficult for an attorney to show that the client understood the terms of the engagement.

14) In 2008, the American College of Trust and Estate Counsel (ACTEC) published a guideline for practitioners entitled "Engagement Letter: A Guide for Practitioners," *available at* www.actec.org/public/EngagementLettersPublic.asp (providing guidance on other forms of representation that may warrant special attention in an engagement letter, such as: representation of multiple generations of the same family, multiple party representation in a business context, representation of a fiduciary, representation of a disabled client, and representations in which the attorney serves as a fiduciary).

15) Some of the ethical rules that are relevant to the practice of estate planning law are printed in Tab Ca, "Estate Planning Joint Representation Letter to Married Couples," at Note on Use 15.

See Note on Use 1 AUTHORIZATION FOR RELEASE OF PROTECTED HEALTH INFORMATION

This Authorization is for the release of my medical records and other protected health information to the following individual(s) or organization(s):

Name	Address	Relationship
____________________	______________________________	______________________
____________________	______________________________	______________________

I hereby authorize my health care provider(s) to release to the above-named individuals or organizations, any and all information and health records data as permitted under the Health Insurance Portability and Accountability Act of 1996, or HIPAA, and the laws of the State of Colorado, or any other state where this Authorization may be presented. I further authorize my health care provider(s) to discuss this health information with the above-named individuals or organizations and to provide prognosis and discuss possible courses of health care actions with these individuals. ***See Note on Use 2*** This Authorization applies to all medical, dental, psychiatric, and other protected health information in the health care provider(s) possession, as provided by law.

The individuals named above are to be considered "personal representatives" as that term is defined under HIPAA and associated laws of the State of Colorado or any other state where this Authorization may be presented.

This Authorization is provided and executed for the purpose of providing health input to the above-named individuals, in consideration of my future health care, and for their providing to my health care provider(s) information concerning my health care needs and wishes.

See Note on Use 3 This Authorization shall remain valid indefinitely, until otherwise revoked by me in writing. I have the right to revoke this authorization at any time and may do so by providing a written revocation to any individual or organization to whom I have previously provided this Authorization. A copy of this Authorization shall be as effective as the original.

No health care entity, as defined by HIPAA, may condition treatment, payment, enrollment or eligibility for benefits on execution of this Authorization, except as provided by law.

I understand that by authorizing this disclosure, such protected health care information provided may be subject to redisclosure by the recipient and that such otherwise protected health care information will no longer be considered protected health care information.

See Note on Use 4

______________________________	______________________________
Name	Date

NOTES ON USE

1) This Authorization is a general authorization for release of protected health care information. The drafter may wish to draft a more restrictive Authorization to meet the client's needs and intentions. *See also* Form 4, "Medical Durable Power of Attorney," at Note on Use 7.

2) A separate Authorization is generally necessary to obtain protected psychotherapy information. The drafter should modify this Authorization for release of such psychotherapy information.

3) This Authorization provides for indefinite effectiveness. The drafter may wish to include a specific termination date or other termination conditions to meet the client's needs.

4) While witnessing and notarization are not required, it may be added, and adding such witnessing and notarization may facilitate acceptance of this Authorization by health care providers. Drafters should be careful to ensure that neither the witnesses nor the notary public are themselves health care providers or employees of health care providers. Use of a neutral notary public and witnesses, unrelated to the client, is strongly recommended.

This is a suggested fee and engagement letter for use by an attorney in representing a husband and wife.

Before this form is used, the caveats at the beginning of the book and all Notes on Use for this form should be carefully read.

See Notes on Use 14 and 15 ESTATE PLANNING JOINT REPRESENTATION LETTER TO MARRIED COUPLES

Dear Mr. and Ms. New Client:

See Note on Use 1 This letter confirms the terms of our representation with respect to the estate planning for which you have recently engaged us. Under the terms of our engagement, the scope of representation shall include **[**insert description of work to be completed**]**.

Our representation under this agreement will be limited to the above described scope of representation. Estate planning involves a variety of techniques, and unless specifically agreed to, our representation will not include: ___________________.

See Note on Use 2 The fee for these services shall be **[**insert a description of the manner in which the fees will be charged and the amount of the fees to be charged**]**.

See Notes on Use 3 and 4 While it is customary for a husband and wife to employ the same law firm to assist them in planning their estate, ethical rules governing all lawyers, nevertheless, limit our ability to represent multiple clients. We may not, for example, jointly represent a husband and wife whose interests are directly adverse, unless (1) we reasonably believe our services will not adversely affect our representation of either party, and (2) both parties consent after consultation regarding the advantages and risks involved.

See Note on Use 5 We have discussed with you the differences between "joint" and "separate" representation, including the fact that if you were represented separately you would each have an advocate for your position and information given to your own lawyer would remain confidential and unobtainable by your spouse.

See Notes on Use 6, 7, and 8 Marriage, in our opinion, does not necessarily cause a husband's and wife's interests to be adverse. However, spouses can have differing, and sometimes conflicting, interests and objectives regarding their estate planning. For example, they may have different views on how property should pass after the death of one or both of them. In addition, we may recommend in some cases that property ownership be changed to take advantage of available tax benefits which may involve gifts from one spouse to the other. Such gifts may affect the classification under applicable law of the property transferred

which in turn may affect the division of such property in the event of a divorce, unless the estate plan also includes a marital property agreement.

See Note on Use 9 Since the information you have provided so far suggests no indication of differences that would result in a conflict, we agree to represent you jointly, with the understanding that the following ethical considerations will apply:

1) When we represent you jointly, matters which either of you discusses with our firm are not protected by the attorney/client privilege from disclosure to your spouse. In order to properly represent you both, therefore, we cannot agree with one of you to withhold information from the other. Generally, matters that you discuss with us will be protected from disclosure to third parties, except with your consent or as we may be required to disclose by law or rules governing professional conduct. For instance, in the event of a will contest, we may be required to testify regarding the communications and circumstances surrounding the making or execution of your will.

2) If there are differences of opinion between you about your proposed estate plan, we may point out the pros and cons of such differences; however, the ethical rules prohibit us, as the lawyers for you both, from advocating one of your positions over the other.

3) If a conflict between you does arise that, in our judgment, renders it impossible for us to continue to represent you jointly, we must withdraw as your joint attorney and advise you to obtain separate counsel.

4) ***See Note on Use 10*** Upon the death of either of you, the survivor's statutory rights to a share of the deceased spouse's estate may differ from, or be greater than, the rights granted to the survivor by the deceased spouse's estate plan. In this or similar cases, lawyers are compelled by the ethics of their profession to counsel the surviving spouse regarding his or her statutory rights.

See Note on Use 11 In addition to the above ethical considerations, please be aware that we do not keep original estate planning documents in our files. Original documents will be returned to you. We may keep a paper copy or a scanned copy of your file; however, please understand that such copies may be destroyed **[**ten**]** years after completion of the work stated in this agreement.

See Note on Use 12 Once your estate planning documents have been executed, our representation of you with respect to the scope of work we have identified in this communication will come to an end. We will, of course, be pleased to have the opportunity to represent you again if the need arises. You should be mindful of the fact that the nature and extent of your assets will change in the future. The services we are providing you as described above will be based on your current estate planning goals and the present state of

the law. However, the tax laws may change in the future, in which case your estate planning documents may need to be revised. Although we may, from time to time, send you general updates regarding changes in the law, because of the large number of clients we represent, we cannot undertake to advise you if changes in the law occur that affect your specific estate plan, nor will we review your file annually or on any other regular basis. Accordingly, we recommend that you call us or another attorney if your estate changes in size or type of assets, if your estate planning goals change, or if you read about changes in the law you think may affect you. We will then be happy to advise you if we think changes are called for.

Please review this letter carefully and if there is anything that is unclear, please let us know so we can discuss it. If the terms outlined above are satisfactory to you, then we would appreciate your signing and returning the enclosed copy of this letter as acknowledgment that you have read and understood it and wish us to proceed to jointly represent you.

Sincerely,

____

See Note on Use 13 We have read the foregoing letter and we consent to your jointly representing us on the terms and conditions described. We understand the discussion of conflicts set forth above and agree that between us, with respect to information either of us provides to you, there shall be no confidential communications.

___________________, 20___ ________________________
Mr. New Client

___________________, 20___ ________________________
Ms. New Client

***** End of Form *****

NOTES ON USE

1) It is recommended that the list of duties undertaken and the matters that are excluded from representation be as specific as possible to avoid misunderstanding and potential liability on the part of the attorney. The responsibilities of the attorney and those of the client should be specified. Some examples of services that an attorney may want to specifically identify as being excluded from the representation (to the extent applicable) are: funding of a trust, preparation of tax returns, income tax advice, contested issues or litigation, asset protection services such as domestic asset protection trusts or off-shore trusts, Medicaid planning, review of business entity documents, or other services that a client may expect to be included in the engagement.

2) Colorado Rule of Professional Conduct (Colo. RPC or Rule) 1.5(b) requires that, if an attorney has not regularly represented a client, the basis or rate of the attorney's fee must be communicated in writing to the client. It may be wise to list all factors upon which the fee is based in order to establish the reasonableness of the fee, for instance, whether the fee is hourly based or a flat fee. Rule 1.5 lists factors that will be considered in determining the reasonableness of a fee, which factors include the time and labor required, the novelty or difficulty of the questions involved, and the skill necessary to perform the legal service. If it is anticipated that the firm or attorney will raise rates over the life of the engagement, this information must be disclosed. Except as provided in a written fee agreement, any actual material changes to the basis or rate of the fee are subject to Rule 1.8(a), which requires the client to give informed consent, in writing, of any transaction with the attorney. Further, Colorado law requires that if any third party will be attempting to collect the fee owed to the attorney, any interest, charge, or expense incidental to the principal obligation (such as charges for copies, faxes, and telephone calls) must be expressly authorized by the agreement creating the debt or obligation. *See* C.R.S. § 12-14-108(1).

3) The adoption of the ABA Model Rules of Professional Conduct by the Colorado Supreme Court has prompted Colorado estate planning lawyers to examine their practices, especially as to the representation of a husband and wife for estate planning legal services. The rules of conduct mandate that the client be informed in writing of the basis or rate of the attorney's fee. This writing need not take the form of an engagement letter (*see* Colo. RPC 1.5, Comment [2]), nonetheless, a letter explaining potential conflicts of interest is required before engaging to represent multiple clients whose interests may turn out to be adverse. *See* Colo. RPC 1.7 and Note on Use 6, below.

   The rules of conduct that are most relevant to the subject of estate planning for spouses are set forth below. For the full text of the rules and the committee comments, see *Colorado Ethics Handbook*, Fifth Ed. (CLE in Colo., Inc. 2007). *See also* Malcolm A. Moore and Anne K. Hilker, "Representing Both Spouses: The New Section Recommendations," *Prob. & Prop.* 26, (July/Aug. 1993), and *ACTEC*

Commentaries on the Model Rules of Professional Conduct, 4th ed. (ACTEC Foundation 2006). *See also* “Lawyers’ Responsibilities and Lawyers’ Responses,” 107 *Harvard L. Rev.* 1547 (May 1994).

4) Estate planning for the non-married couple is becoming a more common practice. Like married couples, non-married couples may seek estate planning with their significant others. The possible lawyer/client representations for a non-married couple are the same as outlined in Note on Use 5 below and the same conflict analysis should be made.

5) A married couple seeking legal advice for estate planning may encounter three possible lawyer/client arrangements for such services:

   a) <u>Separate Representation</u>—An arrangement that contemplates that each spouse will be represented by a different lawyer. This form of representation is not very cost effective, but is best used where conflicting interests of the parties render joint representation impossible or unworkable.
   b) <u>Joint Representation</u>—An arrangement that contemplates that both spouses will be represented together by the same lawyer. This form of representation is usually less costly, since only one lawyer is involved, and may be used if there are no conflicts between the spouses or if both spouses have consented to joint representation despite minor conflicts between them.
   c) <u>Simultaneous Representation</u>—An arrangement that contemplates that both spouses will be represented by the same lawyer simultaneously but separately. The ethical authority for this form of representation is unclear and for this reason it is not recommended.

   The representation letter provided here is intended for use in a joint representation of a married couple, which seems to be the prevailing form of practice and conforms most often to the expectations of the clients.

6) Colo. RPC 1.7 is the basic rule governing the concurrent representation of clients with potentially adverse or conflicting interests. Comment [27] to Rule 1.7 acknowledges that conflicts may arise in estate planning, where for example, “A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present.” The general rule prohibits the representation of a client if the representation of (a) one client will be directly adverse to another client or (b) if the representation may be materially limited by the lawyer’s responsibilities to another client, unless (1) the lawyer reasonably believes the representation will not be adversely affected, (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, confirmed in writing.

Comments [18] and [19] to Rule 1.7, as well as Rule 1.0, state that informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. In particular, when jointly representing multiple clients, the attorney must provide the clients with information explaining the implications of the common representation, including possible effects on loyalty, confidentiality, and the attorney-client privilege.

The comments to Rule 1.7 squarely address the ability of a client to waive a conflict that might arise in the future. Comment [22] provides that the effectiveness of the waiver is determined by the client's understanding of the material risks that the waiver entails. A comprehensive, detailed explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of the representations make it more likely that the client will make a valid waiver of a future conflict. Factors such as the client's familiarity with the type of conflict, the specificity of the consent, and the client's level of sophistication can impact the effectiveness of the waiver. In no circumstances, however, can a waiver of a future conflict be effective if circumstances materialize that would make the conflict nonconsentable under Rule 1.7(b). Whether a conflict is consentable depends on the circumstances. If the clients are generally aligned in interest, a common representation is permissible despite some difference in interest between them. Colo. RPC 1.7, Comment [28].

7) C.R.S. § 14-10-113(7)(a) provides that, for the purpose of division of marital property in a dissolution proceeding, gifts of property (with the exception of nonbusiness tangible personal property) from one spouse to another, whether in trust or not, shall be presumed to be marital property and not separate property. This presumption may be rebutted by clear and convincing evidence. Some practitioners feel that, as a result of this statute, transfers of marital property for estate planning purposes between spouses does not create a conflict because by statute such transfer is presumed not to convert the transferred property into the separate property of the donee spouse. Accordingly, in applicable circumstances, an attorney might consider deleting the last two sentences of the sixth paragraph of the Engagement Letter.

8) This form letter acknowledges the lawyer's perception, after the initial meeting with the clients, that no significant adversity or conflict is apparent between the parties. It is intended to inform the clients of the ethical ground rules that will govern the representation from this point forward. This letter does not request that clients waive conflicts that might arise in the future. If, during the initial meeting or any subsequent meeting, a conflict does develop that may still allow the joint representation to continue after consultation and consent within the guidelines of Colo. RPC 1.7, then the lawyer should consider documenting the specific nature of the conflict and the consent of the parties after consultation in some different form of memorandum or letter signed or initialed by the parties. However, if a waiver of the conflict is not obtained, or if the conflict is so severe so as to preclude waiver of it under Rule 1.7,

then joint representation may not continue and the lawyer ordinarily must withdraw from representing either party in matters which are in conflict. *See* Colo. RPC 1.7, Comment [29].

Under Colo. RPC 1.9, the lawyer may not continue to represent one spouse in the same or substantially related matter where the spouses' interests are materially adverse without the other spouse's informed consent, confirmed in writing. This would appear to bar a lawyer from continuing to represent one spouse where a conflict had developed in representing both. For discussion of the lawyer's duty to withdraw, see Russell G. Pearce, "Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses," 62 *Fordham L. Rev.* 1253, 1269 (1994). *See also* "Report of the Special Study Committee on Professional Responsibility: Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife," 28 *Real Prop. & Prob. J.* 765, 774 (Winter 1994).

9) As stated in Comment [32] to Rule 1.7, it is important when representing clients jointly to make clear that the attorney's role is not one of partisanship that would normally be expected in other circumstances. Jointly represented clients may be required to assume greater responsibility for decisions than if such clients were separately represented.

This letter also makes it clear that when jointly representing husband and wife clients, the lawyer cannot agree with one spouse to withhold confidential information from the other. The receipt of confidential information by the lawyer from one spouse intending that it be kept confidential from the other spouse presents the greatest threat to the lawyer's independent judgment and to the continued representation of both spouses. Comment [31] to Rule 1.7 provides that the attorney's duty of loyalty to each client almost certainly prohibits continued common representation if one client asks the lawyer not to disclose to the other client information relevant to the common representation. At the outset of the representation, therefore, the comment suggests that the attorney should advise each client that information will be shared among the jointly represented clients. The "Report of the Special Study Committee," cited above, discusses three broad categories of confidences that may cause the lawyer to conclude that the differences between the spouses make their interests adverse and may require the lawyer to either disclose the confidence or withdraw from the joint representation. *See Report* at 784. *See also* Collett, "Disclosure, Discretion, or Deception: the Estate Planner's Ethical Dilemma From a Unilateral Confidence," 28 *Real Prop. & Prob. J.* 683 (Winter 1994), in which the author concludes that the lawyer must disclose confidential information to the nonconfiding spouse under certain circumstances.

Practitioners should be aware that, after the death of a client, the attorney-client privilege may be waived when heirs or devisees make a claim through the decedent. *Swindler & Berlin v. U. S.*, 524 U.S. 399, 404-05 (1998). Although Colorado has not yet codified this testamentary exception, Colorado courts have recognized such an

exception to the attorney-client privilege as early as 1905 in the case of *Estate of Shapter*, 85 P. 688 (Colo. 1905). In that will contest dispute, the trial court permitted the attorney who drafted the will to testify as to the circumstances surrounding the will execution. This ruling was upheld in *Denver National Bank v. McLagan*, 298 P.2d 386 (Colo. 1956), in which the drafting attorney was permitted to testify as to "all matters leading up to the execution of the will including statements of the testator [and] his mental condition, and to facts relating to the issue of undue influence and other matters affecting the validity of the will." *See also Glover v. Patten*, 165 U.S. 394, 407-08 (1897); *Wesp v. Everson*, 33 P.3d 191, 200 (Colo. 2001); "Wills and the Attorney-Client Privilege," 14 *Ga. L. Rev*. 325, 334 (1980).

10) It is important that the attorney consider whether a client's estate plan grants a surviving spouse fewer rights than the statutory rights of the surviving spouse and advise the client accordingly.

11) Because of the nature of estate planning work, the issue of file retention presents practical problems regarding the nature and length of storage of a client's file. Accordingly, attorneys may wish to include language in their engagement letter that discloses their office policy regarding file retention and reserves the right to discard client files a certain number of years after the representation has ended or documents have been signed. Such language may help obviate the need to contact clients/former clients if and when an attorney wants to cull files.

    There is no bright-line rule delineating how long attorneys should or must keep copies of executed wills, or mandating that files be destroyed within a certain period following representation. However, Colo. RPC 1.15(j) requires attorneys to keep copies of accounting records, including the engagement letter/fee agreement, for at least seven years following the termination of representation of a client. Accounting records that are required to be kept for this period also include copies of those portions of each client's case file "reasonably necessary for a complete understanding of the financial transactions pertaining thereto." Colo. RPC 1.15(j)(8). In the case of an estate planning attorney, this may mean keeping a copy of all final documents produced for the client (to show the work produced for the fee charged) for a minimum of seven years following the termination of representation. What an attorney does with these records after the seven-year period is not limited by outright ethical or legal duties, other than the duty to safeguard the client's interests. Practical considerations, such as the statute of limitations on malpractice, should be taken into consideration.

    The following articles may provide additional guidance on file retention issues: Doris B. Truhlar & Joseph N. de Raismes, "Coping with the Avalanche: A Survey on the Disposition of Client Files," 16 *Colo. Law.* 1787 (Oct. 1987); Raymond P. Micklewright, "Understanding File Retention: Developing an Ethical Policy and Plan," 30 *Colo. Law.* 147 (Oct. 2001).

As of May 2011, the Colorado Bar Association's Ethics Committee is reviewing the Rules of Professional Conduct regarding file retention. Although Colo. RPC 1.15(j) states that files must be retained for seven years, it is generally acknowledged that the Ethics Committee believes that files should be retained for ten years. The Ethics Committee is expected to issue a Formal Opinion regarding file retention, but has not as of May 2011. For the most up-to-date information on this topic, please consult the Colorado Rules of Professional Conduct and the Ethics Committee's webpage, www.cobar.org/index.cfm/ID/20202/CETH/Ethics-Committee.

12) During the active part of the representation, an attorney must keep the client reasonably informed regarding developments in the law that might affect the client. *See* Colo. RPC 1.1, "Competence," and Colo. RPC 1.3, "Diligence." Specific language in an engagement letter regarding the termination of an attorney's representation clarifies that an attorney does not have an ongoing responsibility to inform the client of changes in the law after the client's estate planning documents have been signed. More information on the termination of an attorney's representation can be found in Chapter 2, "The Client-Lawyer Relationship," of *Lawyers' Professional Liability in Colorado*, 2nd ed. (Michael T. Mihm ed., CLE in Colo., Inc. Supp. 2008).

13) As provided in Colo. RPC 1.5, a client must be informed in writing of the basis or rate of the attorney's fee. Consent in writing is not required unless there is a material change to the basis or rate of the fee or unless the client is required to give informed consent to a conflict of interest. Without a signed engagement letter, however, it is more difficult for an attorney to show that the client understood the terms of the engagement.

14) In 2008, the American College of Trust and Estate Counsel (ACTEC) published a guideline for practitioners entitled *Engagement Letter: A Guide for Practitioners* (providing guidance on other forms of representation that may warrant special attention in an engagement letter, such as: representation of multiple generations of the same family, multiple party representation in a business context, representation of a fiduciary, representation of a disabled client, and representations in which the attorney serves as a fiduciary). To inquire about ordering this publication, or about the *ACTEC Commentaries on the Model Rules of Professional Conduct*, 4th ed. (ACTEC Foundation 2006) (another helpful resource), send an e-mail to info@actec.org or visit ACTEC's website at www.actec.org.

15) Some of the ethical rules that are relevant to the practice of estate planning law are as follows.

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.

RULE 1.5. FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

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

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

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

(4) the amount involved and the results obtained;

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

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

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a).

(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 otherwise prohibited. A contingent fee agreement shall meet all of the requirements of Chapter 23.3 of the Colorado Rules of Civil Procedure, "Rules Governing Contingent Fees."

(d) Other than in connection with the sale of a law practice pursuant to Rule 1.17, a division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the basis upon which the division of fees shall be made, and the client's agreement is confirmed in writing; and

(3) the total fee is reasonable.

(e) Referral fees are prohibited.

(f) Fees are not earned until the lawyer confers a benefit on the client or performs a legal service for the client. Advances of unearned fees are the property of the client and shall be deposited in the lawyer's trust account pursuant to Rule 1.15(f)(1) until earned. If advances of unearned fees are in the form of property other than funds, then the lawyer shall hold such property separate from the lawyer's own property pursuant to Rule 1.15(a).

(g) Nonrefundable fees and nonrefundable retainers are prohibited. Any agreement that purports to restrict a client's right to terminate the representation, or that unreasonably restricts a client's right to obtain a refund of unearned or unreasonable fees, is prohibited.

RULE 1.6. CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

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

(2) to reveal the client's intention to commit a crime and the information necessary to prevent the crime;

(3) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(4) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(5) to secure legal advice about the lawyer's compliance with these Rules, other law or a court order;

(6) 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 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; or

(7) to comply with other law or a court order.

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, confirmed in writing.

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, in a writing signed by the client. 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 the cause of action or subject matter of litigation 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 sexual relationship existed between them when the client lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (b) 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, confirmed in writing.

(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, confirmed in writing.

(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.

TABLE OF CONTENTS

Page

1) GIFTING POWERS FOR AN ATTORNEY-IN-FACT. D-1

2) GIFTS FROM REVOCABLE TRUSTS. D-2

3) DURABLE POWER OF ATTORNEY LIMITED TO GIFTING. D-3

NOTES ON USE. D-7

GIFTING

1) GIFTING POWERS FOR AN ATTORNEY-IN-FACT

Effective July 1, 2009, Colorado adopted the Uniform Power of Attorney Act, C.R.S. §§ 15-14-701, *et seq.* C.R.S. §15-14-713(1)(b) requires the power of attorney to expressly grant authority to make a gift for the agent to have that power. However, additional restrictions on the power to make gifts are included in C.R.S. §15-14-740 and C.R.S. §15-14-724(2). For example, a general authorization of a power to make gifts includes gifts only up to the annual federal gift tax exclusion limit. The power of attorney must expressly grant authority to make gifts in excess of the annual exclusion. Form 1 includes a space that the principal may initial to include a gifting power in the general grant of authority to the agent, but that power is limited under C.R.S. §15-14-740 to the gift tax annual exclusion amount, among other limitations. Where broader gifting powers are appropriate, additional express authority should be given to the agent. In addition, C.R.S. §15-14-724(2) restricts an agent who is not the principal's spouse, ancestor or descendant from exercising the power of attorney to benefit himself or herself. For nontraditional families, this restriction may not be appropriate, and it may be advisable for the power of attorney to specifically authorize the agent to benefit himself or herself.

Even under prior Colorado law, general provisions authorizing gifts were not sufficient. *See Estate of Bronston v. Comm'r*, T.C.M. 1988-510. A power explicitly authorizing an attorney-in-fact to make gifts may be granted the agent either in a General Durable Power of Attorney or in a Durable Power of Attorney with powers relating only to gifting such as that in paragraph 3 of this Tab D. As to the language of a power to make gifts, see Kathleen Ford Bay, "Repercussions of Gifts Under Powers of Attorney – The Ripple Effect," 3 *Probate and Property* 6, 9 (Nov./Dec. 1989), in which the author suggests the following sample language where gifting powers are desired:

> I specifically authorize and encourage my attorney-in-fact to make gifts (outright, in trust or otherwise) to himself or herself, individually, or to my other children and their descendants, to the extent such gifts will be eligible for the gift tax annual exclusion provided in I.R.C. § 2503(b), as amended. However, when a child of mine, his or her spouse, or other descendant of mine is acting as my attorney-in-fact hereunder, gifts to himself or herself in an individual capacity shall be limited to $5,000.00 per year.

In lieu of the last sentence of the above paragraph, the following could be used:

> Any authority granted to my attorney-in-fact shall be limited so as to prevent this power of attorney (1) from causing my attorney-in-fact to be taxed on my income; (2) from causing my estate to be subject to a [taxable] general power of appointment (as that term is defined in I.R.C. § 2514(e), as amended), possessed by my attorney-in-fact; and (3) from

causing my attorney-in-fact to have any incidents of ownership (within the meaning of I.R.C. § 2042, as amended), with regard to any life insurance policies on the life of my attorney-in-fact.

If the agent is a permissible donee under the gifting power, limiting the gifts the agent can make to himself or herself to $5,000.00 per year avoids the argument that the agent holds a taxable general power of appointment. *See* I.R.C. § 2514(e); *see also* Chapter 14, "*Inter Vivos* Gifts," and Chapter 18, "Powers of Appointment," in *Colorado Estate Planning Handbook*, Fifth Ed. (David K. Johns *et al.* eds., CLE in Colo., Inc. Supp. 2009).

See TAM 199944005 (July 16, 1999). The applicable state court recognized that an agent under a general power of attorney is empowered to transact all the business of the principal. If there is language granting broad authority to an agent under a general power of attorney, the national office concluded that it was uncertain under the applicable state law whether or not an express grant of authority to make gifts was necessary. (Discussed in 1 The Chase Journal, 48-49 (2000).)

Annuity policy beneficiaries may not be amended absent specific authority in the power of attorney authorizing a change by the agent according to most policies.

See Estate of Swanson v. U.S., 46 Fed. Cl. 388 (2000). The court held that 38 annual exclusion gifts made by an agent under a durable agency that did not expressly grant the agent the power to make gifts remained includable in the principal's estate. (Discussed in 12 Probate Practice Reporter 13 (May 20, 2000).)

If the principal is incapacitated, estate planning may be needed to minimize estate and other taxes, and the client may decide that a broader gifting power should be included. An example is the following:

"Gifts. My agent may make gifts in equal or unequal proportions to or for the benefit of any one or more of the group comprising my family members (including any such potential donee who is acting as my agent) and those charitable organizations, if any, to which I may have made or may hereafter make contributions, or their successors, so long as my agent is reasonably convinced that my remaining assets will always be sufficient to provide for me in the manner to which I have become accustomed, taking into account the possibility that illness, disability, or advancing age may increase the funds required to so provide for me.

Such gifts may be made in such amounts and at such times as will minimize income taxes payable during my life and estate or other death taxes, or generation-skipping transfer taxes, payable at my death, and may exceed the gift tax annual exclusion amount, except that gifts by the agent to the agent that are authorized in this instrument shall be limited to

amounts determined to be advisable for the agent's health, education, maintenance and support in his or her accustomed manner of living.

I authorize my agent to split gifts for federal gift tax purposes with my spouse to the extent my agent deems appropriate.

With respect to the making of gifts pursuant to the standards set out above in this paragraph, I encourage but do not require my agent to review my records, including but not limited to my income or gift tax returns, to determine which beneficiaries I have supported in the past and to consider the desirability of continuing my prior pattern of giving.

If I have made a will or a memorandum disposition that is effective on my death with respect to any of my tangible personal property, I hereby grant to my agent the power during my lifetime to transfer and deliver any such property to the donee or donees designated in the will or memorandum, as if I were then deceased. This power shall be exercised only if my agent in good faith determines that I am so incapacitated that I am unable effectively to make decisions concerning my tangible personal property, that I am unlikely to recover so as to be able effectively to make such decisions, that the property to be transferred and delivered cannot feasibly be used for my comfort in my place of residence, and that the property or its net sale proceeds are not necessary to provide for me in the manner to which I have become accustomed.

I authorize my agent to make gifts as my agent deems appropriate to qualify me for benefits from governmental programs or civil or military service."

2) GIFTS FROM REVOCABLE TRUSTS

Effective for decedents dying after August 5, 1997, any transfer from any portion of a revocable trust shall, for the purposes of I.R.C. §§ 2035 and 2038, be treated as a transfer made directly by the trust settlor. *See* I.R.C. § 2035(e). Accordingly, property transferred from a revocable trust within three years before the settlor's death should not be included in the settlor's estate unless the settlor retained a power over such property after its transfer. Such elimination by I.R.C. § 2035(e) of the possibility of inclusion of a gift from a revocable trust in the settlor's estate enhances use of such gifts as an estate planning tool. An annual exclusion gift even made directly from a revocable trust will not be included in the settlor's gross estate. Gifting may be accomplished for an absent or incapacitated revocable trust settlor having executed a durable power of attorney which specifically grants gifting powers.

Where a settlor has a power of attorney authorizing the agent to make gifts, the suggested language below, when inserted into the settlor's revocable trust, will permit the trustee either (I) to transfer trust property to settlor's agent under the settlor's durable power of

attorney so that the agent may make gifts authorized by the power of attorney or (ii) to gift property directly from the trust to donees designated by the agent. Suggested language is:

> PARTICIPATE IN GIFTING: If settlor has a power of attorney which permits the agent to make gifts of settlor's property, trustee shall comply with all written distribution requests by the agent which are consistent with the provisions of the power of attorney and, in trustee's judgment, will not in the aggregate reduce the trust estate to a value less than that needed to meet settlor's reasonably foreseeable future needs. Trustee shall have no duty to see to the disposition by the agent of any distribution received from trustee.

The suggested language may be inserted in any of three revocable trust forms in this edition: the Revocable Marital Deduction Trust (Form 13A), the Revocable Disclaimer Trust (Form 16), and the Short Form Revocable Trust (Form 18).

In Forms 13A and 16, such language may be inserted as paragraph 2.4, and in Form 18 as paragraph 3.3. In each form, the paragraph being displaced and paragraphs following it should be renumbered to follow the inserted paragraph.

3) DURABLE POWER OF ATTORNEY LIMITED TO GIFTING

The following is a form of Durable Power of Attorney with powers pertaining only to gifting.

[LIMITED] DURABLE POWER OF ATTORNEY FOR GIFTING

I, ______________________, the principal, appoint ____________________ as my attorney-in-fact (subsequently referred to as agent). If my agent ceases to serve due to death, incapacity, or resignation, or in the event that my agent is unavailable, I appoint ____________________ as successor agent.

A) I authorize my agent to make gifts on my behalf as provided in this instrument.

B) My agent's authority to gratuitously transfer my assets to others shall be limited to the maximum gift tax annual exclusion available to each permissible donee, except as is otherwise provided below.

C) Permissible donees are limited to my children, my children's descendants, [my children's spouses, my stepchildren, my nieces and nephews, my godchild or

godchildren (and/or other designated classes)].

D) In addition, my agent may make unlimited educational and medical expense gifts to or for the benefit of permissible donees. Amounts for educational and medical expense gifts shall be paid directly to the providers, however. Amounts gifted to educational organizations shall be restricted to tuition payments. Amounts distributed for medical expenses shall be paid directly to health care providers for medical services made for the benefit of permissible donees. Educational and medical gifts made directly to providers must otherwise satisfy the requirements of § 2503(e) of the Internal Revenue Code of 1986, as amended, and its regulations.

E) Donative transfers may be made by my agent in those instances where my agent determines that gifts are prudent for reasonable purposes, including the consequences of retaining resources in my name alone where such retention would increase the federal estate taxation of my estate at the time of my death [or at the death of my spouse if my spouse survives me].

F) Further, my agent may withdraw assets from any revocable trust that I have created to make gifts authorized by this power of attorney. In lieu of such withdrawals, my agent may direct the trustee of such trust in writing to distribute trust assets directly to donees designated by my agent where such recipients are permissible donees.

G) With regard to my agent, no sum may be distributed to him or her from my assets in any amount that would result in the creation of a taxable general power of appointment in him or her.

H) Gifts may be made to my agent's children and descendants of children (if they are otherwise permissible donees) provided that no gifts may be made to them that satisfy a support obligation owing by my agent to them. Such gifts may be made to his or her children otherwise, however, in such amounts as my agent determines to be appropriate (not to exceed my agent's authority as is otherwise defined in this instrument).

I) This power of attorney shall become effective upon my disability. For this purpose, I will be considered disabled if

I am unable to manage my property and affairs effectively. My disability may be established by adjudication or by a written opinion by my physician.

J) This instrument is written and executed in the State of Colorado and shall be interpreted in accordance with the laws of this state.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on ____________________, 20____.

____
Principal

STATE OF COLORADO)
) ss.
COUNTY OF _______________)

The foregoing instrument was acknowledged before me on __________, 20___ by ________________________.

Witness my hand and official seal.

My commission expires ____________________.

____
Notary Public

[SEAL]

NOTES ON USE

1) To the extent that unlimited gifting is authorized, such that the unified credit or a portion of it may be used during the Principal's lifetime, the limitation in the title should be excluded. *See* paragraph 1, Tab D.

2) Need for specific authority under C.R.S. §15-14-724(1)(b) and 15-14-740. *See* TAM 9736004, TAM 9231003, and PLR 9509034 (gifts made under a power of attorney are not completed gifts where the gifts are not specifically authorized by the instrument). *See also People v. Gracey*, 940 P.2d 1050 (Colo. App. 1996). *See also*, to the same effect, *Kunewa v. Joshua*, 924 P.2d 559 (Haw. App. 1996). Use of the term "transfer" added to an agent's powers was sufficient to specifically authorize the conveyance of real estate. *See Whitford v. Gaskill*, 480 S.E.2d 690 (N.C. 1997).

3) <u>Alternative</u>:

> My agent shall have the authority to make periodic gifts to permissible donees. Gifts may be made in amounts determined appropriate by my agent and may be made equally or unequally in my agent's discretion among permissible donees, and may exceed the federal gift tax annual exclusion.

4) *See* I.R.C. §§ 2503(e)(2)(A) and (B).

5) *See* TAM 9731003 and I.R.C. § 2038, involving gifts by guardians to reduce potential estate tax liability. Oral instructions do not overcome lack of gifting authority in a power of attorney. *See Arambula v. Atwell*, 948 S.W.2d 173 (Mo. App. 1997).

6) <u>Additional optional provision</u>:

> My agent may make gifts into any trust created for my child, ____________________, who is disabled, as defined in 42 U.S.C. § 1382c(a)(3), pursuant to 42 U.S.C. § 1396p(c)(2)(B)(iv), provided that such transfer does not disqualify me from receiving state-provided medical care under the [Colorado] Medicaid Program if I am otherwise eligible.

7) *See* I.R.C. § 2503(b). See paragraph 1, Tab D, limiting gift to the agent to $5,000.00 to avoid a taxable power of appointment. *See* I.R.C. § 2514(e).

8) <u>Alternative</u>:

> This power of attorney is effective as of the date of its execution and shall not be affected by my disability. It is durable and shall remain effective until my death.

No powers specifically authorizing gifting are included in this form. *See* Gifting (Tab D). No authority under the Colorado Patient Autonomy Act is granted in this form. *See* Form 4, Medical Durable Power of Attorney.

GENERAL DURABLE POWER OF ATTORNEY
~~**(Including authority under the Colorado Patient Autonomy Act)**~~

OF

____

I, ________________________, also known as __________________________, of __________________________, Colorado, the principal, revoke all prior general durable non-medical powers of attorney, and I appoint _____________________ of _____________________, as my attorney-in-fact (subsequently called agent). If my agent ceases to serve due to death, incapacity, resignation, or other cause, I appoint _________________ of _____________________ as successor agent. My agent shall have the following authority:

1. **Grant of Authority**. My agent may do everything necessary in my name and for my benefit which I could do if I were personally present and able. It is my intention that my agent may perform any act and exercise any power, duty, right, or obligation that I could perform or exercise. Such authority is intended to relate to any person, transaction, or interest concerning real and personal property, including intangible property interests, in which I now have an interest, and property in which my interest is subsequently acquired. ~~I empower my agent to delegate authority to others.~~

2. **Uniform Power of Attorney Act.** My agent's authority includes, but is not limited to, the general authority granted by the Uniform Power of Attorney Act, C.R.S. Sections 15-14-701, *et seq.*, or in any successor Colorado statute. General construction of authority granted to my agent is described in C.R.S. Sections 15-14-724(5) (grant of broadest authority controls) and 15-14-726.

3. **General Powers**. [Alternative 1:] The general powers granted to my agent are listed in C.R.S. Sections 15-14-727 through 739, and include the authority to act with respect to real property, tangible personal property, stocks and bonds, commodities and options, banks and other financial institutions, operation of entity or business, insurance

and annuities, estates, trusts and other beneficial interests, claims and litigation, personal and family maintenance, benefits from governmental programs or civil or military service, retirement plans, and taxes.

[Alternative 2:] I grant to my agent the general powers listed in C.R.S. Sections 15-14-727 through 739. The following powers are illustrative of my agent's authority; they are not intended to be exclusive:

1) To acquire, encumber and dispose of any interest of mine in real or personal property upon such terms as my agent determines to be appropriate.

2) To hold, invest, lease and otherwise manage any interest of mine in real or personal property; to recover possession of property by lawful means; and to maintain, protect, insure, move, store, repair, rebuild, alter, or improve any of that property.

3) To acquire, exchange, and dispose of any interest that I have in stocks, bonds, other securities, and government investments, including Treasury bills, bonds and notes.

4) ~~To transact every kind of business including the collection, payment, and settlement of all amounts and interests receivable by me or payable by me or to me.~~ To buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call or put options on stocks or stock indexes traded on a regulated option exchange.

5) To deposit or withdraw from any account or interest of mine in any bank, investment institution, credit union, savings and loan association, or similar institution; to open, continue, modify or terminate accounts in any such institution in my name, or in the name of my agent.

6) To make, endorse, execute, deliver and receive deeds, assignments, contracts, checks, drafts, notes, receipts, releases and any other written instruments that may be necessary. This power expressly includes the authority to endorse and collect obligations of the United States Government or any other governmental entity and to obtain duplicates for checks or other instruments which are missing for any reason.

7) To borrow in my name and for my benefit, upon such terms as my agent determines to be necessary, and to pledge or give as security therefore any of my property.

8) To have access to any safe deposit box or boxes of which I am an owner or lessee; to remove or deposit property of mine; to surrender any such box or boxes; and to rent a safe deposit box or boxes in my name or in the name of my agent, or both.

9) To operate, buy, sell, enlarge, reduce or terminate an ownership interest with respect to any lawful business of whatever nature owned by me; perform a duty or discharge a liability and exercise in person or by proxy a right, privilege, or option that I have, may have, or claim to have; to enforce the terms of an ownership agreement.

10) To continue, pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract procured by me or on my behalf that insures or provides an annuity either to me or another person, whether or not I am a beneficiary under the contract.

11) To accept, receive, receipt for, sell, assign, pledge, or exchange a share in or payment from an estate, trust, or other beneficial interest, to demand or obtain money or another thing of value to which I am, may become, or claim to be, entitled by reason of an estate, trust, or other beneficial interest; to exercise for my benefit a presently exercisable general power of appointment held by me.

12) To institute, prosecute, defend, compromise, arbitrate and settle legal or administrative proceedings, or otherwise engage in litigation on my behalf.

13) To perform the acts necessary to maintain the customary standard of living for me, my spouse, and the following individuals, whether living when this power of attorney is executed or later born:

a) My children,

b) Other individuals legally entitled to my support,

c) Those individuals whom I have customarily supported or

indicated my intent to suppport.

14) To enroll in, apply for, select, reject, change, amend, or discontinue, on my behalf, a benefit or program; prepare, file, and maintain a claim of mine for a benefit or assistance, financial or otherwise, to which I may be entitled under a statute or regulation.

15) To create, open, close, rollover, split up, fund, and make additions to and withdrawals or distributions from a retirement plan; to exercise investment powers available under a retirement plan; to borrow from, sell assets to, or purchase assets from a retirement plan.

16) To prepare, ~~execute~~ sign and file federal, state, local, and foreign income, gift, payroll, property, Federal Insurance Contributions Act, and other tax returns~~ in all appropriate taxing jurisdictions~~; to execute Federal Tax Form 2848, or any power of attorney form required by the Internal Revenue Service or state authority; to exercise any elections I may have under federal, state, or local tax law; to execute Federal Tax Form 907 or otherwise to exercise authority to extend a period of limitations; and generally to represent me in all tax matters and proceedings of all kinds and for all periods before or after the date of this delegation, before all offices and officers of the Internal Revenue Service, state taxing authority, and any other taxing body.

17) To engage, compensate and discharge an attorney, accountant, discretionary investment manager, expert witness, or other advisor, upon such terms as my agent determines to be appropriate, in order to exercise or implement the authorities granted under this power of attorney.

~~To pay persons and organizations for goods and services provided to me or for my benefit, including reasonable compensation to my agent. If I become disabled or incompetent, my agent shall not be obliged to obtain approval of such payments by any individual or court. I exonerate my agent for payments made in good faith pursuant to this authorization.~~

14) ~~To hire and dismiss agents, counsel and other employees, upon such terms as my agent determines to be appropriate.~~

~~6) To transfer all or any part of property owned by me or in which I have an interest to the trustee of any revocable trust created by me during my lifetime, such that the same is held and becomes a part of the corpus of that trust to be dealt with in accordance with the terms of such trust.~~

~~7) [Other - specific authority]~~

~~8) To act on my behalf in consenting to or refusing medical treatment as defined in the Colorado Patient Autonomy Act (C.R.S. §§ 15-14-503 through 15-14-509), with full powers, including the powers to make decisions for me related to my medical treatment, health care, personal care, and residential placement, to the maximum extent permitted in the Act. All other medical provisions of the Act are incorporated into this power.~~

4. **SPECIFIC POWERS**. In addition, I grant to my agent the authority in the following paragraphs that I initial:

______ at any time, and from time to time, to create a trust or trusts, revocable or irrevocable, for my behalf or for the benefit of my beneficiaries with ultimate dispositive provisions substantially similar to those of my existing Will or other dispositive documents.

______ at any time, and from time to time, to transfer any property to the person then serving as trustee of any such trust, to be held and administered in accordance with the terms of the trust instrument.

______ at any time, and from time to time, to revoke or amend any such trust, or to remove property from such trust, consistent with the terms of the trust instrument and my estate plan.

______ to direct the trustee of any such trust to distribute income or principal from the trust to my agent for my behalf.

______ To make a gift, which under C.R.S. Section 15-14-740 is subject to certain restrictions, including the following: (a) the amount of the gift per donee per year shall not exceed the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code section

2503(b), as amended, without regard to whether the federal gift tax exclusion applies to the gift, or if my spouse agrees to consent to a split gift pursuant to Internal Revenue Code section 2513, as amended, the amount of the gift per donee per year shall not exceed twice the annual federal gift tax exclusion limit; and (b) to consent to the splitting of a gift made by my spouse in an amount per donee per year not to exceed the aggregate annual federal gift tax exclusions for both of us.

______ to create, revoke or amend rights of survivorship, including the creation of joint tenancy arrangements for real or personal property, consistent with my estate plan.

______ to create, revoke or amend beneficiary designations, including beneficiary deeds, consistent with my estate plan, and I authorize my attorney to disclose copies of my current estate planning documents to my agent.

______ to delegate authority, in writing, granted in this instrument to others, individual or corporate, on such terms and guidelines as my agent deems reasonable.

______ to waive my right to be a beneficiary of a joint and survivor annuity including a survivor benefit under a retirement plan.

______ to exercise fiduciary powers that the principal has authority to delegate to an agent, including the power to participate in the appointment and removal of a fiduciary and the power to direct a fiduciary in the exercise of the fiduciary's powers.

______ to renounce and disclaim interests and powers.

______ Except for the exercise of a general power of appointment for my benefit, to the extent the agent is authorized as provided in C.R.S. section 15-14-734, or for the benefit of persons other than me, to the extent that the agent is authorized to make gifts as provided in C.R.S. section 15-14-740, to release and exercise powers of appointment.

______ In addition to the general authority to operate a business described in C.R.S. section 15-14-732, to exercise on my behalf authority I have as a member, partner, or manager of a partnership, limited liability company, or other entity.

______ To name one or more successor agents.

5. **HIPAA Authority**. My agent acting under this instrument has authority to pay for my healthcare. ~~current authority to make decisions for me related to my health care.~~ Accordingly, I confirm that in connection therewith, my agent is my personal representative for this purpose ~~all purposes~~ relating to my protected health information, pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and regulations thereunder, in particular, 45 C.F.R. § 164.502(g)(1) and (2), and under Colorado state law, C.R.S. § 15-14-~~506(3)~~ 709(4).

6. **Conservator**. In the event it becomes necessary to appoint ~~a guardian or~~ a conservator for me, I direct that the court having jurisdiction over me appoint the agent named in this durable power of attorney or the successor agent in the event that the named agent is unable to serve.

7. **Durability**. This general power of attorney is durable. It shall not terminate in the event of my incapacity and shall survive until my death.

8. **Governing Law**. This power of attorney is written and executed in the State of Colorado and shall be interpreted in accordance with the laws of that state. I intend that this instrument be recognized to the fullest extent possible by third parties and courts in other states.

9. **Compensation**. My agent is entitled to receive reasonable compensation for services performed and to reimbursement for expenses properly incurred.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on ____________________, 20___.

____
Principal

____
~~Principal's Social Security Number~~

STATE OF COLORADO)
) ss.
COUNTY OF _______________)

The foregoing instrument was acknowledged before me on ____________________, 20___ by ______________________________.

Witness my hand and official seal.

My commission expires ____________________.

____
Notary Public

[SEAL]

This Certification is not meant to be signed on creation of the power of attorney; rather, it is to be used if necessary later to encourage third parties to accept the agent's actions.

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

STATE OF COLORADO)
) ss.
County of ____________________)

I, ____________________________________ (Name of agent), certify under penalty of perjury that ______________________, (Name of principal), granted me authority as an agent or successor agent in a power of attorney dated __________________________________.

I further certify that to my knowledge:

(1) The principal is alive and has not revoked the power of attorney or my authority to act under the power of attorney, and the power of attorney and my authority to act under the power of attorney have not terminated;

(2) If the power of attorney was drafted to become effective upon the happening of an event or contingency, the event or contingency has occurred;

(3) If I was named as a successor agent, the prior agent is no longer able or willing to serve; and

(4) ____
____

(Insert other relevant statements)

SIGNATURE AND ACKNOWLEDGMENT

____________________________________ ____________________________
Agent signature Date

____
Agent's name printed

____
____
Agent's address

____
Agent's telephone number

This document was acknowledged before me on ______________________________ (Date)
by ____, Agent.
Witness my hand and official seal. My commission expires:

____
Notary Public

This document prepared by:

____

*** * * End of Form * * ***

NOTES ON USE

1) Effective July 1, 2009, Colorado adopted the Uniform Power of Attorney Act, C.R.S. §§ 15-14-701, *et seq*. Effective January 1, 2010, the new Act applied to all existing financial powers of attorney. Prior to the new Act, durable powers of attorney ~~are~~ were governed by C.R.S. §§ 15-14-601, *et seq.*; 15-14-501; and 15-14-502. Under C.R.S. § 15-14-724(3), the general grant of authority in paragraph 1 of the form authorizes the agent to perform the acts in C.R.S. §§ 15-14-727 through 739, even without including the specific reference to those powers in alternative (1) of paragraph 3. If the practitioner intends to exclude any of the general powers in C.R.S. §§ 15-14-727 through 739, paragraph 1 must be revised accordingly.

2) The new Act makes a number of changes from prior law. Some powers must now be specifically included in the Power of Attorney that previously did not have to be listed, such as those in section 15-14-724, and other provisions are default powers that did need to be listed in the past. For example, unless the power of attorney provides that compensation shall not be paid to the agent, reasonable compensation shall be payable under the new Act under C.R.S. §15-14-712. Under prior law, compensation had to be specifically granted to the agent in the power of attorney. Paragraph 8 authorizes compensation to be paid to the agent, which makes it clear to all parties concerned, even though this is the default rule in the statutes.

See *orange book text*, chapter ___ discussing general powers of attorney.

~~3) If the power to substitute an agent is desired, the following could be added:~~

> ~~In the event my successor agent is unable to serve or if my successor agent is serving, I empower such agent to substitute another for himself or herself, and such appointed agent shall have all authority granted my agent under this instrument.~~

~~Generally, *see* Andrew H. Hook, "Durable Powers of Attorney — They are not Forms!" 24 *Tax Management, Estates, Gifts and Trusts Journal* 211, (Tax Management, Inc., Sept. 9, 1999); Howard M. Zaritsky, *et al*., "Year End Gifting Reminders," 11 *Probate Practice Reporter* 1 (Dec. 1999).~~

3) Detailed descriptions of general powers are set out in the Act in C.R.S. §§ 15-14-727 through 15-14-739, and you may want to simply incorporate them by reference, as illustrated in Alternative 1 of paragraph 3. You could also include the description of the powers in the power of attorney, as listed in Alternative 2. Some practitioners believe this is more helpful to the agent. Also keep in mind that the general grant of authority in paragraph 1 authorizes the agent to exercise all the powers listed in C.R.S. §§ 15-14-727 through 15-14-739 whether or not the powers are referenced in paragraph 3. If the practitioner intends to exclude any of the general powers, paragraph 1 must be revised accordingly.

4) Under the Act at C.R.S. 15-14-724, certain powers must be specifically granted (the so-called "hot powers"), and those are listed in the form with blanks for the principal to initial, in order to grant them to the agent under this Power of Attorney. The practitioner should keep in mind that some of the hot powers may be needed simply to implement general powers. For example, an agent with general authority regarding insurance and annuities does not have the authority to create or change a beneficiary designation without an express grant of that authority as one of the "hot powers." Or, an agent with general authority regarding banks and financial institutions would not be able to create a survivorship interest on an account without an express grant of that authority in the "hot powers." Whenever grant of express authority is considered, it is important to balance the property management benefits against the potential for abuse. In additionto the "hot powers," under C.R.S. § 15-14-711, specific authority for an agent to designate a successor or "substitute agent" must be granted. The form includes a line to initial to grant the power to name a successor agent, even though it is not a listed "hot power" in C.R.S. § 15-14-724. Section 15-14-711 also includes a provision that unless otherwise provided in the power of attorney, either co-agent may act alone on behalf of the principal.

5) Gifting powers are one of the powers that must be specifically listed, but if only a general grant to make gifts is included in the power of attorney, those gifts are subject to the restrictions under C.R.S. § 15-14-740, including the limit of gifts to the gift tax annual exclusion. Tab D, "Gifting Powers" includes a separate Limited Power of Attorney just for gifting that grants broader powers than those in section 15-14-740, and TAB D also includes a sample provision to grant gifting powers in the General Durable Power of Attorney.

6) C.R.S. § 15-14-724(2) contains additional restrictions with respect to exercise of the "hot powers" that could significantly impact a power of attorney prepared for a client in a nontraditional family. That section provides that if the agent is "not an ancestor, spouse, or descendant of the principal" the agent may not exercise the powers to create an interest in the agent or an individual to whom the agent owes a legal obligation of support. In such a nontraditional family, specific power for the agent to benefit himself or herself may be advisable.

~~7) You may want to include specific powers in certain agencies. *See* Notes on Use 4 through 10.~~

8) Powers Regarding Sophisticated Investment Transactions: Specific authority for sophisticated financial investments and transactions is not included in this paragraph. The addition of powers to engage in such transactions should be specific to the needs of the client. Sophisticated transactions include, but are not limited to, the following:

   a) Put/calls; index options trading; LEAPS-long term options;

   b) Currency trading; currency options;

c) Foreign markets;

d) Commodity futures; commodity futures options;

e) Real estate investment trusts ("REIT") and real estate mortgage investment conduits ("REMIC");

f) Derivatives; and

g) Over-the-counter "penny stock."

Brokerage compliance departments and transfer houses have become more restrictive in acceptance of a power of attorney because of past history of abused authority and wrongful transactions by attorneys-in-fact. Transfer agents are especially reluctant to allow the attorney-in-fact to engage in sophisticated transactions listed above unless those powers are specifically designated in the governing document. It is widely recognized that these sophisticated transactions are normally speculative and inherently risky. Because of this extensive risk, counsel usually should not include such speculative powers in the governing documents without due consideration of the client's specific circumstances. Counsel may encounter clients who are using sophisticated transactions to speculate. In such case, the attorney-in-fact should not be encouraged to continue to speculate. Counsel should consider limiting the sophisticated security powers to those that will mitigate speculative positions previously taken by the principal.

When encountering a principal that is utilizing any of the sophisticated transactions listed above, counsel should not automatically assume the principal is speculating and taking undue risk, because practices of a number of industries include the use of such sophisticated transactions to hedge liability to reduce the overall risk. This practice should not be confused with speculation. Examples include agricultural operations that produce the product that would be purchased or sold on a futures or commodities market. To continue the prudent use of such sophisticated transactions to enhance the overall business operation, the agent must be given the particular powers to do so in the power of attorney.

For **selling** securities, the power to "sell, assign and transfer" in the specific market (*i.e.*, (a) through (g) above), should be spelled out in the power of attorney to be acceptable to most issuers transferring securities. For **buying** securities, so long as purchases are reasonably prudent and suitable for the principal, most powers of attorney include general authority for agents to invest for their principal. Speculative or risky security purchases require more specific power of attorney language for the added risk. Selling short requires specific power of attorney language. General language in a power of attorney will **not** authorize agents to pledge trust collateral, get loans or trade on margin. If the principal has a business need of trading on margin, the specific authority for the agent to continue the practice must be included in the power of attorney. Most compliance departments are now requiring prior approval of the power of attorney for margin

or loan accounts or for the other sophisticated investments listed above.

9) Powers Regarding Tax Matters: The new act at C.R.S. §15-14-739 includes a general grant of authority to deal with tax matters, and this authority was apparently intended to cover all powers that the agent would need to address the principal's dealings with taxing authorities. However, it is possible that this statute does not include the specific authority to execute a Form 2848 or Form 907 as required in the Internal Revenue Code and Regulations. The power described in Alternative 2(16) of paragraph 3 includes that specific reference. The following language was contained in the prior notes on use, and includes authority to sign ~~is similar to~~ Federal Tax Form 2848, *Power of Attorney and Declaration of Representative*. Note, however, that this language has been held insufficient to authorize a taxpayer's representative to sign Federal Tax Form 907, *Agreement to Extend Period of Limitations*, in the absence of additional language containing this specific authorization. *See* Rev. Rul. 76-60, 1976-1 C.B. 387. Currently, a power of attorney must be filed with the IRS in order for the agent to receive a check in payment of any refund of taxes, including penalties and interest; the execution of a waiver of restriction on assessment or collection of a deficiency, or a waiver of notice of disallowance of a refund claim; the execution of a consent to extend the assessment or collection, or for executing an IRS closing agreement. New procedural rules governing powers of attorney appear in Treas. Reg. §§ 601.501 through 601.509.

ALTERNATIVE FOR TAX POWERS:

> To execute Federal Tax Form 2848 or any power of attorney form required by the Internal Revenue Service, including covering any tax years; to prepare, sign and file federal, state, or local income, gift, other tax returns of all kinds, FICA returns, payroll tax returns, claims for refunds, requests for extensions of time, ruling requests, petitions to the tax court or other courts regarding tax matters, and any and all other tax related documents, including, without limitation, receipts, offers, waivers, consents (including, but not limited to, consents and agreements under I.R.C. § 2032A, or any successor section thereto), closing agreements and any power of attorney form required by the Internal Revenue Service, state taxing authority, or other taxing body with respect to any tax period; to consent to extension of any limitation of action relating to assessments; to pay taxes due, collect refunds, post bonds, receive confidential information and contest deficiencies determined by the Internal Revenue Service, state taxing authority, or other taxing body; to exercise any elections I may have under federal, state, or local tax law; and generally to represent me in all tax matters and proceedings of all kinds and for all periods before or after the date of this delegation, before all offices and officers of the Internal Revenue Service, state taxing authority, and any other taxing body. I authorize my agent to substitute a representative and

to delegate authority to a new representative and to retain and discharge professional counsel.

~~10) Powers Relating to Life Insurance: It may be desirable to specifically include authority for the agent to act in connection with the principal's life insurance policies. The agent could be given the power to transfer any interest which the principal has in policies of life insurance on the principal's life, including withdrawing cash value from them, transferring the ownership of policies, changing beneficiaries and exercising other incidents of ownership which the principal has the right to exercise. On the other hand, in order to avoid the consequences of the agent holding incidents of ownership, a prohibition should be considered. It could read:~~

~~"My agent shall have no rights, powers, or authority with regard to any policy of life insurance owned by me insuring the life of my agent."~~

10) Power to Deal With Mineral Interests: Specific authority to deal with mineral interests is not included in the text of the form, and although it may be included in the general authority to deal with real property, for a client who owns significant mineral or oil and gas interests, specific language may be advisable. If this is desired the following language could be used:

> To grant, bargain, sell, convey and lease for oil, gas and mineral purposes any and all real estate which I may own or in which I may possess any interest, wherever situate, for such price and on such terms which my agent deems best, and to make, execute, acknowledge and deliver good and sufficient documents of conveyance for the same, with or without covenants of warranty; to sell, assign, transfer and convey any and all oil and gas leases and royalty and mineral interests which I may own or in which I may possess any interest, wherever situate, for such consideration and on such terms as my agent deems best, and to execute good and sufficient assignments and conveyances for the same; to execute any and all necessary division orders, transfer orders and similar instruments; to release and surrender any and all non-producing oil and gas leases in which I may own an interest.

~~11) Management Powers: If specific management authority is desired to be given by the principal, the following language is illustrative of such authority:~~

> ~~To maintain, repair, improve, invest, manage, insure, rent, lease, encumber, and in any manner deal with any real or personal property, tangible or intangible, or any interest therein that I now own or may hereafter acquire in my name and for my benefit, upon such terms and conditions as my agent deems proper.~~

11) Powers of Collection and Payment: Specific authority may be given to an agent to forgive or attempt to recover money and interests due the principal. An

illustrative provision is the following:

> To forgive, request, demand, sue for, recover, collect, receive, hold all such sums of money, debts, dues, commercial paper, checks, drafts, accounts, deposits, legacies, bequests, devises, notes, interests, stock certificates, bonds, dividends, certificates of deposit, annuities, pension, profit sharing, retirement, social security, insurance and other contractual benefits and proceeds; all documents of title, all property, real or personal, intangible and tangible property and property rights and demands whatsoever, liquidated or unliquidated, now or hereafter owned by, or due, owing, payable or belonging to me, or in which I have or may hereafter acquire an interest, to have, use and take all lawful means and equitable and legal remedies and proceedings in my name for the collection and recovery thereof, and to adjust, sell, compromise, and agree for the same, and to execute and deliver for me, on my behalf and in my name, all endorsements, releases, receipts, or other sufficient discharges for the same; to execute or release deeds of trust or other security agreements as may be necessary or proper in the exercise of the rights and powers herein granted.

~~12) Authority to Renounce or Disclaim: As noted above with respect to the grant of additional powers, C.R.S. § 15-14-501 724(1)(h) authorizes a principal to expressly grant the agent the authority to empower his or her attorney-in-fact or agent to renounce and disclaim interests and powers, to make gifts, in trust or otherwise, and to release and exercise powers of appointment. (Emphasis added.) An illustrative provision authorizing disclaimer is the following:~~

> ~~My agent may disclaim, release, remove, or abandon any property or interest therein or power relative thereto (including the power to alter, amend, revoke, or terminate) which for any reason and by any means I may now hold or to which I may hereafter become entitled, whether by retention, gift, or testate or intestate succession and whether passing to me or for my benefit, outright, in trust or otherwise, and may exercise any right or power I may have in the estate of another person, whether or not such other person is then living including, but not limited to, the right to claim an elective share in any estate or under any will. In the exercise of the powers conferred hereunder, my agent should act in a manner consistent with any estate planning actions which I may have taken or which my agent may have taken pursuant to other provisions of this instrument, giving consideration to the effects, tax or otherwise, of any such disclaimer, release, abandonment, or exercise upon persons interested in my estate and persons who would, but for such action, receive property which is affected by such action.~~

~~*See Matter of Estate of Colacci*, 549 P.2d 1096 (Colo. App. 1976); Brand and LaPiana, *Disclaimers in Estate Planning*, (ABA 1990); and § 18.3.4, "Renunciation Or Disclaimer Of Powers," in *Colorado Estate Planning Handbook*, Fifth Ed. (David K. Johns *et al.* eds., CLE in Colo., Inc. Supp. 2009).~~

~~In Colorado, C.R.S. § 15-14-116 requires notice to the state resource provider (Department of Health Care Policy and Financing), where protective proceedings are involved. Some states bar disclaimer where state aid is being given to the insolvent principal, *e.g.*, Connecticut General Statutes § 17-82j; *see Matter of Scrivani*, 455 N.Y.S.2d 505 (Sup. Ct. 1982).~~

~~Under UPC II, the right to an elective share can be exercised by an agent under the authority of a power of attorney on behalf of a surviving spouse. *See* C.R.S. § 15-11-206. Under prior law (C.R.S. § 15-11-203), only a surviving spouse or the court could exercise this right.~~

12) The prior version of this form included a paragraph authorizing the agent to make healthcare decisions for the principal. Those powers are discussed generally in Form 4, the Medical Durable Power of Attorney. Included in the general power of attorney is the designation of the agent as a "personal representative" under HIPAA just for the purpose of obtaining information from health care practitioners to be able to review and pay medical bills.

~~13) Powers Regarding Health Care: This provision is designed to delegate medical decision-making authority to the attorney-in-fact, thereby conferring legal standing on that agent to provide surrogate informed consent or refusal for the principal's medical care. *See* Colorado Patient Autonomy Act in regard to using durable powers of attorney, C.R.S. §§ 15-14-503 to 15-14-509; proxy decision-making for medical treatment, C.R.S. §§ 15-18.5-101 to 15-18.5-103; directives prohibiting application of cardiopulmonary resuscitation, C.R.S. §§ 15-18.6-101 through 15-18.6-108; and living wills, C.R.S. §§ 15-18-101 to 15-18-113. The U.S. Supreme Court's decision in *Cruzan v. Director, Missouri Department of Health*, notes that "the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment." 492 U.S. 261, 277 (1990).~~

~~It is the practice of some attorneys to draft detailed durable medical powers of attorney as separate documents that address the scope of the attorney-in-fact's powers and the principal's personal directions, treatment preferences, and quality of life considerations. *See* Medical Durable Power of Attorney (Form 4).~~

~~In the event that the principal has executed a separate durable power of attorney for medical care, paragraph 15 should be deleted. Consideration should be given to referring to the existence of the special medical power. A guardian's authority to revoke or suspend an agent's powers regarding the principal's personal care does not apply to medical treatment decisions made by an agent appointed in a medical durable power of attorney.~~

~~Notes on Use 12 through 15 cover only the limited topic of HIPAA's interaction with powers of attorney and similar agency documents used in estate planning, such as a parental delegation of powers. For more background on HIPAA, see sources listed at Note 15.~~

~~14) HIPAA Background: The Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. § 1320d-1320d-8, and its accompanying regulations, 45 C.F.R. §§ 160-164, creates a privacy rule which governs the use and disclosure of a person's "individually identifiable health information." Under regulations promulgated by the Secretary of the Department of Health and Human Services, "individually identifiable health information" is health information which (1) identifies the individual or could reasonably be used to identify the individual; (2) is created, received, transmitted or maintained by a "covered entity"; and (3) pertains to the individual's past, present or future physical or mental health, or to the provision of health care services to the individual, or to the payment for such services. 45 C.F.R. § 160.103. HIPAA's privacy rule applies to all individually identifiable health information held by health plans, health care clearinghouses, and health care providers who transmit health information electronically, all of which are collectively known as "covered entities" under the HIPAA regulations. 45 C.F.R. § 160.103. Covered entities generally include any insurance company, health insurance plan, physician, hospital, pharmacy, nursing facility, dentist, diagnostic lab, psychologist, home health care agencies, etc. HIPAA's regulations contain very detailed, specific rules for the disclosure of this health information, and covered entities which improperly disclose an individual's protected health information are subject to penalties for violations.~~

~~15) Disclosure Rules: Practitioners need to be aware of HIPAA and its disclosure rules in drafting powers of attorney and in working with agents who may be requesting disclosure of a principal's health information. Generally, access to an individual's protected health information under the HIPAA regulations can be obtained from a covered entity by:~~

> ~~**A)** Direct disclosure to the individual himself;~~
> ~~**B)** Direct disclosure to the individual's HIPAA Personal Representative (HIPAA P.R.);~~
> ~~**C)** Disclosure to a third party under a signed Authorization signed by the individual;~~
> ~~**D)** Disclosure to a third party under a signed Authorization signed by the HIPAA P.R.;~~
> ~~**E)** Disclosure pursuant to a court order.~~

~~There are also a few Colorado statutes on the issue of disclosure of patient records and the individual's right to access his or her medical records for inspection and copying, most of which are consistent with HIPAA and its regulations. C.R.S. § 25-1-801 (covering health care facilities); C.R.S. § 25-1-802 (covering health care providers); C.R.S. § 10-16-423 (covering HMOs). For more on these statutes see~~

~~Cyndi Lyden, Louisa M. Ritsick, and K. Gabriel Heiser, "Rights to and Disclosure of Medical Information: HIPAA and Colorado Law," 33 *Colo. Law.* 101 (Oct. 2004).~~

~~**A)** An individual can request his or her own health information from a covered entity. 45 C.F.R. § 164.502(a)(1)(i).~~

~~**C)** A signed "valid authorization" form containing the required "core elements" specified in the regulations authorizes the covered entity to release the health information described in the authorization to the person(s) named in the authorization. To count as a valid authorization under 45 C.F.R. § 164.508(c)(1) of the regulations, the form must be written in "plain language" and must contain these core elements:~~

- ~~i) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion;~~
- ~~ii) The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure;~~
- ~~iii) The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure;~~
- ~~iv) An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure;~~
- ~~v) A statement of the individual's right to revoke the authorization in writing and the exceptions to the right to revoke, together with a description of how the individual may revoke the authorization;~~
- ~~vi) A statement that information used or disclosed pursuant to the authorization may be subject to redisclosure by the recipient and no longer be protected by this rule;~~
- ~~vii) Signature of the individual and date; and~~
- ~~viii) If the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual.~~

~~Obviously, the individual himself or herself (if not incapacitated) can sign a valid authorization and allow his or her protected health information to be disclosed to anyone he or she designates. Where the individual cannot sign, his or her agent who is a HIPAA P.R. (discussed below) can sign the authorization form on his or her behalf.~~

~~Covered entities may require individuals to use their own authorization form. Authorization forms must be signed and dated but need not be notarized or witnessed. Psychotherapy notes require a separate authorization form; they cannot be requested in an authorization form which requests other protected health information. The Privacy Rule distinguishes between "psychotherapy notes" which are segregated from the balance of the patient's medical record, and other mental health treatment information. In a nutshell, the therapist's personal "psychotherapy notes" occupy a higher level of privacy protection than information about the patient's medications, diagnosis and therapy schedule. *See* 45 C.F.R § 164.508(a)(2). When requesting psychotherapy notes, simply modify the Authorization form so that it authorizes the covered entity to disclose and provide copies of psychotherapy notes, but no other protected health information.~~

~~**B and D)** "HIPAA Personal Representative" status. There are several state law sources of HIPAA Personal Representative status. If under state law a person has **currently effective authority to make health care decisions** on behalf of an individual, that person is a HIPAA P.R. and must be treated as the individual under the regulations. 45 C.F.R. § 164.502(g)(2) states: "If under applicable law a person has authority to act on behalf of an individual who is an adult or an emancipated minor in making decisions related to health care, a covered entity must treat such person as a personal representative under this subchapter . . ." For deceased individuals, an executor, administrator or other person having authority to act on behalf of the decedent or his or her estate is also a HIPAA P.R. 45 C.F.R. § 164.502(g)(4). Proxy decision-makers under C.R.S. §§ 15-18.5-101, *et seq*., are also HIPAA P.R.s, as are court-appointed guardians who possess the power to consent to medical treatment for the ward. C.R.S. § 15-14-315(1)(d). *See Colorado Estate Planning Handbook*, Fifth Ed. (David K. Johns *et al.* eds., CLE in Colo., Inc. Supp. 2009) at Chapter 32, "Protected Persons."~~

~~45 C.F.R. § 164.502(g)(1) states that covered entities **must** treat a HIPAA P.R. as they would treat the individual himself or herself. However, the HIPAA P.R. must be treated "as" the individual only to the extent that protected health information is relevant to matters on which the personal representative is authorized to represent the individual. If the agent's health-care decision-making authority is limited in the power of attorney, his or her access to protected health information will be similarly limited.~~

~~A HIPAA P.R. is entitled to direct disclosure of any of the principal's protected health information which is **relevant to his or her authority to make health care decisions** for the principal. A HIPAA P.R. is also authorized to sign valid authorization forms that will allow the covered entity to release the individual's protected health information to third parties.~~

~~The corollary to this is that an agent who does **not** possess currently effective~~

authority to make health care decisions on behalf of the principal (such as an agent under a "springing" medical power of attorney effective only on the incapacity of the principal, or an agent under a financial power of attorney which contains no explicit authority to make health care decisions) is not a HIPAA P.R. Merely stating in a power of attorney that it is the principal's desire that the agent be a HIPAA P.R., or have access to all of the principal's medical records, is not enough to confer HIPAA P.R. status on the agent; the agent must also have current authority to make health care decisions on behalf of the principal.

Form 1 (General Durable Power of Attorney), Form 2 (Parent's or Guardian's Delegation of Powers), and Form 4 (Medical Durable Power of Attorney) in *Colorado Estate Planning Forms* are "standing" powers. If the agent has currently effective authority under state law to make health care decisions for the principal, it is not necessary that the power of attorney contain HIPAA-specific language. However, use of the drop-in language added to Forms 1, 2, and 4 to confirm the agent's HIPAA P.R. status may be helpful in dealing with third parties.

16) Sources for More Information on HIPAA and Estate Planning:

A) Darla Daniel and Susan Fox Buchanan, "HIPAA Ramifications on Estate Planners," Fall Estate Planning Update, CLE in Colorado, Inc. (presented Nov. 2004).

B) Cyndi Lyden, Louisa M. Ritsick, and K. Gabriel Heiser, "Rights to and Disclosure of Medical Information: HIPAA and Colorado Law," 33 *Colo. Law.* 101 (Oct. 2004).

C) Daniel B. Evans, "What Estate Lawyers Need to Know About HIPAA and 'Protected Health Information,'" 18 *Probate & Property* 20 (July/Aug. 2004).

D) Michael L. Graham and Jonathan G. Blattmachr, "Planning for HIPAA Privacy Rule," 29 *ACTEC Journal* 307 (2004).

17) Sources for More Information on HIPAA Generally:

A) Richard L. Murray, Jr. and Patrick T. O'Rourke, "Confidentiality of Medical Records and The Health Insurance Portability and Accountability Act of 1996," 30 *Colo. Law.* 65 (March 2001).

B) Department of Health and Human Services website, www.hhs.gov/ocr/hipaa which includes links to
- The HIPAA statute, www.hhs.gov/ocr/privacy/hipaa/administrative/statute/index.html
- The Privacy Rule, www.hhs.gov/ocr/privacy/hipaa/administrative/privacyrule/index.h

~~tml~~

- ~~OCR Summary and Guidance explaining significant aspects of the Privacy Rule, www.hhs.gov/ocr/privacy/hipaa/understanding/summary/index.html~~
- ~~OCR HIPAA Privacy Guidance on Personal Representatives, referencing 45 CFR § 164.502(g), www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/personalreps.html~~
- ~~HHS's HIPAA Privacy FAQ, www.hhs.gov/ocr/privacy/hipaa/faq/index.html~~
- ~~Fact Sheet, "How to File a Health Information Privacy Complaint," www.hhs.gov/ocr/privacy/hipaa/complaints/index.html~~

~~C) American Medical Association FAQ on the Privacy Rule, www.ama-assn.org/ama/pub/category/11567.html~~

~~D) American Hospital Association website (contains a checklist of elements required for a valid authorization), www.aha.org/aha_app/issues/HIPAA/index.jsp~~

~~18) *See Guardianship of Smith*, 684 N.E.2d 613 (Mass. App. 1997). The probate court must, on a proper petition, appoint the individual nominated in the power of attorney except for good cause shown. The burden of proof is on one challenging the appointment. *See* 79 *Elder Law Advisory* 8 (Oct. 1997). *See also* C.R.S. §§ 15-14-310 and 15-14-413.~~

13) The form states that the power of attorney is "durable." Under C.R.S. 15-14-704, a power of attorney executed on or after January 1, 2010 is durable unless it expressly provides it is terminated on the incapacity of the principal. This is the reverse from prior law. The form still provides for the power of attorney to remain effective following the disability of the principal, because the laws of other states may still require this phrase to be included.

14) This paragraph may instead be written to read: "This power of attorney shall become effective upon the disability of the principal." This springing power may present a problem in proving the principal's disability. Evidence of the principal's disability on which a third party can rely may be described in the instrument. A letter from a treating physician, for example, may be such evidence. See form 4 for an example of a designation of the agent as a "personal representative" under HIPAA to obtain information to determine incapacity. The problem with the springing power is providing a mechanism for the agent to determine when it is effective.

See Comerica Bank - Texas v. Texas Commerce Nat'l Assoc., 2 S.W.3d 723 (Tex. App. 1999). There is no prohibition against a springing power and the court

upheld the validity of the power of attorney, notwithstanding that it did not specifically authorize this feature (discussed in 11 *Probate Practice Reporter* 7-8 (Dec. 1999)).

15) ~~The principal's social security number is not required, nor is the agent's.~~ The social security numbers for the principal and the agent were included on the prior form. Because of identity theft concerns, it is not recommended that the principal's or the agent's social security numbers be included on the power of attorney, but the agent may need to supply those numbers to third parties.

19) ~~To ensure compliance by third parties, an agency instrument should be notarized. *See* C.R.S. § 15-14-607.~~ To convey an interest in real property, a power of attorney must be acknowledged and recorded. *See* C.R.S. § 38-30-123. A witness to the principal's signature is not required in Colorado, but it may be required in other states if this document is used in a state outside of Colorado.

16) Under C.R.S. § 15-14-705, the principal's signature on the power of attorney is presumed to be genuine if a notary statement is included. In addition, under C.R.S. § 15-14-719, a person that in good faith accepts a purportedly acknowledged power of attorney is protected from liability in acting in reliance upon it.

17) Use caution in having an agent sign the "Acceptance" section. Under C.R.S. § 15-14-714, once an agent has accepted appointment, he or she has duties to take action on behalf of the principal. C.R.S. § 15-14-713 describes when an agent has accepted appointment. Under prior law, an agent did not have fiduciary duties unless and until the agent actually took action. The following is a form that could be used for the agent to sign accepting the appointment:

ACCEPTANCE BY AGENT

The undersigned agent hereby accepts the delegation of authority set out in this instrument.

__________________________ ____________________________________
____
Date Agent's Specimen Signature

~~Agent's Social Security Number~~

18) The agent may run into problems with third parties (banks, brokerage houses, title companies, etc.) accepting the agent's directions. The last page of the Power of

Attorney is a certification form for the agent to sign. C.R.S. §15-14-720 authorizes third parties to rely on a Power of Attorney that is accompanied by such a certification, and protects those who have relied on the document from liability. C.R.S. § 15-14-720 requires third parties to comply with the agent's directions after the certification has been provided, and lists the damages for not complying with the agent's directions, which may include the cost of obtaining court appointment of a conservator. The certification form is included in C.R.S. § 15-14-742.

19) The new Act contains a statutory form that replaces the prior statutory form that was found in C.R.S. §§ 15-1-1301 through 15-1-1317. The following is the statutory form found in C.R.S. § 15-14-741.

STATE OF COLORADO STATUTORY FORM

POWER OF ATTORNEY

IMPORTANT INFORMATION

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the "Uniform Power of Attorney Act," Part 7 of Article 14 of Title 15, Colorado Revised Statutes.

This power of attorney does not authorize the agent to make health care decisions for you.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until you die, revoke the power of attorney, the agent resigns, or the agent is unable to act for you.

Your agent is entitled to reasonable compensation unless you state otherwise in the special instructions.

This form provides for designation of one agent. If you wish to name more than one agent you may name a coagent in the special instructions. Coagents are not required to act together unless you include that requirement in the special instructions.

If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.

This power of attorney becomes effective immediately unless you state otherwise in the special instructions.

If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.

DESIGNATION OF AGENT

I, ________________, (name of principal) name the following person as my agent:

Name of agent:

____

Agent's address:

____

Agent's telephone number:

____

DESIGNATION OF SUCCESSOR AGENT(S) (OPTIONAL)

If my agent is unable or unwilling to act for me, I name as my successor agent:

Name of successor agent:

____

Successor agent's address:

____

Successor agent's telephone number:

____

If my successor agent is unable or unwilling to act for me, I name as my second successor agent:

Name of second successor agent:

____

Second successor agent's address:

____

Second successor agent's telephone number:

____

GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the "Uniform Power of Attorney Act," Part 7 of Article 14 of Title 15, Colorado Revised Statutes:

(INITIAL each subject you want to include in the agent's general authority. If you wish to grant general authority over all of the subjects you may initial "All preceding subjects" instead of initialing each subject.)

(____) Real property
(____) Tangible personal property
(____) Stocks and bonds
(____) Commodities and options
(____) Banks and other financial institutions
(____) Operation of entity or business
(____) Insurance and annuities
(____) Estates, trusts, and other beneficial interests
(____) Claims and litigation
(____) Personal and family maintenance
(____) Benefits from governmental programs or civil or military service
(____) Retirement plans
(____) Taxes
(____) All preceding subjects

GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent.)

(____) Create, amend, revoke, or terminate an *inter vivos* trust
(____) Make a gift, subject to the limitations of the "Uniform Power of Attorney Act" set forth in C.R.S. § 15-14-740, and any special instructions in this power of attorney
(____) Create or change rights of survivorship
(____) Create or change a beneficiary designation
(____) Authorize another person to exercise the authority granted under this power of attorney
(____) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
(____) Exercise fiduciary powers that the principal has authority to delegate
(____) Disclaim, refuse, or release an interest in property or a power of appointment
(____) Exercise a power of appointment other than: (1) The exercise of a general power

of appointment for the benefit of the principal which may, if the subject of estates, trusts, and other beneficial interests is authorized above, be exercised as provided under the subject of estates, trusts, and other beneficial interests; or (2) the exercise of a general power of appointment for the benefit of persons other than the principal which may, if the making of a gift is specifically authorized above, be exercised under the specific authorization to make gifts

(____) Exercise powers, rights, or authority as a partner, member, or manager of a partnership, limited liability company, or other entity that the principal may exercise on behalf of the entity and has authority to delegate excluding the exercise of such powers, rights, and authority with respect to an entity owned solely by the principal which may, if operation of entity or business is authorized above, be exercised as provided under the subject of operation of the entity or business

LIMITATION ON AGENT'S AUTHORITY

An agent that is not my ancestor, spouse, or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the special instructions.

SPECIAL INSTRUCTIONS (OPTIONAL)

You may give special instructions on the following lines:

____
____
____
____
____

EFFECTIVE DATE

This power of attorney is effective immediately unless I have stated otherwise in the special instructions.

NOMINATION OF CONSERVATOR OR GUARDIAN (OPTIONAL)

If it becomes necessary for a court to appoint a conservator of my estate or guardian of my person, I nominate the following person(s) for appointment:

Name of nominee for conservator of my estate:
____

Nominee's address:
____

Nominee's telephone number:

____

Name of nominee for guardian of my person:

____

Nominee's address:

____

Nominee's telephone number:

____

RELIANCE ON THIS POWER OF ATTORNEY

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person knows it has terminated or is invalid.

SIGNATURE AND ACKNOWLEDGMENT

____

____

Your signature   Date

____

Your name printed

____

____

Your address

____

Your telephone number

State of Colorado)
) ss.
County of ____________)

This document was acknowledged before me on _______________ (Date), by _________________________ (Name of principal).

(Seal, if any)

____

Signature of Notary

My commission expires: ________________

This document was prepared by:

____

____

____

IMPORTANT INFORMATION FOR AGENT

Agent's duties

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

(1) Do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;
(2) Act in good faith;
(3) Do nothing beyond the authority granted in this power of attorney; and
(4) Disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:

(Principal's name) by (Your signature) as agent

Unless the special instructions in this power of attorney state otherwise, you must also:

(1) Act loyally for the principal's benefit;
(2) Avoid conflicts that would impair your ability to act in the principal's best interest;
(3) Act with care, competence, and diligence;
(4) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
(5) Cooperate with any person that has authority to make health care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal's expectations, to act in the principal's best interest; and
(6) Attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest.

Termination of agent's authority

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

(1) Death of the principal;
(2) The principal's revocation of the power of attorney or your authority;
(3) The occurrence of a termination event stated in the power of attorney;
(4) The purpose of the power of attorney is fully accomplished; or
(5) If you are married to the principal, a legal action is filed with a court to end your marriage, or for your legal separation, unless the special instructions in this power of attorney state that such an action will not terminate your authority.

Liability of Agent

The meaning of the authority granted to you is defined in the "Uniform Power of Attorney Act," Part 7 of Article 14 of Title 15, Colorado Revised Statutes. If you violate the "Uniform Power of Attorney Act," Part 7 of Article 14 of Title 15, Colorado Revised Statutes, or act outside the authority granted, you may be liable for any damages caused by your violation.

If there is anything about this document or your duties that you do not understand, you should seek legal advice.
[*** End of Form***]

~~Proposed by the National Conference of Commissioners on Uniform State Laws,~~ the General Assembly of Colorado enacted the Uniform Statutory Form Power of ~~Attorney Act effective July 1, 1992~~. ~~The goal of the Uniform Law Commissioners and the Colorado General Assembly is to provide and encourage use of a uniform form that can be used in whole or in part to diffuse objections by third parties who are requested to recognize the authority of an agent under such power. The Commissioners' and the Colorado General Assembly's expectation is that the form will become familiar and readily accepted in Colorado.~~

~~The Uniform Statutory Form Power of Attorney Act does not preclude the practitioner from using the form provided in this book, adopting his or her own form, or altering the statutory form. The advantages of the statutory form are uniformity in format, and the construction of the powers conferred to the agent are further spelled out in the statute. A disadvantage of the statutory form is that it may not easily be understood by the principal or agent. A power of attorney specifically designed for a special purpose or purposes may be preferable and more easily understood by the parties. The statutory form does not provide for springing powers or a specific termination date. The statutory power does not provide for successor or co-agents.~~

Effective January 1, 1995, the statutory form power of attorney was amended. The form of the Colorado Statutory Power of Attorney for Property, as amended, ~~follows~~.

~~**COLORADO STATUTORY POWER OF ATTORNEY FOR PROPERTY**~~

~~NOTICE: UNLESS YOU LIMIT THE POWER IN THIS~~

~~DOCUMENT, THIS DOCUMENT GIVES YOUR AGENT THE POWER TO ACT FOR YOU, WITHOUT YOUR CONSENT, IN ANY WAY THAT YOU COULD ACT FOR YOURSELF. THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE "UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT," PART 13 OF ARTICLE 1 OF TITLE 15, COLORADO REVISED STATUTES, AND PART 6 OF ARTICLE 14 OF TITLE 15, COLORADO REVISED STATUTES. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.~~

~~THE PURPOSE OF THIS POWER OF ATTORNEY IS TO GIVE THE PERSON YOU DESIGNATE (YOUR "AGENT") BROAD POWERS TO HANDLE YOUR PROPERTY AND AFFAIRS, WHICH MAY INCLUDE POWERS TO PLEDGE, SELL, OR OTHERWISE DISPOSE OF ANY REAL OR PERSONAL PROPERTY WITHOUT ADVANCE NOTICE TO YOU OR APPROVAL BY YOU. THIS FORM 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 THE PROVISIONS OF THIS FORM AND MUST KEEP A RECORD OF RECEIPTS, DISBURSEMENTS, AND SIGNIFICANT ACTIONS TAKEN AS AGENT. YOU MAY NAME SUCCESSOR AGENTS UNDER THIS FORM BUT NOT CO-AGENTS. UNTIL YOU REVOKE THIS POWER OF ATTORNEY OR A COURT ACTING ON YOUR BEHALF TERMINATES IT, YOUR AGENT MAY EXERCISE THE POWERS GIVEN HERE THROUGHOUT YOUR LIFETIME, EVEN AFTER YOU MAY BECOME DISABLED, UNLESS YOU EXPRESSLY LIMIT THE DURATION OF THIS POWER IN THE MANNER PROVIDED BELOW.~~

~~YOU MAY HAVE OTHER RIGHTS OR POWERS UNDER COLORADO LAW NOT CONTAINED IN THIS FORM.~~

~~I, ___________________________________ (Insert your full name and address) appoint ___________________________________ (Insert the full name and address of the person appointed) as my agent (attorney-in-fact)~~

~~to act for me in any lawful way with respect to the following initialed subjects:~~

~~TO GRANT ONE OR MORE OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF EACH POWER YOU ARE GRANTING. TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF IT. YOU MAY, BUT NEED NOT, CROSS OUT EACH POWER WITHHELD.~~

~~INITIAL~~

~~_______ (A) Real property transactions (when properly recorded).~~
~~_______ (B) Tangible personal property transactions.~~
~~_______ (C) Stock and bond transactions.~~
~~_______ (D) Commodity and option transactions.~~
~~_______ (E) Banking and other financial institution transactions.~~
~~_______ (F) Business operating transactions.~~
~~_______ (G) Insurance and annuity transactions.~~
~~_______ (H) Estate, trust, and other beneficiary transactions.~~
~~_______ (I) Claims and litigation.~~
~~_______ (J) Personal and family maintenance.~~
~~_______ (K) Benefits from social security, Medicare, Medicaid, or other governmental programs or military service.~~
~~_______ (L) Retirement plan transactions.~~
~~_______ (M) Tax matters.~~

~~UNLESS YOU DIRECT OTHERWISE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED OR TERMINATED AS SPECIFIED BELOW. STRIKE THROUGH AND WRITE YOUR INITIALS TO THE LEFT OF THE FOLLOWING SENTENCE IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO CONTINUE IF YOU BECOME DISABLED, INCAPACITATED, OR INCOMPETENT.~~

~~1. ( ) This power of attorney will continue to be effective even though I become disabled, incapacitated, or incompetent.~~

~~YOU MAY INCLUDE ADDITIONS TO AND LIMITATIONS ON THE AGENT'S POWERS IN THIS POWER OF ATTORNEY IF THEY ARE SPECIFICALLY DESCRIBED BELOW.~~

~~2. The powers granted above shall not include the following~~

~~powers or shall be modified or limited in the following manner (here you may include any specific limitations you deem appropriate, such as a prohibition of or conditions on the sale of particular stock or real estate or special rules regarding borrowing by the agent):~~

3. ~~In addition to the powers granted above, I grant my agent the following powers (here you may add any other delegable powers, such as the power to make gifts, exercise powers of appointment, name or change beneficiaries or joint tenants, or revoke or amend any trust specifically referred to below):~~

4. ~~SPECIAL INSTRUCTIONS. ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS TO YOUR AGENT:~~

~~YOUR AGENT WILL BE ENTITLED TO REIMBURSEMENT FOR ALL REASONABLE EXPENSES INCURRED IN ACTING UNDER THIS POWER OF ATTORNEY. STRIKE THROUGH AND INITIAL THE NEXT SENTENCE IF YOU DO NOT WANT YOUR AGENT TO ALSO BE ENTITLED TO REASONABLE COMPENSATION FOR SERVICES AS AGENT.~~

5. ~~( ) My agent is entitled to reasonable compensation for services rendered as agent under this power of attorney.~~

~~THIS POWER OF ATTORNEY MAY BE AMENDED IN ANY MANNER OR REVOKED BY YOU AT ANY TIME. ABSENT AMENDMENT OR REVOCATION, THE AUTHORITY GRANTED IN THIS POWER OF ATTORNEY IS EFFECTIVE WHEN THIS POWER OF ATTORNEY IS SIGNED AND CONTINUES IN EFFECT UNTIL YOUR DEATH, UNLESS YOU MAKE A LIMITATION ON DURATION BY COMPLETING THE FOLLOWING:~~

6. ~~This power of attorney terminates on~~

~~_________________________. (Insert a future date or event, such as court determination of your disability, when you want this power to terminate prior to your death).~~

~~BY RETAINING THE FOLLOWING SENTENCE, YOU MAY, BUT ARE NOT REQUIRED TO, NAME YOUR AGENT AS GUARDIAN OF YOUR PERSON OR CONSERVATOR OF YOUR PROPERTY, OR BOTH, IF A COURT PROCEEDING IS BEGUN TO APPOINT A GUARDIAN OR CONSERVATOR, OR BOTH, FOR YOU. THE COURT WILL APPOINT YOUR AGENT AS GUARDIAN OR CONSERVATOR, OR BOTH, IF THE COURT FINDS THAT SUCH APPOINTMENT WILL SERVE YOUR BEST INTERESTS AND WELFARE. STRIKE THROUGH AND INITIAL PARAGRAPH 7 IF YOU DO NOT WANT YOUR AGENT TO ACT AS GUARDIAN OR CONSERVATOR, OR BOTH.~~

~~7. ( ) If a guardian of my person or a conservator for my property, or both, are to be appointed, I nominate the agent acting under this power of attorney as my guardian or conservator, or both, to serve without bond or security.~~

~~IF YOU WISH TO NAME SUCCESSOR AGENTS, INSERT THE NAME AND ADDRESS OF ANY SUCCESSOR AGENT IN THE FOLLOWING PARAGRAPH:~~

~~8. If any agent named by me shall die, become incapacitated, resign, or refuse to accept the office of agent, I name the following each to act alone and successively, in the order named, as successor to such agent:~~

____
____
____

~~For purposes of this paragraph 8, a person is considered to be incapacitated if and while the person is a minor or a person adjudicated incapacitated or if the person is unable to give prompt and intelligent consideration to business matters, as certified by a licensed physician.~~

~~I agree that any third party who receives a copy of this document may act under it. Revocation of the power of attorney is not effective as to a third party until the third party learns of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.~~

~~Signed on ____________________ 20, ___.~~

~~IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, IT MAY BE IN YOUR BEST INTEREST TO CONSULT A COLORADO LAWYER RATHER THAN SIGN THIS FORM.~~

____
~~(Your Signature)~~

____
~~(Your Social Security Number)~~

~~YOU MAY, BUT ARE NOT REQUIRED TO, REQUEST YOUR AGENT AND SUCCESSOR AGENTS TO PROVIDE SPECIMEN SIGNATURES BELOW. IF YOU INCLUDE SPECIMEN SIGNATURES IN THIS POWER OF ATTORNEY, YOU MUST COMPLETE THE CERTIFICATION OPPOSITE THE SIGNATURES OF THE AGENTS.~~

~~NOTICE TO AGENTS: BY EXERCISING POWERS UNDER THIS DOCUMENT, THE AGENT ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT UNDER COLORADO LAW.~~

~~Specimen Signatures of Agent (and successors):~~	~~I certify that the signatures of my agent (and successors) are correct.~~
________________________	________________________
~~Agent~~	~~Principal~~
________________________	________________________
~~Successor Agent~~	~~Principal~~
________________________	________________________
~~Successor Agent~~	~~Principal~~

STATE OF COLORADO)
) ss.
COUNTY OF ____________________)

This document was acknowledged before me on ______________________________ (date) by ______________________________ (name of principal) (, who certifies the correctness of the signature(s) of the agent(s).)

My commission expires ____________________.

(Seal) ______________________________
Notary Public

(5)) C.R.S. § 15-14-610 provides a form of affidavit that an agent under a power of attorney may use to certify that the power of attorney is still effective. A third party who relies on the affidavit is generally entitled to the protections under C.R.S. § 15-14-607. The use of an affidavit is also referred to in C.R.S. § 15-14-501(2). The statutory agent's affidavit follows.

COLORADO AGENT'S
AFFIDAVIT REGARDING POWER OF ATTORNEY

STATE OF COLORADO)
) ss.
COUNTY OF ____________________)

I, ______________________________, whose address is ______________________________, of lawful age, pursuant to §§ 15-1-1302, 15-14-501, and 15-14-502, Colorado Revised Statutes, state that upon my oath that I am the attorney-in-fact and agent for ______________________, principal, under the power of attorney dated ______________________, a copy of which is attached hereto and incorporated herein by this reference, that as of this date I have no actual knowledge of the [revocation or*] termination of the power of attorney by any act of the principal, or by the death [disability, or incompetence*] of the principal, that my authority has not been terminated by a decree of dissolution of marriage or legal separation, and that to the best of my knowledge the power of attorney has not been so terminated and remains valid, in full force and effect.

Dated: ____________________ ______________________________
Attorney-in-fact

The foregoing Affidavit was subscribed and sworn to before me on ____________________, 20___, by ____________________________,

~~Agent.~~

~~Witness my hand and official seal.~~

~~My commission expires ____________________.~~

____

~~Notary Public~~

~~* Strike "revocation or" and "disability or incompetence" if the power of attorney is durable and the principal is disabled or incompetent.~~

No powers specifically authorizing gifting are included in this form. *See* Gifting (Tab D). No authority under the Colorado Patient Autonomy Act is granted in this form. *See* Form 4, Medical Durable Power of Attorney.

GENERAL DURABLE POWER OF ATTORNEY

OF

____

I, ______________________, also known as ________________________, of ________________________, Colorado, the principal, revoke all prior general durable non-medical powers of attorney, and I appoint ___________________ of ___________________, as my attorney-in-fact (subsequently called agent). If my agent ceases to serve due to death, incapacity, resignation, or other cause, I appoint _______________ of ___________________ as successor agent. My agent shall have the following authority:

1. **Grant of Authority**. My agent may do everything necessary in my name and for my benefit which I could do if I were personally present and able. It is my intention that my agent may perform any act and exercise any power, duty, right, or obligation that I could perform or exercise. Such authority is intended to relate to any person, transaction, or interest concerning real and personal property, including intangible property interests, in which I now have an interest, and property in which my interest is subsequently acquired.

2. **Uniform Power of Attorney Act.** My agent's authority includes, but is not limited to, the general authority granted by the Uniform Power of Attorney Act, C.R.S. Sections 15-14-701, *et seq.*, or in any successor Colorado statute. General construction of authority granted to my agent is described in C.R.S. Sections 15-14-724(5) (grant of broadest authority controls) and 15-14-726.

3. **General Powers**. [Alternative 1:] The general powers granted to my agent are listed in C.R.S. Sections 15-14-727 through 739, and include the authority to act with respect to real property, tangible personal property, stocks and bonds, commodities and options, banks and other financial institutions, operation of entity or business, insurance

and annuities, estates, trusts and other beneficial interests, claims and litigation, personal and family maintenance, benefits from governmental programs or civil or military service, retirement plans, and taxes.

[Alternative 2:] I grant to my agent the general powers listed in C.R.S. Sections 15-14-727 through 739. The following powers are illustrative of my agent's authority; they are not intended to be exclusive:

1) To acquire, encumber and dispose of any interest of mine in real or personal property upon such terms as my agent determines to be appropriate.

2) To hold, invest, lease and otherwise manage any interest of mine in real or personal property; to recover possession of property by lawful means; and to maintain, protect, insure, move, store, repair, rebuild, alter, or improve any of that property.

3) To acquire, exchange, and dispose of any interest that I have in stocks, bonds, other securities, and government investments, including Treasury bills, bonds and notes.

4) To buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call or put options on stocks or stock indexes traded on a regulated option exchange.

5) To deposit or withdraw from any account or interest of mine in any bank, investment institution, credit union, savings and loan association, or similar institution; to open, continue, modify or terminate accounts in any such institution in my name, or in the name of my agent.

6) To make, endorse, execute, deliver and receive deeds, assignments, contracts, checks, drafts, notes, receipts, releases and any other written instruments that may be necessary. This power expressly includes the authority to endorse and collect obligations of the United States Government or any other governmental entity and to obtain duplicates for checks or other instruments which are missing for any reason.

7) To borrow in my name and for my benefit, upon such terms as my agent determines to be necessary, and to pledge or give as security therefore any

of my property.

8) To have access to any safe deposit box or boxes of which I am an owner or lessee; to remove or deposit property of mine; to surrender any such box or boxes; and to rent a safe deposit box or boxes in my name or in the name of my agent, or both.

9) To operate, buy, sell, enlarge, reduce or terminate an ownership interest with respect to any lawful business of whatever nature owned by me; perform a duty or discharge a liability and exercise in person or by proxy a right, privilege, or option that I have, may have, or claim to have; to enforce the terms of an ownership agreement.

10) To continue, pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract procured by me or on my behalf that insures or provides an annuity either to me or another person, whether or not I am a beneficiary under the contract.

11) To accept, receive, receipt for, sell, assign, pledge, or exchange a share in or payment from an estate, trust, or other beneficial interest, to demand or obtain money or another thing of value to which I am, may become, or claim to be, entitled by reason of an estate, trust, or other beneficial interest; to exercise for my benefit a presently exercisable general power of appointment held by me.

12) To institute, prosecute, defend, compromise, arbitrate and settle legal or administrative proceedings, or otherwise engage in litigation on my behalf.

13) To perform the acts necessary to maintain the customary standard of living for me, my spouse, and the following individuals, whether living when this power of attorney is executed or later born:

    a) My children,

    b) Other individuals legally entitled to my support,

    c) Those individuals whom I have customarily supported or indicated my intent to support.

14) To enroll in, apply for, select, reject, change, amend, or discontinue, on

my behalf, a benefit or program; prepare, file, and maintain a claim of mine for a benefit or assistance, financial or otherwise, to which I may be entitled under a statute or regulation.

15) To create, open, close, rollover, split up, fund, and make additions to and withdrawals or distributions from a retirement plan; to exercise investment powers available under a retirement plan; to borrow from, sell assets to, or purchase assets from a retirement plan.

16) To prepare, sign and file federal, state, local, and foreign income, gift, payroll, property, Federal Insurance Contributions Act, and other tax returns; to execute Federal Tax Form 2848, or any power of attorney form required by the Internal Revenue Service or state authority; to exercise any elections I may have under federal, state, or local tax law; to execute Federal Tax Form 907 or otherwise to exercise authority to extend a period of limitations; and generally to represent me in all tax matters and proceedings of all kinds and for all periods before or after the date of this delegation, before all offices and officers of the Internal Revenue Service, state taxing authority, and any other taxing body.

17) To engage, compensate and discharge an attorney, accountant, discretionary investment manager, expert witness, or other advisor, upon such terms as my agent determines to be appropriate, in order to exercise or implement the authorities granted under this power of attorney.

4. **SPECIFIC POWERS**. In addition, I grant to my agent the authority in the following paragraphs that I initial:

______ at any time, and from time to time, to create a trust or trusts, revocable or irrevocable, for my behalf or for the benefit of my beneficiaries with ultimate dispositive provisions substantially similar to those of my existing Will or other dispositive documents.

______ at any time, and from time to time, to transfer any property to the person then serving as trustee of any such trust, to be held and

administered in accordance with the terms of the trust instrument.

______ at any time, and from time to time, to revoke or amend any such trust, or to remove property from such trust, consistent with the terms of the trust instrument and my estate plan.

______ to direct the trustee of any such trust to distribute income or principal from the trust to my agent for my behalf.

______ To make a gift, which under C.R.S. Section 15-14-740 is subject to certain restrictions, including the following: (a) the amount of the gift per donee per year shall not exceed the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code section 2503(b), as amended, without regard to whether the federal gift tax exclusion applies to the gift, or if my spouse agrees to consent to a split gift pursuant to Internal Revenue Code section 2513, as amended, the amount of the gift per donee per year shall not exceed twice the annual federal gift tax exclusion limit; and (b) to consent to the splitting of a gift made by my spouse in an amount per donee per year not to exceed the aggregate annual federal gift tax exclusions for both of us.

______ to create, revoke or amend rights of survivorship, including the creation of joint tenancy arrangements for real or personal property, consistent with my estate plan.

______ to create, revoke or amend beneficiary designations, including beneficiary deeds, consistent with my estate plan, and I authorize my attorney to disclose copies of my current estate planning documents to my agent.

______ to delegate authority, in writing, granted in this instrument to others, individual or corporate, on such terms and guidelines as my agent deems reasonable.

______ to waive my right to be a beneficiary of a joint and survivor annuity including a survivor benefit under a retirement plan.

______ to exercise fiduciary powers that the principal has authority to

delegate to an agent, including the power to participate in the appointment and removal of a fiduciary and the power to direct a fiduciary in the exercise of the fiduciary's powers.

______ to renounce and disclaim interests and powers.

______ Except for the exercise of a general power of appointment for my benefit, to the extent the agent is authorized as provided in C.R.S. section 15-14-734, or for the benefit of persons other than me, to the extent that the agent is authorized to make gifts as provided in C.R.S. section 15-14-740, to release and exercise powers of appointment.

______ In addition to the general authority to operate a business described in C.R.S. section 15-14-732, to exercise on my behalf authority I have as a member, partner, or manager of a partnership, limited liability company, or other entity.

______ To name one or more successor agents.

5. **HIPAA Authority**. My agent acting under this instrument has authority to pay for my healthcare. Accordingly, I confirm that in connection therewith, my agent is my personal representative for this purpose relating to my protected health information, pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and regulations thereunder, in particular, 45 C.F.R. § 164.502(g)(1) and (2), and under Colorado state law, C.R.S. § 15-14-709(4).

6. **Conservator**. In the event it becomes necessary to appoint a conservator for me, I direct that the court having jurisdiction over me appoint the agent named in this durable power of attorney or the successor agent in the event that the named agent is unable to serve.

7. **Durability**. This general power of attorney is durable. It shall not terminate in the event of my incapacity and shall survive until my death.

8. **Governing Law**. This power of attorney is written and executed in the State of Colorado and shall be interpreted in accordance with the laws of that state. I intend that this instrument be recognized to the fullest extent possible by third parties and courts in other states.

9. **Compensation**. My agent is entitled to receive reasonable compensation for services performed and to reimbursement for expenses properly incurred.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on __________________, 20___.

____
Principal

STATE OF COLORADO)
) ss.
COUNTY OF _______________)

The foregoing instrument was acknowledged before me on _____________________, 20___ by _______________________________.

Witness my hand and official seal.

My commission expires _____________________.

____
Notary Public

[SEAL]

This Certification is not meant to be signed on creation of the power of attorney; rather, it is to be used if necessary later to encourage third parties to accept the agent's actions.

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

STATE OF COLORADO)
) ss.
County of __________________)

I, ________________________________ (Name of agent), certify under penalty of perjury that ______________________, (Name of principal), granted me authority as an agent or successor agent in a power of attorney dated ______________________________.

I further certify that to my knowledge:

(1) The principal is alive and has not revoked the power of attorney or my authority to act under the power of attorney, and the power of attorney and my authority to act under the power of attorney have not terminated;

(2) If the power of attorney was drafted to become effective upon the happening of an event or contingency, the event or contingency has occurred;

(3) If I was named as a successor agent, the prior agent is no longer able or willing to serve; and

(4) ____
____

(Insert other relevant statements)

SIGNATURE AND ACKNOWLEDGMENT

____ ____________________________
Agent signature Date

____
Agent's name printed

____
____
Agent's address

____
Agent's telephone number

This document was acknowledged before me on ___________________________ (Date)
by ______________________________________, Agent.
Witness my hand and official seal. My commission expires:

____
Notary Public

This document prepared by:

____

*** * * End of Form * * ***

NOTES ON USE

1) Effective July 1, 2009, Colorado adopted the Uniform Power of Attorney Act, C.R.S. §§ 15-14-701, *et seq*. Effective January 1, 2010, the new Act applied to all existing financial powers of attorney. Prior to the new Act, durable powers of attorney were governed by C.R.S. §§ 15-14-601, *et seq.*; 15-14-501; and 15-14-502. Under C.R.S. § 15-14-724(3), the general grant of authority in paragraph 1 of the form authorizes the agent to perform the acts in C.R.S. §§ 15-14-727 through 739, even without including the specific reference to those powers in alternative (1) of paragraph 3. **If the practitioner intends to exclude any of the general powers in C.R.S. §§ 15-14-727 through 739, paragraph 1 must be revised accordingly.**

2) The new Act makes a number of changes from prior law. Some powers must now be specifically included in the Power of Attorney that previously did not have to be listed, such as those in section 15-14-724, and other provisions are default powers that did need to be listed in the past. For example, unless the power of attorney provides that compensation shall not be paid to the agent, reasonable compensation shall be payable under the new Act under C.R.S. §15-14-712. Under prior law, compensation had to be specifically granted to the agent in the power of attorney. Paragraph 8 authorizes compensation to be paid to the agent, which makes it clear to all parties concerned, even though this is the default rule in the statutes.

   See *Orange Book Text*, chapter ___ discussing general powers of attorney.

3) Detailed descriptions of general powers are set out in the Act in C.R.S. §§ 15-14-727 through 15-14-739, and you may want to simply incorporate them by reference, as illustrated in Alternative 1 of paragraph 3. You could also include the description of the powers in the power of attorney, as listed in Alternative 2. Some practitioners believe this is more helpful to the agent. Also keep in mind that the general grant of authority in paragraph 1 authorizes the agent to exercise all the powers listed in C.R.S. §§ 15-14-727 through 15-14-739 whether or not the powers are referenced in paragraph 3. **If the practitioner intends to exclude any of the general powers, paragraph 1 must be revised accordingly.**

3) Under the Act at C.R.S. 15-14-724, certain powers must be specifically granted (the so-called "hot powers"), and those are listed in the form with blanks for the principal to initial, in order to grant them to the agent under this Power of Attorney. The practitioner should keep in mind that some of the hot powers may be needed simply to implement general powers. For example, an agent with general authority regarding insurance and annuities does not have the authority to create or change a beneficiary designation without an express grant of that authority as one of the "hot powers." Or, an agent with general authority regarding banks and financial institutions would not be able to create a survivorship interest on an account without an express grant of that authority in the "hot powers." Whenever grant of express authority is considered, it is

important to balance the property management benefits against the potential for abuse. In addition to the "hot powers," under C.R.S. § 15-14-711, specific authority for an agent to designate a successor or "substitute agent" must be granted. The form includes a line to initial to grant the power to name a successor agent, even though it is not a listed "hot power" in C.R.S. § 15-14-724. Section 15-14-711 also includes a provision that unless otherwise provided in the power of attorney, either co-agent may act alone on behalf of the principal.

4) Gifting powers are one of the powers that must be specifically listed, but if only a general grant to make gifts is included in the power of attorney, those gifts are subject to the restrictions under C.R.S. § 15-14-740, including the limit of gifts to the gift tax annual exclusion. Tab D, "Gifting Powers" includes a separate Limited Power of Attorney just for gifting that grants broader powers than those in section 15-14-740, and TAB D also includes a sample provision to grant gifting powers in the General Durable Power of Attorney.

5) C.R.S. § 15-14-724(2) contains additional restrictions with respect to exercise of the "hot powers" that could significantly impact a power of attorney prepared for a client in a nontraditional family. That section provides that if the agent is "not an ancestor, spouse, or descendant of the principal" the agent may not exercise the powers to create an interest in the agent or an individual to whom the agent owes a legal obligation of support. In such a nontraditional family, specific power for the agent to benefit himself or herself may be advisable.

6) <u>Powers Regarding Sophisticated Investment Transactions:</u> Specific authority for sophisticated financial investments and transactions is not included in this paragraph. The addition of powers to engage in such transactions should be specific to the needs of the client. Sophisticated transactions include, but are not limited to, the following:

a) Put/calls; index options trading; LEAPS-long term options;

b) Currency trading; currency options;

c) Foreign markets;

d) Commodity futures; commodity futures options;

e) Real estate investment trusts ("REIT") and real estate mortgage investment conduits ("REMIC");

f) Derivatives; and

g) Over-the-counter "penny stock."

Brokerage compliance departments and transfer houses have become more restrictive in acceptance of a power of attorney because of past history of abused

authority and wrongful transactions by attorneys-in-fact. Transfer agents are especially reluctant to allow the attorney-in-fact to engage in sophisticated transactions listed above unless those powers are specifically designated in the governing document. It is widely recognized that these sophisticated transactions are normally speculative and inherently risky. Because of this extensive risk, counsel usually should not include such speculative powers in the governing documents without due consideration of the client's specific circumstances. Counsel may encounter clients who are using sophisticated transactions to speculate. In such case, the attorney-in-fact should not be encouraged to continue to speculate. Counsel should consider limiting the sophisticated security powers to those that will mitigate speculative positions previously taken by the principal.

When encountering a principal that is utilizing any of the sophisticated transactions listed above, counsel should not automatically assume the principal is speculating and taking undue risk, because practices of a number of industries include the use of such sophisticated transactions to hedge liability to reduce the overall risk. This practice should not be confused with speculation. Examples include agricultural operations that produce the product that would be purchased or sold on a futures or commodities market. To continue the prudent use of such sophisticated transactions to enhance the overall business operation, the agent must be given the particular powers to do so in the power of attorney.

For **selling** securities, the power to "sell, assign and transfer" in the specific market (*i.e.*, (a) through (g) above), should be spelled out in the power of attorney to be acceptable to most issuers transferring securities. For **buying** securities, so long as purchases are reasonably prudent and suitable for the principal, most powers of attorney include general authority for agents to invest for their principal. Speculative or risky security purchases require more specific power of attorney language for the added risk. Selling short requires specific power of attorney language. General language in a power of attorney will **not** authorize agents to pledge trust collateral, get loans or trade on margin. If the principal has a business need of trading on margin, the specific authority for the agent to continue the practice must be included in the power of attorney. Most compliance departments are now requiring prior approval of the power of attorney for margin or loan accounts or for the other sophisticated investments listed above.

7) <u>Powers Regarding Tax Matters:</u> The new act at C.R.S. §15-14-739 includes a general grant of authority to deal with tax matters, and this authority was apparently intended to cover all powers that the agent would need to address the principal's dealings with taxing authorities. However, it is possible that this statute does not include the specific authority to execute a Form 2848 or Form 907 as required in the Internal Revenue Code and Regulations. The power described in Alternative 2(16) of paragraph 3 includes that specific reference. The following language was contained in the prior notes on use, and includes authority to sign Federal Tax Form 2848, *Power of Attorney and Declaration of Representative*. Note, however, that this language has been held insufficient to authorize a taxpayer's representative to sign Federal Tax Form 907, *Agreement to*

Extend Period of Limitations, in the absence of additional language containing this specific authorization. *See* Rev. Rul. 76-60, 1976-1 C.B. 387. Currently, a power of attorney must be filed with the IRS in order for the agent to receive a check in payment of any refund of taxes, including penalties and interest; the execution of a waiver of restriction on assessment or collection of a deficiency, or a waiver of notice of disallowance of a refund claim; the execution of a consent to extend the assessment or collection, or for executing an IRS closing agreement. New procedural rules governing powers of attorney appear in Treas. Reg. §§ 601.501 through 601.509.

<u>ALTERNATIVE FOR TAX POWERS</u>:

> To execute Federal Tax Form 2848 or any power of attorney form required by the Internal Revenue Service, including covering any tax years; to prepare, sign and file federal, state, or local income, gift, other tax returns of all kinds, FICA returns, payroll tax returns, claims for refunds, requests for extensions of time, ruling requests, petitions to the tax court or other courts regarding tax matters, and any and all other tax related documents, including, without limitation, receipts, offers, waivers, consents (including, but not limited to, consents and agreements under I.R.C. § 2032A, or any successor section thereto), closing agreements and any power of attorney form required by the Internal Revenue Service, state taxing authority, or other taxing body with respect to any tax period; to consent to extension of any limitation of action relating to assessments; to pay taxes due, collect refunds, post bonds, receive confidential information and contest deficiencies determined by the Internal Revenue Service, state taxing authority, or other taxing body; to exercise any elections I may have under federal, state, or local tax law; and generally to represent me in all tax matters and proceedings of all kinds and for all periods before or after the date of this delegation, before all offices and officers of the Internal Revenue Service, state taxing authority, and any other taxing body. I authorize my agent to substitute a representative and to delegate authority to a new representative and to retain and discharge professional counsel.

8) <u>Power to Deal With Mineral Interests:</u> Specific authority to deal with mineral interests is not included in the text of the form, and although it may be included in the general authority to deal with real property, for a client who owns significant mineral or oil and gas interests, specific language may be advisable. If this is desired the following language could be used:

> To grant, bargain, sell, convey and lease for oil, gas and mineral purposes any and all real estate which I may own or in which I may possess any interest, wherever situate, for such price and on such terms which my agent deems best, and to make, execute,

> acknowledge and deliver good and sufficient documents of conveyance for the same, with or without covenants of warranty; to sell, assign, transfer and convey any and all oil and gas leases and royalty and mineral interests which I may own or in which I may possess any interest, wherever situate, for such consideration and on such terms as my agent deems best, and to execute good and sufficient assignments and conveyances for the same; to execute any and all necessary division orders, transfer orders and similar instruments; to release and surrender any and all non-producing oil and gas leases in which I may own an interest.

9) Powers of Collection and Payment: Specific authority may be given to an agent to forgive or attempt to recover money and interests due the principal. An illustrative provision is the following:

> To forgive, request, demand, sue for, recover, collect, receive, hold all such sums of money, debts, dues, commercial paper, checks, drafts, accounts, deposits, legacies, bequests, devises, notes, interests, stock certificates, bonds, dividends, certificates of deposit, annuities, pension, profit sharing, retirement, social security, insurance and other contractual benefits and proceeds; all documents of title, all property, real or personal, intangible and tangible property and property rights and demands whatsoever, liquidated or unliquidated, now or hereafter owned by, or due, owing, payable or belonging to me, or in which I have or may hereafter acquire an interest, to have, use and take all lawful means and equitable and legal remedies and proceedings in my name for the collection and recovery thereof, and to adjust, sell, compromise, and agree for the same, and to execute and deliver for me, on my behalf and in my name, all endorsements, releases, receipts, or other sufficient discharges for the same; to execute or release deeds of trust or other security agreements as may be necessary or proper in the exercise of the rights and powers herein granted.

10) The prior version of this form included a paragraph authorizing the agent to make healthcare decisions for the principal. Those powers are discussed generally in Form 4, the Medical Durable Power of Attorney. Included in the general power of attorney is the designation of the agent as a "personal representative" under HIPAA just for the purpose of obtaining information from health care practitioners to be able to review and pay medical bills.

11) The form states that the power of attorney is "durable." Under C.R.S. 15-14-704, a power of attorney executed on or after January 1, 2010 is durable unless it expressly provides it is terminated on the incapacity of the principal. This is the reverse from prior law. The form still provides for the power of attorney to remain effective following the disability of the principal, because the laws of

other states may still require this phrase to be included.

12) This paragraph may instead be written to read: "This power of attorney shall become effective upon the disability of the principal." This springing power may present a problem in proving the principal's disability. Evidence of the principal's disability on which a third party can rely may be described in the instrument. A letter from a treating physician, for example, may be such evidence. See Form 4 for an example of a designation of the agent as a "personal representative" under HIPAA to obtain information to determine incapacity. The problem with the springing power is providing a mechanism for the agent to determine when it is effective.

    See Comerica Bank - Texas v. Texas Commerce Nat'l Assoc., 2 S.W.3d 723 (Tex. App. 1999). There is no prohibition against a springing power and the court upheld the validity of the power of attorney, notwithstanding that it did not specifically authorize this feature (discussed in 11 *Probate Practice Reporter* 7-8 (Dec. 1999)).

13) The social security numbers for the principal and the agent were included on the prior form. Because of identity theft concerns, it is not recommended that the principal's or the agent's social security numbers be included on the power of attorney, but the agent may need to supply those numbers to third parties.

14) To convey an interest in real property, a power of attorney must be acknowledged and recorded. *See* C.R.S. § 38-30-123. A witness to the principal's signature is not required in Colorado, but it may be required in other states if this document is used in a state outside of Colorado.

15) Under C.R.S. § 15-14-705, the principal's signature on the power of attorney is presumed to be genuine if a notary statement is included. In addition, under C.R.S. § 15-14-719, a person that in good faith accepts a purportedly acknowledged power of attorney is protected from liability in acting in reliance upon it.

16) Use caution in having an agent sign the "Acceptance" section. Under C.R.S. § 15-14-714, once an agent has accepted appointment, he or she has duties to take action on behalf of the principal. C.R.S. § 15-14-713 describes when an agent has accepted appointment. Under prior law, an agent did not have fiduciary duties unless and until the agent actually took action. The following is a form that could be used for the agent to sign accepting the appointment:

ACCEPTANCE BY AGENT

The undersigned agent hereby accepts the delegation of authority set out in this instrument.

______________________ ______________________________

____

Date Agent's Specimen Signature

17) The agent may run into problems with third parties (banks, brokerage houses, title companies, etc.) accepting the agent's directions. The last page of the Power of Attorney is a certification form for the agent to sign. C.R.S. §15-14-720 authorizes third parties to rely on a Power of Attorney that is accompanied by such a certification, and protects those who have relied on the document from liability. C.R.S. § 15-14-720 requires third parties to comply with the agent's directions after the certification has been provided, and lists the damages for not complying with the agent's directions, which may include the cost of obtaining court appointment of a conservator. The certification form is included in C.R.S. § 15-14-742.

18) The new Act contains a statutory form that replaces the prior statutory form that was found in C.R.S. §§ 15-1-1301 through 15-1-1317. The following is the statutory form found in C.R.S. § 15-14-741.

STATE OF COLORADO STATUTORY FORM

POWER OF ATTORNEY

IMPORTANT INFORMATION

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the "Uniform Power of Attorney Act," Part 7 of Article 14 of Title 15, Colorado Revised Statutes.

This power of attorney does not authorize the agent to make health care decisions for you.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until you die, revoke the power of attorney, the agent resigns, or the agent is unable to act for you.

Your agent is entitled to reasonable compensation unless you state

otherwise in the special instructions.

This form provides for designation of one agent. If you wish to name more than one agent you may name a coagent in the special instructions. Coagents are not required to act together unless you include that requirement in the special instructions.

If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.

This power of attorney becomes effective immediately unless you state otherwise in the special instructions.

If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.

DESIGNATION OF AGENT

I, _________________, (name of principal) name the following person as my agent:

Name of agent:
____
Agent's address:
____
Agent's telephone number:
____

DESIGNATION OF SUCCESSOR AGENT(S) (OPTIONAL)

If my agent is unable or unwilling to act for me, I name as my successor agent:

Name of successor agent:
____
Successor agent's address:
____
Successor agent's telephone number:
____

If my successor agent is unable or unwilling to act for me, I name as my second successor agent:

Name of second successor agent:

____
Second successor agent's address:
____
Second successor agent's telephone number:
____

GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the "Uniform Power of Attorney Act," Part 7 of Article 14 of Title 15, Colorado Revised Statutes:

(INITIAL each subject you want to include in the agent's general authority. If you wish to grant general authority over all of the subjects you may initial "All preceding subjects" instead of initialing each subject.)

(____) Real property
(____) Tangible personal property
(____) Stocks and bonds
(____) Commodities and options
(____) Banks and other financial institutions
(____) Operation of entity or business
(____) Insurance and annuities
(____) Estates, trusts, and other beneficial interests
(____) Claims and litigation
(____) Personal and family maintenance
(____) Benefits from governmental programs or civil or military service
(____) Retirement plans
(____) Taxes
(____) All preceding subjects

GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent.)

(____) Create, amend, revoke, or terminate an *inter vivos* trust
(____) Make a gift, subject to the limitations of the "Uniform Power of Attorney Act" set forth in C.R.S. § 15-14-740, and any special instructions in this power of attorney
(____) Create or change rights of survivorship
(____) Create or change a beneficiary designation
(____) Authorize another person to exercise the authority granted under this power of

attorney

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

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

(____) Disclaim, refuse, or release an interest in property or a power of appointment

(____) Exercise a power of appointment other than: (1) The exercise of a general power of appointment for the benefit of the principal which may, if the subject of estates, trusts, and other beneficial interests is authorized above, be exercised as provided under the subject of estates, trusts, and other beneficial interests; or (2) the exercise of a general power of appointment for the benefit of persons other than the principal which may, if the making of a gift is specifically authorized above, be exercised under the specific authorization to make gifts

(____) Exercise powers, rights, or authority as a partner, member, or manager of a partnership, limited liability company, or other entity that the principal may exercise on behalf of the entity and has authority to delegate excluding the exercise of such powers, rights, and authority with respect to an entity owned solely by the principal which may, if operation of entity or business is authorized above, be exercised as provided under the subject of operation of the entity or business

LIMITATION ON AGENT'S AUTHORITY

An agent that is not my ancestor, spouse, or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the special instructions.

SPECIAL INSTRUCTIONS (OPTIONAL)

You may give special instructions on the following lines:

____

____

____

____

____

EFFECTIVE DATE

This power of attorney is effective immediately unless I have stated otherwise in the special instructions.

NOMINATION OF CONSERVATOR OR GUARDIAN (OPTIONAL)

If it becomes necessary for a court to appoint a conservator of my estate or guardian of my person, I nominate the following person(s) for appointment:

Name of nominee for conservator of my estate:
____

Nominee's address:
____

Nominee's telephone number:
____

Name of nominee for guardian of my person:
____

Nominee's address:
____

Nominee's telephone number:
____

RELIANCE ON THIS POWER OF ATTORNEY

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person knows it has terminated or is invalid.

SIGNATURE AND ACKNOWLEDGMENT

____

____

Your signature Date

____

Your name printed

____

____

Your address

____

Your telephone number

State of Colorado)
) ss.
County of ____________)

This document was acknowledged before me on _______________ (Date), by _________________________ (Name of principal).

(Seal, if any)

____
Signature of Notary

My commission expires: ________________

This document was prepared by:

____

____

____

IMPORTANT INFORMATION FOR AGENT

Agent's duties

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

(1) Do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;
(2) Act in good faith;
(3) Do nothing beyond the authority granted in this power of attorney; and
(4) Disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:

(<u>Principal's name</u>) by (<u>Your signature</u>) as agent

Unless the special instructions in this power of attorney state otherwise, you must also:

(1) Act loyally for the principal's benefit;
(2) Avoid conflicts that would impair your ability to act in the principal's best interest;

(3) Act with care, competence, and diligence;

(4) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

(5) Cooperate with any person that has authority to make health care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal's expectations, to act in the principal's best interest; and

(6) Attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest.

Termination of agent's authority

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

(1) Death of the principal;

(2) The principal's revocation of the power of attorney or your authority;

(3) The occurrence of a termination event stated in the power of attorney;

(4) The purpose of the power of attorney is fully accomplished; or

(5) If you are married to the principal, a legal action is filed with a court to end your marriage, or for your legal separation, unless the special instructions in this power of attorney state that such an action will not terminate your authority.

Liability of Agent

The meaning of the authority granted to you is defined in the "Uniform Power of Attorney Act," Part 7 of Article 14 of Title 15, Colorado Revised Statutes. If you violate the "Uniform Power of Attorney Act," Part 7 of Article 14 of Title 15, Colorado Revised Statutes, or act outside the authority granted, you may be liable for any damages caused by your violation.

If there is anything about this document or your duties that you do not understand, you should seek legal advice.

[*** End of Form***]