May a power of attorney be electronically executed?

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Consumer and commercial transactions sometimes involve the creation of, and reliance upon, a power of attorney (POA). For example, a POA may be used to grant authority to an agent in connection with consummation of the transaction, or to confer attorney-in-fact status to one of the transaction participants.

When the transaction documents are presented and executed electronically, a key question arises: may a POA be electronically executed? The answer depends on a number of considerations.

This edition's Insight explores the relatively complex relationship between a POA, the Electronic Signatures in Global and National Commerce Act (ESIGN), the Uniform Electronic Transactions Act (UETA) and other state laws governing the use of electronic records and signatures.

To begin with, in states that have adopted the UETA, it is the UETA (and not ESIGN) that will primarily apply to any state law governing creation of a POA. In New York, Illinois and Washington State (the three states that have not adopted UETA), the primary applicable law may be the non-uniform state law on electronic records and signatures, or ESIGN (depending on the circumstances). We refer to ESIGN, UETA and the non-uniform laws collectively as the eCommerce laws.
In general, a POA is simply a formal appointment of an agent. Most states do not require a POA to be in writing in order to be effective, except in specific cases established by statute. The exceptions vary from state to state, and may include healthcare directives, POAs used in real estate transactions, and durable powers of attorney (which, unlike general agency appointments, survive and are enforceable even after the principal becomes mentally incapacitated).

As a result, most POAs can be executed electronically with or without authorization under the eCommerce laws, since there is no writing or signature requirement to begin with. To the extent the POA in question is subject to a writing and/or signature requirement, whether or not the applicable eCommerce Law will render an electronically executed POA enforceable often depends on the purpose for which the POA is used. By its terms, for example, the UETA only authorizes the use of electronic records and signatures in lieu of signed writings in connection with a “transaction,” which is defined as “an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.” ESIGN has a similar limitation.

So, for example, a POA that is given to facilitate execution of a note, mortgage and deed as part of real estate purchase is almost certainly part of a transaction, since the agency appointment in the POA is an action between two persons (principal and agent), and the execution and delivery of the POA is express intended to relate to the conduct of commercial affairs. Therefore, to the extent such a POA is required to be in writing and the writing requirement is not excluded from the applicable eCommerce Law, the eCommerce laws should authorize the use of electronic records and signatures in its execution (subject to any filing or recording requirements imposed by public records offices). If the POA is not required to be in writing, then using an electronic record and signature to make the appointment is not necessary, but should be effective.

On the other hand, the application of the eCommerce laws to a durable power of attorney or a healthcare directive is less clear, especially in states that have not adopted the Uniform Power of Attorney Act (UPAA). These documents usually evidence appointments permitting the agent to act as the principal’s representative in a wide range of circumstances, some of which may be part of a transaction, and others of which are not. What’s more, it is not necessarily clear that the appointment itself, even though between two parties, is necessarily related to the “conduct of business, commercial, or governmental affairs.” The Reporter’s Comments to the UETA (specifically Comment 9 to Section 3) actually speak to this ambiguity:

Records used unilaterally, or which do not relate to business, commercial (including consumer), or governmental affairs are not governed by this Act in any event, and exclusion of laws relating to such records may create unintended inferences about whether other records and signatures are covered by this Act...

A power of attorney is simply a formalized type of agency agreement. In general, no formal requirements for paper or execution were found to be applicable to the validity of powers of attorney.

Special health powers of attorney have been established by statute in some States. These powers may have special requirements under state law regarding execution, acknowledgment and possibly notarization. In the normal case, such powers will not arise in a transactional context and so would not be covered by this Act. However, even if such a record were to arise in a transactional context, this Act operates simply to remove the barrier to the use of an electronic medium, and preserves other requirements of applicable substantive law, avoiding any necessity to exclude such laws from the operation of this Act. Especially in light of the provisions of Sections 8 and 11, the substantive requirements under such laws will be preserved and may be satisfied in an electronic format.

Accordingly, under existing law the ability to use electronic records and signatures in connection with a POA may depend on one or more of the following: (1) the purpose for which the POA is created, (2) any specific legal requirements related to the formation of the POA, and (3) the purpose for which the POA is used. In addition, note that it is not clear whether a revocation of a POA, if required by state law to be in writing, constitutes a “transaction” – creating the possibility that revocation could not be done using electronic records and signatures, either.

For states that have adopted UPAA without significant variation (with Kentucky being the latest, as discussed below in this issue), the ability to use electronic records and signatures for durable powers of attorney is clearer: except for POAs related to healthcare and other exemptions, the POA can be completed using electronic records...
and signatures.

There may be additional considerations in those states that have not adopted the uniform version of the UETA. This includes Washington state, which did adopt UPAA but did not adopt the definitions allowing for electronic records or signatures, and New York, which expressly excludes certain POAs from coverage under the New York Electronic Signatures and Records Act, but separately authorizes electronic execution of some POAs under other law.

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