House Bill 659 – Maryland's new General and Limited Power of Attorney Act ("2010 POA Act") – became effective October 1, 2010.While generally modeled after the Uniform Power of Attorney Act, it contains provisions unique to Maryland law.

Significantly, the Act provides that a person (including banks, insurance companies and brokerage firms) may not refuse to accept an acknowledged statutory form financial power of attorney. If a person refuses to accept a statutory form or a power of attorney in "substantially the same form" as one of the statutory forms, such person may be ordered by a Court to accept such form. Additionally, that person may be held liable for the reasonable attorneys' fees and costs incurred in an action or proceeding that either confirms the validity of such statutory form or mandates its acceptance.

The 2010 POA Act provides two statutory form financial powers of attorney – a "Personal Financial Power of Attorney" and a "Limited Power of Attorney." There is no requirement that anyone execute a new statutory form financial power of attorney.

The Personal Financial Power of Attorney is *not* a general power of attorney and only can be used in certain circumstances. (It lacks several powers commonly given in a general power of attorney.) It is approximately seven pages long, and it provides a section for special instructions to agents.

The Limited Power of Attorney is a "check the box" style document, approximately 20 pages long, and also contains a special instructions section. If all of the powers contained in the Limited Power of Attorney are given, it grants more comprehensive powers than the Personal Financial Power of Attorney.

Additional powers can be given to agents in both statutory forms under the "Special Instructions" sections. However, several members of the Maryland Bar have questioned whether providing special instructions in a statutory form will cause the otherwise statutory form to fail a "substantially similar" test, thus depriving its intended user of the benefit of possibly recovering attorneys' fees.

It is important to note that a comment to the statutory form provided for in the Uniform Power of Attorney Act specifically provides that "any statutorily-sanctioned deviation from the statutory form may be indicated in, or on an addendum to, the Special Instructions." Accordingly, consideration should be given whether to provide for special instructions, and, if so given, the character and extent of the instructions should be carefully considered.

The 2010 POA Act allows for a principal to deviate from certain new responsibilities imposed upon an agent by statutory default. Any deviation from the statutory default should be provided for in the special instructions section of a statutory form (a non- statutory form can similarly deviate).

Practitioners should familiarize themselves with the new agent responsibilities created by the 2010 POA Act. These "optional" responsibilities may include, without limitation, the following duties:

- to maintain loyalty for the principal's benefit;
- to not create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;
- to keep a record of all receipts, disbursements and transactions made on behalf of the principal;
- to cooperate with a person that has authority to make health care decisions for the principal, and
- to attempt to preserve the principal's estate plan.

The 2010 POA Act also imposes new execution requirements for financial powers of attorney executed on or after October 1. Powers of attorney executed *after* October 1 must be notarized and attested to by two witnesses. The notary may serve as one of the witnesses.

For clients executing powers of attorney on October 1 or thereafter, it may be appropriate for a practitioner to prepare a non-statutory financial power of attorney that meets the new signing requirements (notarization and two witnesses) after informing a client of her/his options. It is important to note that existing financial powers of attorney will remain valid after October 1.

Clients can opt out of all of the provisions of the 2010 POA Act. However, the statutory abrogation of the common law permitting powers of attorney to be durable is contained in the 2010 POA Act (and deleted from its current location in the Maryland Code). Opting out of the 2010 POA Act effectively prevents a power of attorney from being durable, which eliminates an essential disability planning tool.

The 2010 POA Act is a somewhat lengthy and complex statute that combines the Uniform Power of Attorney Act and legislative drafting to protect the elderly. It will be up to Maryland Courts (and possibly the General Assembly) to render the ultimate interpretation of the 2010 POA Act's potentially ambiguous provisions.