THE NEW YORK STATE
LAW REVISION COMMISSION

2007
RECOMMENDATION
ON
PROPOSED REVISIONS TO THE GENERAL OBLIGATIONS LAW
POWERS OF ATTORNEY

NEW YORK STATE
LAW REVISION COMMISSION

80 New Scotland Avenue
Albany, New York 12208

(518) 472-5858
(518) 445-2303 (fax)

- - - - - -

TABLE OF CONTENTS

I. Executive Summary

The power of attorney is a written instrument whereby an individual appoints another person to act on his or her behalf in financial matters.[1] The person making the appointment is known as the "Principal;" the person receiving the appointment is known as the "Agent."[2] Their relationship is governed by the law of agency.[3] The power of attorney is widely used for financial and estate planning and for avoiding the expense of guardianship in the event of incapacity.[4] Its popularity among attorneys and the public at large has also led to its use for transactions far more complex than those originally contemplated by the law, particularly in the area of gift giving and property transfers. Given an aging population and the concomitant increase in the potential for incapacity, the use of the power of attorney, particularly the durable power of attorney, whose effectiveness continues beyond the Principal's incapacity, is likely to become even more widespread.

As well as being useful, the power of attorney is deceptively simple to create. It can be obtained from any number of websites on the Internet or in a stationery store and its execution merely requires the Principal's signature be acknowledged by a notary public. But this simplicity belies the extraordinary power that this instrument can convey. The potential authority of the Agent can include power to transfer assets that pass by Will as well as assets such as life insurance or retirement benefits that ordinarily pass outside a Will. The Principal may delegate these sweeping powers to the Agent without fully understanding the scope of the Agent's authority.

Despite the broad authority associated with this important legal tool, monitoring the Agent's exercise of her authority is difficult. The Agent can act immediately and without notice to the Principal, even a Principal with capacity.[5] With a durable power of attorney, which continues in effect after the Principal's incapacity, the Agent can continue to act without oversight even though the incapacitated Principal is no longer able to control or review the Agent's actions, an arrangement that was not permitted by common law.

---

[1] Although the issue of whether the power of attorney could be used for health care decisionmaking was unsettled for a time, the law now clearly limits the use to powers of attorney to financial matters.

[2] Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 4 (2001) (citing 1 Floyd R. Mechem, A Treatise on the Law of Agency § 35, at 19 (2d ed. 1914) ("when the [agent's] authority is conferred by formal instrument in writing, it is said to be conferred by 'letter of attorney,' or, more commonly by 'power of attorney.' Agency relationships may also be created orally."). *See also* N.Y.Jur. Agency §63.

[3] Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. at 4.

[4] A power of attorney may also be used in commercial and business transactions but powers of attorney used for those purposes are beyond the scope of the Commission's Recommendation.

[5] If the instrument is a springing power of attorney it becomes effective upon the occurrence of a specified event such as the Principal's incapacity. Despite this potential safeguard, springing durable powers of attorney are not as popular as durable ones that become effective immediately.

Not only is the lack of any oversight troubling, the general obligations law, which governs the use of powers of attorney, is silent on several salient elements of the use of powers of attorney:

the Agent's fiduciary obligations and accountability,

the disclosure of the agency relationship when the Agent's handwritten signature is required,

the events which terminate the power of attorney,

the circumstances when refusing to accept a power of attorney is reasonable, and

the use of powers of attorney to obtain medical records which are protected by the HIPAA Privacy Rule of 2003[6] regarding confidentiality of an individual's health information.

Ambiguities in the general obligations law and the statutory short form power of attorney surrounding an Agent's authority to make gifts and other property transfers can create problems about whether the exercise of such authority is permissible, particularly when an incapacitated Principal can no longer clarify his or her intent.

Based on its study, the Commission has concluded that while a power of attorney should remain an instrument flexible enough to allow an Agent to carry out the Principal's reasonable intentions, the combined effect of its potency and ease of creation, statutory silence about an Agent's responsibilities, and statutory ambiguities about the authority to transfer assets can frustrate the proper use of the power of attorney, particularly when a Principal is incapacitated and can no longer take steps to ensure its proper use. To the extent that guidance can be found in the common law, its principles should be codified in the general obligations law to provide clarity and direction for Principals and Agents. The statute should also offer guidance to third parties asked to accept powers of attorney and those asked to investigate financial exploitation.

The major significant changes recommended by the Commission are as follows:

A. Major Gifts and Other Property Transfers: The bill requires that a grant of authority to make major gifts and other asset transfers must be set out in a Major Gifts Rider which is witnessed in the same manner as a Will. The creation of a Major Gifts Rider allows the Principal to make an informed decision as to whether the Agent may make gifts or other transfers of the Principal's property to third parties as well as to the Agent. The execution requirements alert the Principal to the gravity of granting the Agent this type of authority.

B. HIPAA Privacy Rule: The bill adds the term "health care billing and payment matters" to the term "records, reports and statements" as those terms are explained in section 5-1502K, so that an Agent can examine, question, and pay medical bills in the event the Principal intends to grant the Agent power with respect to records, reports and statements.

---

[6] Health Insurance Portability and Accountability Act of 1996, Public Law 104 -191. *See* Privacy Rule at 45 C.F.R. Parts 160, 164.

C. Agent: The bill includes a statutory explanation of the Agent's fiduciary duties. A Notice to the Agent is added to the statutory short form explaining the role of the Agent, the Agent's fiduciary obligations and the legal limitations on the Agent's authority. If the Agent intends to accept the appointment, the Agent is required to sign the power of attorney as an acknowledgment of the Agent's fiduciary obligations.

The bill also requires that in transactions on behalf of the Principal, the Agent's legal relationship to the Principal must be disclosed where a handwritten signature is required. In all transactions (including electronic transactions) where the Agent purports to act on the Principal's behalf, the Agent's actions constitute an attestation that the Agent is acting under a valid power of attorney and within the scope of the authority conveyed by the instrument. The bill provides that the Principal may provide in the power of attorney that the Agent receive reasonable compensation if the Principal so desires. Without this designation, the Agent is not entitled to compensation.

D. Principal: The bill adds a section to the statute that explains how the power of attorney can be revoked. It expands the Caution to the Principal so that the Principal will be better informed about the serious nature of the document. The bill also permits the Principal to appoint someone to monitor the Agent's actions on behalf of the Principal, and gives the Monitor the authority to request that the Agent provide the Monitor with a copy of the power of attorney and a copy of the documents that record the transactions the Agent has carried out for the Principal.

E. Third Parties: The bill provides that third parties have the ability to refuse to accept powers of attorney based on reasonable cause. Reasonable cause includes the Agent's refusal to provide an original or certified copy of the power of attorney, the third party's good faith referral of the Principal and the Agent to the local adult protective services unit, the third party's actual knowledge of a report to the local adult protective services unit by another person, actual knowledge of the Principal's death, or the incapacity of the Principal if the power of attorney is nondurable. The bill expands the definition of "financial institution" to include securities brokers, securities dealers, securities firms, and insurance companies and provides that a financial institution must accept a validly executed power of attorney without requiring that the power of attorney be on the institution's own form. The third party does not incur any liability in acting on a power of attorney unless the third party has actual notice that the power is revoked or otherwise terminated. A third party is deemed to have actual notice of revocation when the office where the account is located receives written notice.

F. Other Major Provisions: The bill increases the amount of the gifting provision to that of the annual exclusion amount under the Internal Revenue Code. It adds a provision allowing gifting to a "529" account up to the annual gift tax exclusion amount. "529" accounts, authorized in the Internal Revenue Code at section 529, are popular tax-advantaged savings accounts for education expenses. The bill amends the provisions regarding gift splitting to allow the Principal to authorize the Agent to make gifts to a defined list of relatives from the Principal's assets up to twice the amount of the annual gift tax exclusions, with the consent of the Principal's spouse.

II. Overview[7]

A. The General Statutory Power of Attorney

The power of attorney is a written instrument whereby an individual appoints another person to act on his or her behalf in financial matters.[8] The person making the appointment is known as the "Principal;" the person receiving the appointment is known as the "Agent."[9] Their relationship is governed by the law of agency.[10]

The general statutory power of attorney became law in New York in 1948.[11] The legislation responded to a growing need for a simple legal document allowing a person expecting to be away from home to appoint an agent for his or her affairs which would be accepted by banks and other institutions. This need grew out of the large number of persons serving in the armed forces during and after World War II. [12] Members of the armed forces were often absent for long periods of time thus underscoring the necessity to plan for those absences.[13] It was also anticipated that the changing state of world affairs would require the continued maintenance of the armed forces overseas, increase air travel, and increase Americans' involvement in world commerce, thus driving the need for an simple way to plan for absences. The Law Revision Commission, which recommended the legislation, noted presciently that the "need for creating an agent with comprehensive powers will stay with us in the coming days of peace."[14]

Concomitant with the growing need for such appointments was the financial industry's custom of rejecting general powers of attorney.[15] These institutions preferred that the power of

---

[7] The research on the history of the power of attorney was originally prepared for a 1998 article that appeared in the New York State Bar Business Law Journal, Rose Mary Bailly, *The Durable Power of Attorney – A Delicate Balance*, 2 NYSBA Business Law Journal 46 (1998).

[8] Although the issue of whether the power of attorney could be used for health care decisionmaking was unsettled for a time, the law now clearly limits the use to powers of attorney to financial matters.

[9] Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 4 (2001)(citing 1 Floyd R. Mechem, A Treatise on the Law of Agency § 35, at 19 (2d ed. 1914) ("when the [agent's] authority is conferred by formal instrument in writing, it is said to be conferred by 'letter of attorney,' or, more commonly by 'power of attorney.'Agency relationships may also be created orally."). *See also* N.Y.Jur. Agency §63.

[10] Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. at 4.

[11] 1948 N.Y. Laws, c. 442, as codified at N.Y. Gen. Bus. Law §422, as repealed by 1963 N.Y. Laws c. 576 and recodified at N.Y. Gen. Oblig. Law §5-1501. ("An Act to amend the General Business Law in relation to a statutory short form of general power of attorney."). The act, which became effective on March 21, 1948, was introduced in the Legislature on the recommendation of the Law Revision Commission. *See* Leg. Doc. 65 (L), 1946 New York State Law Revision Commission Report, Recommendation and Studies 681(1946 Report).

[12] 1946 Report at 689.

[13] *Id.*

[14] *Id.*

[15] *Id.*

attorney be drafted to address the specific transaction needed, a requirement which involved additional expense of drafting multiple documents for the Principal.[16]

The aim of the statute was create a simple device empowering an Agent "to meet crises as they develop."[17] At the time of the enactment of the original statutory short form power attorney, general powers of attorney were understood to confer full power to act in all the Principal's affairs.[18] The idea for a statutory short form was inspired by forms for deeds and mortgages.[19] The language of the form granted the Agent broad authority, listing a wide variety of matters that the Principal could exclude from the Agent's authority.[20] If the Principal did not cross out a listed item, the Agent received that power.[21] In order to qualify as a statutory short form power of attorney, the power had to be in writing, contain language required by the statute, and be signed by the Principal and acknowledged in the same manner as a deed.[22] The form itself was apparently viewed as sufficient to overcome the banks' objections to common law general powers of attorney because no reference was made in the statute as to whether banks were required to accept the statutory short form.

The drafters of the original general power of attorney recognized that the "simple device" created "a danger against which *some* safeguard should be provided"[23] since the consequences to the Principal who chose a dishonest Agent increased as the Agent's powers increased.[24] It was determined that "the statute should somehow make it difficult for either a layman or lawyer to use the statutory form without having first consciously faced the risk he thereby incurs."[25] Hence, a cautionary notice was included in the form advising the Principal that the execution of the statutory short form was a matter of great legal significance and that legal advice may be needed for certain questions.[26]

Over the years, the statutory short form became a very popular planning device. It could be executed without incurring an attorney's fee and could be executed anywhere so long as a notary would acknowledge the Principal's signature.

---

16 *Id.* (noting a letter complaining about these practices).

17 1946 Report at 689.

18 1948 New York State Law Revision Commission Report, Recommendation and Studies 39, 41, ,63 (1948 Report on Powers of Attorney).

19 1946 Report at 691, citing N.Y. Real Prop. Law §§253, 254.

20 1948 N.Y. Laws, c. 442, as codified at N.Y. Gen. Bus. Law §422, as repealed by 1963 N.Y. Laws c. 576 and recodified at N.Y. Gen. Oblig. Law §5-1501.

21 *Id.*

22 *Id.*

23 1946 Report at 691.

24 *Id.*

25 *Id.*

26 *Id.* ("Notice: The powers granted by this document are broad and sweeping. They are defined in the New York General Business Law, Article 13, sections 222-234 which expressly permits the use of any other or different form of power of attorney desired by the parties concerned.").

However, the limitations of using a general power of attorney became apparent before long. The most significant difficulties related to the termination of the document's legal effect upon the occurrence of the Principal's incapacity, the lack of oversight of the Agent, and the continuing refusal of many financial institutions to accept the statutory short form.

B. The Durable Power of Attorney

As a matter of law, the legal effectiveness of a general power of attorney ends if the Principal revokes it, the Principal loses capacity, or the Principal dies.[27] Revocation and death are clear-cut events, after which an Agent would have no reason to act. While an incapacitated Principal might well need the assistance of an Agent to carry on the Principal's affairs, the rationale for terminating the power of attorney upon the Principal's loss of capacity is that the Principal can no longer direct the Agent.[28]

Although the original drafters focused on the needs of members of the armed services and business travelers, the general power of attorney came to be used by others as well, particularly frail elderly adults who would appoint an Agent to manage their affairs during a time of illness or decline. Unfortunately, an elderly person who has lost capacity could no longer rely on the Agent's assistance because the power of attorney was no longer valid. Thus, the general power of attorney was useless for planning for incapacity. Prior to 1975 in New York, the alternatives for persons concerned about mental incapacity included a social security representative payee, joint bank accounts, creation of a trust, or a judicially appointed committee[29] or conservator.[30] These alternatives had their own limitations. A representative payee and a joint bank account are confined to certain assets.[31] The creation of a trust or the involuntary appointment of a third party were viewed as expensive and time consuming,[32] and in the case of judicial appointments, stigmatizing.[33]

The enactment of the durable power of attorney in 1975 eliminated these problems. The general obligations law provides that a power of attorney can continue to be effective after the Principal loses capacity if the instrument contains language expressing that intent, i.e., language of durability.[34] A Principal could now rest assured that his or her incapacity would not hinder the Agent in carrying out the Principal's wishes. However, there is no oversight of the Agent.

---

[27] *See* N.Y. Jur. Agency §§ 76, 77 & 79.

[28] Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. at 4(citing Seavey, *The Rationale of Agency*, 29 Yale L.J. 859, 893 (1920)).

[29] N.Y.Men. Hyg. L. §§78.1 et seq., as repealed by 1992 Laws of New York, c. 698.

[30] N.Y.Men. Hyg. L. §§77.1 et seq., as repealed by 1992 Laws of New York, c. 698.

[31] Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. at 5.

[32] *Id.*

[33] *See generally*, 1992 New York State Law Revision Commission Report On Conservators and Committees.

[34] *See* 1975 Laws of New York c. 195, as codified at N.Y. Gen. Oblig. Law §5-1601, as amended and renumbered by 1994 Laws of New York, c. 694, as codified at N.Y. Gen. Oblig. Law §5-1501.

C. The Springing Durable Power of Attorney

Despite its overall popularity, the immediate effectiveness of the durable power of attorney caused concern in some quarters. Once the Principal signs the instrument, the Agent can act without further delay. A healthy individual wishing to appoint an Agent to act at the onset of the Principal's incapacity may be reluctant to execute a document that authorizes the Agent to act immediately, when the need for the Agent to act may not arise for several years, if at all. One way practitioners have dealt with this concern is to have the Principal sign the document and then to hold the instrument in the practitioner's desk or safe, notifying the Agent only if and when the need for his or her services arises by virtue of the Principal's incapacity.

In 1988, the springing durable power of attorney statute was enacted to address this timing problem.[35] The springing durable power of attorney allows the Principal to define an event the occurrence of which triggers the effectiveness of the power of attorney. The "springing" event may be one that can occur immediately or one that may occur in the future, such as the Principal's incapacity.[36] The Principal names a person in the springing power of attorney who is charged with declaring that the "springing" event has occurred.[37] The effectuation of the springing power of attorney does not require that the person be correct in stating that the event has occurred. In essence the Principal is delegating the determination of when the power of attorney becomes effective to another person.

Despite the availability of a statutory springing durable power of attorney, they are not used with any regularity in New York. Most practitioners and their clients prefer that a previously executed durable power of attorney be held by the practitioner until the Agent needs to act.

III. Areas of Concern

A. Lack of Supervision of An Agent While the Principal is Incapacitated

Both the durable and springing durable power of attorney permit the Agent to continue to act after the Principal has become incapacitated. The intent behind this change to the common law was laudable – to allow an Agent to act for the Principal precisely at a time when the Principal needs assistance, to permit the Principal to plan for possible incapacity, and to eliminate the need for expensive alternatives such as a trust or guardianship. However, the Principal's incapacity leaves her unable to monitor the Agent's actions and to revoke the power if she is not satisfied with the Agent's conduct. Thus an Agent can take actions on behalf of the Principal without any supervision for months or years, and not always to the benefit of the Principal. The general obligations law does not address this problem.

---

[35] 1988 Laws of New York, c. 210, as as codified at N.Y. Gen. Oblig. Law §5-1602, as amended and renumbered by 1994 Laws of New York, c. 694, as codified at N.Y. Gen. Oblig. Law §5-1506.

[36] N.Y. Gen. Oblig. Law §5-1506.

[37] *Id.*

B. Major Gifts and Other Property Transfers

The statutory short form's "Caution" to the Principal probably does not go far enough to underscore the power entailed in the document's use. The transfers at issue in the recent Court of Appeals decision in *Matter of Ferrara*[38] illustrate the point. The Agent (the Principal's nephew) made transfers pursuant to a modified gifting power authorizing gifts to himself in unlimited amounts, including transfers of certificates of deposit, proceeds of multiple bank accounts, proceeds of the sale of stock, and proceeds from the sale of the Principal's house, totaling $820,541. All of these transfers were accomplished by the Agent in a two-week period between the execution of the power of attorney and the Principal's death. These transfers went unchallenged until the beneficiary under the Principal's will, the Salvation Army, commenced a discovery and turnover proceeding in Surrogate's Court and followed the appeals process all the way to the Court of Appeals which held that any gifts the agent made, including gifts to himself were required to be made on the basis of either specific instructions from the Principal or, in the absence of such instructions, in the Principal's best interest. The Court held that the Agent had failed to demonstrate that the transfers were in the Principal's best interest.

Powers of attorney often serve two very different purposes: management of the Principal's everyday financial affairs, and reorganization or distribution of the Principal's assets in connection with financial and estate planning. Current law allows the use of the statutory short form power of attorney for both purposes.

The existing statutory language and statutory form make it difficult for a Principal to make an informed decision about what, if any, authority she wants to give the Agent with respect to making gifts and transferring property interests in connection with financial and estate planning.

First, the gifting and transfer provisions are scattered among other more arguably routine provisions. The statutory gifting authority is listed thirteenth (M) of sixteen powers and authority over insurance transactions and retirement benefit transactions, which can include changing beneficiaries, are listed sixth (F) and twelfth (L) respectively, and all of them can be easily overlooked. Unlike the gifting power, the insurance and retirement benefit powers listed on the form give no hint that their construction sections allow the agent to change beneficiary designations. In giving the Agent authority over insurance policies and retirement benefits, the Principal may be thinking of more routine matters, such as the need for more insurance or a different type of insurance and might be unaware that she had given the Agent authority that could alter her estate plan or reduce her property.

Second, the statutory short form does not indicate that the Agent may be able to engage in self-gifting or to designate himself as the beneficiary of the Principal's insurance policies and retirement benefits.[39]

---

[38] 7 N.Y 3d 244 (2006). *See also In re Kislak*, 24 A.D.3d 258, 808 N.Y.S.2d 174 (1st Dept. 2005)(the transfers involved more than $1 million of the Principal's assets which the Agent transferred to himself.)

[39] See §§ 5-1502F(2) "To procure new, different, or additional contracts of insurance on the life of the principal . . . and to designate the beneficiary of any such contract of insurance, provided, however, that the agent

The potential for confusion is compounded by a third factor, namely, the ambiguity of the law regarding these types of transactions. On the one hand, the statutory construction sections for the authority to open joint bank accounts, and to change beneficiaries to insurance policies and retirement plans do not require that in order to exercise such authority the Agent also be granted authority to make gifts or vice versa.[40] So it might appear from a reading of the statute, that Agent can open a joint bank account and make changes in beneficiary designations without having separate gifting authority. On the other hand, cases interpreting the statute appear to hold that gifting authority must be granted in addition to granting authority over joint bank accounts, and insurance and retirement benefits if the Principal intends that Agent is authorized to open joint bank accounts with the Principal and change the beneficiaries of the Principal's insurance policies and retirement benefits.[41]

Finally, current law permits modifications to the statutory short form to authorize significant transfers, but like the powers listed explicitly on the form, they may be buried amid masses of legal text and fail to attract the Principal's attention to the significance of these modifications.

C. The Potential for Financial Exploitation

As early as the original enactment of the general power of attorney it was recognized that the power of attorney could be abused by the Agent.[42] When the creation of the durable power of attorney and the springing power of attorney expanded their use for financial management or

---

himself cannot be such beneficiary unless the agent is spouse, child, grandchild, parent, brother or sister of the principal;" (note that the self-gifting class differs from that described above at 5-1502M(1): "spouse, children and other descendants, and parents"; 5-1502F(3) "To . . . change the beneficiary of any such contract of insurance, provided, however, that the agent himself cannot be such beneficiary unless the agent is spouse, child, grandchild, parent, brother or sister of the principal; and 5-1502L(2) "To . . .designate a beneficiary or beneficiaries, provided, however, that the agent may not designate herself or himself a beneficiary unless the agent is a spouse, child, grandchild, parent, brother or sister of the beneficiary, or unless the short form power of attorney permits the agent to designate himself or herself . . ." [emphasis added] (note that this section specifically allows a modification permitting the agent to designate herself as beneficiary).

[40] In fact a close reading of the language of section 5-1502M governing certain gifting transactions suggests that the drafters did not intend to require gifting authority to change insurance or retirement beneficiaries. See § 5-1502M("The powers explicitly authorized in the provisions of this section 5-1502M of the general obligations law shall not be construed to diminish any like powers authorized in any other section of title 15 of article 5 of the general obligations law. Accordingly, such powers as are authorized in any other section of title 15 of article 5 of the general obligations law shall be construed as if the provisions of this section do not exist.").

[41] *See, e.g., Matter of Griffin*, 160 Misc.2d 871, 874 (Surr. Ct., Bronx Co., 1994) ("Assuming arguendo that respondent had been validly appointed as decedent's attorney-in-fact to act on her behalf in the selection of a retirement benefit, this status by itself would have given respondent the power but not the right to name herself as one of the beneficiaries of the retirement benefit. Respondent, as decedent' s attorney-in-fact, does not have the right to use the power of attorney to make a gift to herself absent an explicit authorization from decedent to use the power for that purpose."); *Mandala v. Mandala* 003329/04 (Sup. Ct., Nassau Co. 2004)(noting that although respondent argued that she had the statutory authority to change decedent's life insurance beneficiary designation to benefit herself, the self-gifting creates a presumption of impropriety that can be rebutted only with a clear showing that the principal intended to make the gift), *Semmler v. Naples*, 166 A.D. 2d 751 (3d Dep't, 1990) (no evidence that decedent intended to allow diversion of her funds into a joint account with rights of survivorship in the agent).

[42] 1946 Report at 691.

planning after the Principal's incapacity, anecdotal evidence of abuse through the use of powers of attorney resurrected the concern over what would happen if the power of attorney was placed in the wrong hands, especially when the Principal's incapacity left him or her powerless to control the Agent.

In the early 1990s public hearings on financial exploitation through powers of attorney led to several recommendations for reform. The recommendations had two prongs, namely, education of the Principal, and holding the Agent accountable. The first prong was aimed to inform the Principal as to the serious nature of the document by 1) expanding the content of the statutory short form's notice to the Principal, 2) requiring the Principal to make an affirmative choice of the powers he or she was delegating to the Agent, and 3) clarifying the consequences of choosing joint Agents. The second prong intended to establish the accountability of the Agent for actions on behalf of the Principal by 1) requiring that the power of attorney be recorded so that it was a public document, and 2) requiring the Agent to account periodically for the transactions.[43]

In 1994, the Legislature adopted the reforms aimed at educating the Principal. The language of the "Notice" to the Principal in the statutory short form was amended to explain to the Principal that the Agent could act without telling the Principal and that if the Principal had questions, he or she should consult an attorney.[44] The same amendment changed the practice by which the delegation of the powers listed on the instrument was manifested. Instead of marking off the powers not delegated to the Agent, the amendment required that the Principal affirmatively initial the powers delegated to the Agent, including an election to make the power of attorney durable.[45]

In 1996, further amendments to the general obligations law refined the statutory short form and responded to critics of the 1994 amendments. The 1996 amendments allowed a Principal to list on one line all the powers to be granted the Agent,[46] an alternative that critics pointed out was necessary for Principals whose disabilities would impede them from initialing each power listed in the statutory form.[47] The title of the "Notice" was changed to "Caution" and its language further refined.[48] In addition, the 1996 amendments allowed the Principal to authorize the Agent to make gifts to the Principal's parents, spouse, children and other descendants in amounts not to exceed $10,000, the federal annual gift tax exclusion amount then in effect.[49] The gifting provision permitted the Principal to insert additional language pursuant to section 5-1503 modifying the statutory gifting class and amount. Also added at the time were powers for tax matters, allowing the Agent to prepare, sign and file tax returns on behalf of the Principal, and for retirement benefit transactions, allowing contributions to and withdrawals from

---

43 *See* Rose Mary Bailly, *The Durable Power of Attorney – A Delicate Balance*, 2 NYSBA Business Law Journal 46, 48 (1998).

44 1994 N.Y. Laws, c. 694 §1, as codified at N.Y. Gen. Oblig. L. §5-1501(1).

45 *Id.*

46 *Id.*

47 1996 Laws of New York, c. 499, as codified at N.Y. Gen. Oblig. L. §5-1501.

48 *Id.*

49 1996 Laws of New York, c. 499, as codified at N.Y. Gen. Oblig. L. §5-1501M.

retirement plans, change of investments and change of beneficiary designations.

The addition of the new powers, especially the one permitting gifting, greatly increased the utility of the power of attorney and its use for significant transfers that are often part of estate, tax, and financial planning.

No changes were made in the law in 1994, 1996 or thereafter with respect to the accountability of the Agent. The Agent's fiduciary responsibilities are not addressed in the general obligations law nor is there any mention of the consequences of violating those responsibilities. Those opposed to regulating the Agent argued that the Agent's common law fiduciary duty and the threat of criminal prosecution were sufficient to deter abuse.[50] However, as noted earlier, the general obligations law says nothing about either of these matters and it remains unclear how an Agent would learn of her legal obligations and the consequences of violating them.

Moreover, financial exploitation using a power of attorney continues, despite the amendments in the 1990s aimed at the Principal. Newspaper articles from around the State attest to its occurrence:

> *"An indictment unsealed Friday charges a niece and grandniece of cleaning out $1.4 million from the bank and investment accounts of a 93-year-old Lewiston woman."*[51]
>
> *"A Queens woman's dream of opening a carrot-cake business will have to wait - the swindler who sweet-talked her way into the hearts of two elderly ladies and stole more than $200,000 is doing one to three years behind bars . . . The con woman played friendly with [a 94-year-old woman]. She acquired power of attorney for the elderly woman and withdrew $85,000 from her accounts."* [52]
>
> *"Two charged with bilking GE retiree: Schenectady prosecutors say men took $1.2 million from woman who suffered from Alzheimer's."*[53]
>
> *"A Bay Ridge attorney surrendered to police yesterday on charges that he stole more than $2 million from 10 clients, including the life savings of a 90-year-old distant relative. . ."*[54]
>
> *"A Rochester tax preparer was arraigned on allegations that he misused a power of attorney to steal $1 million from an elderly woman."*[55]
>
> *"Town police arrested a Falconer woman who is accused of swindling an elderly man out of his home and pension checks."*[56]
>
> *" [An 85-year-old Queens man] allegedly handed over $250,000 and his power of attorney to a woman after meeting her outside a Queens supermarket.. . . [The woman] is*

---

50 *See* Rose Mary Bailly, *The Durable Power of Attorney – A Delicate Balance*, 2 NYSBA Business Law Journal 46, 48 (1998).

51 *Two indicted in theft of $1.4 million*, Buffalo News, March 10, 2007 at D3.

52 *1 to 3 years for 'carrot' con lady*, New York Post, September 8, 2006, at 17.

53 Albany Times Union, April 13, 2002, at B3.

54 Newsday March 21, 2002, at A08; *see also* New York Post March 21, 2002 at 12.

55 *Woman allegedly bilked of $1 million*, Rochester Democrat & Chronicle, December 9, 2006, at 1B.

56 *Police Accuse Woman of Swindling Man*, Buffalo News, September 9, 2004, at B3.

also accused of mortgaging [the man's] home for $550,000 without his consent."[57]

"Two New York City women were arraigned Thursday in City Court on charges they stole thousands of dollars from an elderly Ukranian man living in Syracuse. . . Court papers indicate the women also had been trying to use power of attorney papers to withdraw more than $300,000 from the victim's account at the Self-Reliance Ukranian Federal Credit Union."[58]

"*Woman with the power of attorney accused in Theft."*[59]

"The daughter of a retired subway conductor who cashed nearly $35,000 of her dead father's pension checks [using a power of attorney] has been charged with grand larceny."[60]

"A pioneer New York businesswoman-socialite who helped shape the public-relations industry spent her final years shut away in a nursing home while a relative grabbed control of her multimillion-dollar estate."[61]

"A housekeeper allegedly stole more than $435,000 from a 93-year-old Forest Hills widow and then moved in on an incapacitated retired police officer, trying to sell his co-op apartment."[62]

"A Deerfield couple pleaded guilty Thursday to stealing more than $600,000 in funds from a 78-year-old relative's bank account [through a power of attorney] while her mental state was in decline"[63]

"*Kind-hearted, 91-year-old Long Island grandmother was conned out of her life savings by her son's best friend [using a power of attorney]"*[64]

"*DeWitt police say an assistant bank manager was accused of befriending an 85-year-old customer, persuading the woman to grant her power of attorney and then stealing $93,597.07 of her retirement savings."*[65]

"A disbarred lawyer and a nursing home official admitted bilking 16 nursing home patients out of more than $2.1 million. They picked people who had no one to watch out for them and emptied their bank accounts."[66]

" After gaining power of attorney, [a home health-care] aide stole thousands of dollars, sold the woman's car and was in the process of selling her house when police were tipped off that something might be amiss."[67]

---

57 *Love at 1st $ight; Geezer my beau: Gal*, New York Post, October 7, 2006 at 15.

58 Syracuse Newspapers, July 26, 2002, at B2.

59 Buffalo News, November 8, 2000, at 2B.

60 New York Daily News, June 4, 2001, at 1.

61 New York Post, June 5, 2001, at 17.

62 Newsday, August 3, 2001, at A17; *see also* New York Daily News, August 3, 2001, at 4.

63 Utica Observer-Dispatch, May 6, 2005 at page 1B.

64 New York Post, June 30, 2005

65 Syracuse Newspapers, May 17, 2002, at A1.

66 New York Daily News, January 15, 2002 at 2.

67 *Licensing urged for home health-care aides*, Buffalo News, September 27, 1998, at 1B.

Case files of adult protective services[68] and court decisions[69] likewise attest to financial exploitation through powers of attorney.

The New York State Elder Abuse Summit convened in May 2004 made its number one issue reform of powers of attorney to address their use in financial exploitation. The New York State Elder Abuse Coalition's Final Report, TARGET ELDER ABUSE (January 2005), likewise identifies reform of powers of attorney to address financial abuse as a top priority.

D. HIPAA's Privacy Rule Barring Agent's Access to Medical Records for Bill Payment

The general obligations law is silent as to the relationship between the power of attorney and the federal Privacy Rule,[70] a federal regulation regarding individual medical information promulgated in April 2003 pursuant to HIPAA.[71] The Privacy Rule prevents the Agent's access to medical records for bill payment decisions and confounds the Agent's ability to carry out what may be one of the more rudimentary acts of an Agent pursuant to a Power of Attorney.

The Privacy Rule barrier to medical records compounds existing ambiguity about an Agent's authority to access medical records under current law. This ambiguity arises out of several factors. Neither subdivision K on the statutory short forms, power to access records, nor section 5-1502K, which construes the term "records," contains an express reference to medical records. Moreover, section 18 of the public health law, which identifies qualified persons who are entitled to access to a patient's health records, does not include the Agent under a power of attorney.[72] As a result, health care providers have refused to make records available to an Agent

---

68 Comments of representatives of Adult Protective Services and Office of Children and Family Services at Law Revision Commission Roundtable, March 22, 2002. *See also* Melina Greenberg and Crystal Doolity, *Adult Protective Services: Responding to Financial Exploitation of Vulnerable Adults* (Government Law Center of Albany Law School 2003).

69 *See, e.g.*, *In re Butin*, 750 N.Y.S.2d 619 (2d Dep't 2002); *Hill v. Bulden*, 191 Misc.2d 354 (N.Y. Sup. Ct. Putnam Co. 2002); *Goldstein v. Block*, 288 A.D.2d 182 (2d Dep't 2001); *In re Prosperi*, 286 A.D.2d 99 (1st Dep't 2001); *People v. Camiola*, 225 A.D.2d 380 (1st Dep't 1996)*; People v. De Leo*, 185 A.D.2d 374 (3d Dep't1992); *Matter of Warren L. Boulanger*, 107 A.D.2d 28 (2d Dep't 1985); *In re Guardianship of Kent*, 188 Misc.2d 509 (N.Y. Sup. Ct. Dutchess Co. 2001); *In re Jennie Fanelli*, 2/23/98 N.Y.L.J. at 28 (N.Y. Sup. Ct. New York Co. 1998); *In re Johnson*, 172 Misc.2d 684 (N.Y. Sup. Ct. Suffolk Co. 1997); *In re Kustka*, 163 Misc.2d 694 (N.Y. Sup. Ct. Queens Co. 1994); *In re Rochester Hospital (Levin)*, 158 Misc.2d 522 (N.Y. Sup. Ct. Monroe Co. 1993). *See also In re Kuperman*, 285 A.D.2d 200 (2d Dep't 2001). *See generally Fitzgerald v. Fitzgerald*, 753 N.Y.S.2d 570 (3d Dep't 2003).

70 45 C.F.R. Parts 160, 164.

71 Health Insurance Portability and Accountability Act of 1996, Public Law 104 -191.

72 *See* N.Y. Pub. Health Law §18(1)(g)(refers only to attorneys who hold a power of attorney from an otherwise qualified person or the patient's estate specifically "authorizing the holder to execute a written request for patient information." An otherwise qualified person is the patient, article 81 guardian, parent of an infant, guardian of an infant, or distributee of deceased patient's estate if no executor or administrator has been appointed.)

seeking clarification of a medical bill, without express language added to the power of attorney document authorizing such release.

The ambiguity created by the lack of express reference to medical records in section 5-1502K is exacerbated by HIPAA Privacy Rule, which creates national standards limiting access to an individual's medical and billing records to the individual and the individual's "personal representative." Under the Privacy Rule, health information relating to billings and payments may be available to an Agent if the Agent can be characterized as the Principal's "personal representative" as defined in the Privacy Rule. Under the regulations, the "personal representative" for an adult or emancipated minor is defined as "a person [who] has authority to act on behalf of a individual who is an adult or an emancipated minor in making decisions related to health care . . . ."[73]

The general obligations law limits the authority of the Agent to financial matters, and expressly prohibits the Agent from making health care decisions for the principal.[74] The public health law defines a health care decision as "any decision to consent or refuse to consent to health care."[75] "Health care," in turn, is defined as "any treatment, service or procedure to diagnose or treat an individual's physical or mental condition."[76]

The Principal may grant health care decision making authority to a third party only by executing a health care proxy pursuant to section 2981 of the public health law. The health care proxy law makes clear that financial liability for health care decisions remains the obligation of the Principal.[77] As a practical matter, payment issues are left to the Principal or the Principal's Agent. The Privacy Rule regarding access to records does not take into account a statutory structure such as New York's, which permits the division of the responsibilities for health care decisions and bill paying between two representatives, the health care agent and the Agent.

E. The Refusal by Financial Institutions to Accept Powers of Attorney

One of the goals of the 1948 legislation and the creation of the statutory short form was to encourage financial institutions to accept such documents. The anticipated results did not follow. Many institutions instead required that the Principal execute a document prepared by the institution. The enactment of the durable power of attorney actually exacerbated the situation. If the financial institution would not accept a statutory short form durable power of attorney and the Principal had already lost capacity, serious difficulties could ensue because the Principal could

---

73 45 C.F.R. § 164.502(g)(2).

74 *See* N.Y. Gen. Oblig. Law §§ 5-1501(1) and (1-a), 5-1502O, and 5-1506.

75 *See* N.Y. Pub. Health Law §18.

76 N.Y. Pub. Health Law §§2980(4) and (6).

77 *See* N.Y. Pub. Health Law §2987.

not legally execute another document.[78] In 1986, the general obligations law was amended to make it unlawful for a financial institution to refuse to accept a statutory short form.[79] Notwithstanding this statutory provision, financial institutions apparently continue to refuse to accept statutory short form powers of attorney and continue to demand that the institution's own form be completed.

IV. The Commission's Study

In 2000, the Commission began its study of the use of powers of attorney with an examination of statutory interpretation of the provisions of the general obligations law, and case law addressing the use of powers of attorney. In March 2002, the Commission hosted a Roundtable Discussion to explore the issues relating to powers of attorney with attorneys from trust and estates and elder law practices, participants from the Judiciary, prosecutors and adult protective service investigators from around the state, representatives from the Office for Children and Family Services, the Office for the Aging, the Attorney General's Office, the Lawyers' Fund for Client Protection, and legislative staff.

As part of its study, the Commission looked to the statutory provisions of other jurisdictions[80] and reforms to the uniform durable power of attorney under consideration by the National Conference of Commissioners of Uniform State Laws.[81] It also considered various studies and surveys on the use of powers of attorney.[82] One national survey showed over 70% consensus among respondents that any power of attorney statute should include direction and guidance about a number of subjects on which New York's statute is silent, including: expressly stated rather than implied gifting authority, a description of the Agent's fiduciary duty, and

---

[78] Case law suggests that in order to execute a DPA, the principal must, at the time of execution, have sufficient mental capacity to enter into a contract. *See generally Lounsberry v. Hull*, 144 Misc. 2d 707 (Sup. Ct. 1989)(i.e. "whether the [principal] was capable of comprehending and understanding the nature of the transaction at issue."). *See Smith v. Comas*, 173 AD2d 535, 535 (2d Dept. 1991), *lv denied* 80 NY2d 854; *see also Ortelere v. Teachers Retirement Bd of City of N.Y.*, 25 NY2d 196 (1969).

[79] 1986 Laws of New York, c. 215, as codified at N.Y. Gen. Oblig. Law §5-1504(3). Although one legislative proposal would have provided for a special proceeding to compel a financial institution to pay compensatory damages and attorneys' fees for a wrongful refusal to accept a power of attorney, it was not enacted

[80] See discussion at Parts IV - X.

[81] *See* Uniform Power of Attorney Act drafted by the National Conference of Commissioners on Uniform State Laws 2006, available at www.law.upenn.edu/bll/ulc/dpoaa/2006final.htm

[82] *See , e.g.*, Linda S. Whitton, *Crossing State Lines with Durable Powers of Attorney*, Probate & Property 28 (September/October 2003); Margaret Bomba, *Abuse of the Elderly and Infirm*, 6 Elder Law Attorney 4 (Fall 1996); David English and Karen Wolff, *Survey Results: Use of Durable Powers of Attorney*, 10 Probate and Property 33 (Jan./Feb. 1996); Margaret Z. Reed and Jonathan Federman, *Abuse of the Durable Power of Attorney: Options for Reform* (Government Law Center of Albany Law School 1994).

safeguards against abuse by an Agent.[83]

Thereafter, over the next six years, members of the Commission and its staff had further discussions with, and considered comments from, interested individuals, including representatives from the Trusts & Estates Section and the Elder Law Section of the New York State Bar and from the banking community. The input from these various individuals and groups helped the Commission refine its proposal.

Throughout this process, the Commission has recognized that the power of attorney is an effective tool for attorneys and the public at large for estate and financial planning and for avoiding the expense of guardianship. Its use is likely to become more widespread as the population ages. This popularity has also led to its use for transactions far more complex than were originally contemplated by the law, particularly in the areas of gift giving and property transfers.

The Commission also concluded that the power of attorney is also a deceptively simple document to create. It can be obtained from any number of websites on the Internet or in a stationery store and its execution merely requires the Principal's signature and the acknowledgment of a notary public. But this simplicity belies the extraordinary power that this instrument can convey.[84]

The instrument's power is also demonstrated by the fact that the potential authority of the Agent can include power to transfer assets that pass by Will as well as those that usually pass outside a Will, such as joint bank accounts, life insurance proceeds, or retirement benefits.[85]

The Principal can delegate these sweeping powers to the Agent without fully recognizing their scope, (particularly if the Principal executes the document without the benefit of legal counsel) and the Agent in turn can exercise them without notice to the Principal, even while the Principal has capacity.

---

[83] Linda S. Whitton, *Crossing State Lines with Durable Powers of Attorney*, Probate & Property 28 (September/October 2003). The survey was conducted by the Joint Editorial Board for Uniform Trusts and Estates Acts (JEB) of the National Conference of Commissioners on Uniform State Laws of elder law and probate sections as well as the leadership of the American Bar Association's Real Property, Probate and Trusts Law Section, the American College of Trust and Estate Counsel and the National Academy of Elder Law Attorneys. There were 371 respondents representing 43 jurisdictions.

[84] *See, e.g., Salvation Army v. Ferrara,* 3 Misc. 3d 944, 775 N.Y.S.2d 470 (2004)(surrogate's court upheld Agent's transfer of decedent's assets in the approximate sum of $820,000 to himself as gifts from his uncle pursuant to a New York statutory short form durable general power of attorney to the detriment of the Salvation Army, the sole beneficiary under the Principal's Last Will and Testament.), aff'd, 22 AD 3d 578 (2d Dept. 2005), rev'd, 7 N.Y.3d 244 (2006).

[85] *See, e.g.,* NY Gen. Oblig. L. §§ 5-1502D, 5-1502F and 5-1502L.

The Agent's actions are difficult to monitor. Unless the instrument is a springing power of attorney, i.e., one that becomes effective upon the occurrence of a specified event such as the Principal's incapacity, the Agent can act immediately and without notice to the Principal. Under a durable power of attorney or springing durable power of attorney, which continues in effect after the Principal's incapacity, the Agent acts without oversight when an incapacitated Principal is no longer able to control or review the Agent's actions, a situation which under common law would have terminated the power of attorney.

Despite the broad authority associated with this important, popular and powerful tool for financial management, there are several gaps in the governing statute. The statute is silent as to: the Agent's fiduciary obligations and accountability, the manner in which the Agent should sign documents where a handwritten signature is required, clear direction about the Agent's authority to make gifts to third parties and to himself or herself, the manner in which the Principal can revoke the document, the circumstances under which a third party may reasonably refuse to accept a power of attorney,[86] and the effect on powers of attorney of the 2003 HIPAA Privacy Rule[87] regarding medical records.[88] The statute's provisions regarding gift giving authority and authority to make other property transfers are ambiguous and confusing.

Based on an extensive study, the Commission concluded that the flexibility of powers of attorney must continue so that the document can be used and adapted to fulfill the Principal's reasonable intentions. However, the Commission also believes that the general obligations law's silence or lack of clarity on several significant aspects of powers of attorney including HIPAA and gifting authority can serve to frustrate the proper use of the instrument.

The Commission recommends that the statute be amended to address the authority to make major gifts and other property transfers, and the effect of HIPAA's Privacy Rule, to provide clarity and direction so that a Principal's intentions can be carried out effectively, and to provide protections that will assist third parties faced with accepting powers of attorney as well as those investigating financial exploitation. The Commission's intent is that these changes will clarify

---

[86] The results of a recent national survey, showed over 70% consensus that any power of attorney statute should include direction and guidance about these subjects. Linda S. Whitton, *Crossing State Lines with Durable Powers of Attorney, Probate & Property* 28 (September/October 2003). The survey was conducted by the Joint Editorial Board for Uniform Trusts and Estates Acts (JEB) of the National Conference of Commissioners on Uniform State Laws of elder law and probate sections as well as the leadership of the American Bar Association's Real Property, Probate and Trusts Law Section, the American College of Trust and Estate Counsel and the National Academy of Elder Law Attorneys. There were 371 respondents representing 43 jurisdictions.

[87] Health Insurance Portability and Accountability Act of 1996, Public Law 104 -191. *See* Privacy Rule at 45 C.F.R. Parts 160, 164.

[88] The Privacy Rule, which became effective in April 2003, is a complex federal regulation addressing the confidentiality of an individual's health information. The Privacy Rule blocks the Agent's access to medical records for verifying the accuracy of a medical bill, which impairs the Agent's ability to act in the best interest of the Principal.

the general obligations law to take into account the more complex transactions associated with the use of powers of attorney, without unduly burdening the utility and simplicity of the document. The recommended amendments to the general obligations law are discussed below.

V. The Commission's Recommendation

A. Powers to Make Major Gifts and Other Transfers -- The Major Gifts Rider

The Commission recommends the addition of a new, separate rider to the power of attorney form in which the Principal may authorize the Agent to make major gifts and other transfers. The use of this rider is required when the Principal intends to grant the Agent that authority. It must be executed in the same manner as a Last Will and Testament[89] which emphasizes its significance to the Principal.

The Principal should have the ability to grant the Agent gifting and other authority to transfer assets as the Principal sees fit but it should be a knowing and willing grant and not one that is an unwitting consequence of statutory obfuscation.

Accordingly, the proposal provides a standard statutory form for routine financial management, and a separate rider for major gifts and other transfers. If used, the Major Gifts Rider must be executed together with a power of attorney. The rider pertaining to major gifts may be omitted if the Principal has no need of it.

To highlight the importance of the Major Gifts Rider, the proposal requires that the Principal sign it before two witnesses or acknowledge her signature before two witnesses. A similar procedure is required for Wills under section 3-2.1 of the estates, powers and trusts law. The heightened execution requirement reflects the fact that the power of attorney is potentially as powerful, if not more so, than a Will as a means for transferring assets. A Will can transfer only probate assets, while the use of a power of attorney may result in a change of beneficiary in non-probate assets such as life insurance[90] and retirement plans as well as assets that would become probate assets when the Principal dies.

The Major Gifts Rider updates the current gifting authority to match provisions of the Internal Revenue Code at section 2503(b) regarding the annual federal gift tax exclusion, and allows the Principal to identify other types of gifts and property transfers that the Agent is authorized to make. The Major Gifts Rider is also the instrument in which the Principal can grant specific authority for an Agent to make major gifts to himself or herself. Allowing the Principal to make an affirmative grant of this authority is intended to resolve any potential ambiguity under

---

89 *See* N.Y. EPTL §3-2.1(a)(2).

90 The agent cannot make beneficiaries on federal insurance policies but that is apparently the only limitation. S*ee Metropolitan Life Ins. Co. v. Sullivan*, 96 F. 3d 18 (2nd Cir. 1996)(agent's authority to make beneficiary designations under GOL 5-1502F(2) is preempted by Federal Employee's Group Life Insurance Act which does not permit agent to make beneficiary designations).

the current statute as to whether self-dealing is permissible.[91]

The new section containing the Major Gifts Rider also collects all of the permissible gifting and transfer powers that are scattered throughout the current construction sections, and the Major Gifts Rider presents a place where the Principal may make an affirmative selection of what powers to grant. The Major Gifts Rider also transforms the various default self-gifting provisions that appear in several construction sections into affirmative choices.

Nothing in or about the Major Gifts Rider is intended to change current law regarding the gifting and property transfer authority that an Agent can exercise, provided, of course, that the Principal has granted that authority in the power of attorney in the first place. If the Agent is granted such authority, the Agent must exercise that authority in the best interest of the Principal unless the Principal has provided specific instructions about the exercise of the authority.[92]

B. Access to Medical Records Protected by HIPAA's Privacy Rule

The proposed amendment to section 5-1502K makes clear that an Agent is an individual's personal representative for purposes of accessing medical records in connection with paying medical bills. The proposed new language in section 5-1502K eliminates the need to add express permission in the power of attorney and would apply to existing powers of attorney as well as newly executed documents. The amendment in no way affects the authority of the health care agent to access medical records in connection with making health care decision nor does it change the prohibition on an Agent making health care decisions.

C. The Agent's Legal Obligations

It is well settled in the common law that the relationship between an attorney-in-fact and principal is that of Agent and Principal,[93] and consequently, the attorney-in-fact must "act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing."[94] Simply put, "[a] power of

---

[91] *See Salvation Army v. Ferrara*, 3 Misc. 3d 944, 775 N.Y.S.2d 470 (Surr. Ct. Rockland Co. 2004), aff'd, 22 AD 3d 578 (2d Dept. 2005), rev'd 7 N.Y.3d 244 (2006)..

[92] *In re Ferrara*, 7 NY3d 244 (2006). *See also* Kelly Dedel Johnson, *Financial Crimes Against the Elderly* 24 (U.S. Department of Justice Office of Community Oriented Policing Services (2004)(noting the lack of oversight of legal documents granting such enormous decision-making authority over financial matters, and criticizing the lack of two key requirements: the involvement of a lawyer in drafting the document, and the presence of witnesses to assure that the Principal's signature is voluntary.).

[93] *See, e.g., Semmler v. Naples*, 166 AD2d 751, 752 (1990) ("The relationship between an attorney-in-fact and his principal has been characterized as agent and principal (*see, Cymbol v Cymbol*, 122 AD2d 771, 772; *Matter of De Belardino*, 77 Misc 2d 253, 256, affd 47 AD2d 589)"); *see also* Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 4 (2001)(citing 1 Floyd R. Mechem, A Treatise on the Law of Agency § 35, at 19 (2d ed. 1914) ("when the [agent's] authority is conferred by formal instrument in writing, it is said to be conferred by 'letter of attorney,' or, more commonly by 'power of attorney.' Agency relationships may also be created orally."). *See also* N.Y.Jur. Agency §63.

[94] *Semmler v. Naples*, 166 AD2d 751, 752 (1990) (citing *Matter of De Belardino*, 77 Misc 2d 253,

attorney . . . is clearly given with the intent that the attorney-in-fact will utilize that power for the benefit of the Principal."[95] The attorney-in-fact has a duty to avoid conflicts of interest and to keep the Principal's property separate from the property of the agent.[96] Where one assumes to act for another he or she should willingly account for such stewardship,"[97] a principle recognized in the common law to apply to the actions of an attorney-in-fact.[98]

1. Statutory Description of Responsibilities of Agent and Standard of Care

Under current New York law, the general obligations law and the statutory form are silent about an Agent's responsibilities and no other statute specifies that the Agent has a fiduciary obligation to the Principal, or identifies the responsibilities or standard of care of an Agent. As a result, common law, which is of limited public accessibility, is the sole source in New York of guidance about the obligations and restrictions on an Agent.[99] In contrast, New York's estates, powers and trusts law and surrogate's court procedure act specifically address the duties and obligations of other types of fiduciaries.[100] Additionally, other states have, to varying degrees, set forth the duty and/or standard of care of the Agent by statute. Notable examples include the statutes of Arizona,[101] California,[102] Florida,[103] Illinois,[104] Minnesota,[105] New Jersey,[106] and

---

256, affd 47 AD2d 589; and *Elco Shoe Mfrs. v Sisk*, 260 NY 100, 103-104).

95 *Moglia v. Moglia*, 144 A.D.2d 347, 348 (1988).

96 *See, e.g., Mantella v. Mantella*, 268 A.D. 2d 852 (3d Dep't 2000); *Musacchio v. Romagnoli*, 235 N.Y.L.J. 116 (Sup. Ct. Westchester Co. 2006).

97 2A NY Jur 2d Agents & Indep. Contractors §239. *See also* Matter of Kent, 188 Misc. 2d 509, 511 (Sup. Ct. Dutchess Co. 2001).

98 *See, e.g., In re Garson*, (1st Dept.) N.Y.L.J. (April 21, 2005).

99 *See, e.g., Mantella v. Mantella*, 268 A.D.2d 852 (3d Dep't 2000)("The relationship between an Agent and Principal has been characterized as agent and Principal with the Agent under a duty to act with the utmost good faith toward the Principal in accordance with the principles of morality, fidelity, loyalty and fair dealing.").

100 *See, e.g.*, N.Y. Est. Powers & Trusts L. §§11-1.6(property held as a fiduciary to be kept separate); and 11-4.7 (liability of personal representative for claims arising out of the administration of the estate); and N.Y. Surr. Ct. Proc. Act §§ 711 (suspension, modification or revocation of letters or removal for disqualification or misconduct); and 719 (in what cases letters may be suspended, modified or revoked, or a lifetime trustee removed or his powers suspended or modified, without process).

101 Ariz. Rev. Stat. §14-5506.

102 Cal. Prob. Code §§4266, 4232.

103 Fla. Stat. ch. 709.08(8).

104 755 Ill. Comp. Stat. §45/2-7.

Pennsylvania.[107] The States of Texas,[108] Colorado[109] and Oklahoma[110] achieve a similar result by requiring that the power of attorney instrument state that the Agent owes a fiduciary duty to the Principal. Given the scope of an Agent's authority, the Commission recommends that the general obligations law describe the fiduciary duties of the Agent, namely, to act in the best interest of the Principal, to keep the Principal's property separate from the property of the Agent, and to keep records and provide them upon demand by specific individuals.

The Third Department has summarized the obligation to act in the best interest of the Principal and to keep the Principal's property separate from the property of the Agent as follows:

> '[a] power of attorney . . . is clearly given with the intent that the attorney-in-fact will utilize that power for the benefit of the Principal'. The relationship between an attorney-in-fact and his Principal has been characterized as agent and Principal with the attorney-in-fact under a duty to act with the utmost good faith toward the Principal in accordance with the principles of morality, fidelity, loyalty and fair dealing'. Consistent with this duty, an agent may not make a gift to himself or a third party of the money or property which is the subject of the agency relationship' In the event such a gift is made, there is created a presumption of impropriety which can only be rebutted with a clear showing that the Principal intended to make the gift.[111]

Otherwise, as between the conflicting interests of the Agent and the Principal, "it is easy to foresee, and all experience has shown, whose interests will be neglected and sacrificed."[112]

The Commission's proposal also provides the standard of care which an Agent must exercise. This approach is similar to that taken in other states.[113] It is the same standard of care

---

105 Minn. Stat. §523.21.

106 N.J. Stat. Ann. §46:2B-8.13.

107 20 Pa. Cons. Stat. §5601.

108 Tex. Prob. Code Ann. §490.

109 Colo. Rev. Stat. §15-1-1302.

110 Okla. Stat. tit. 15 §1003.

111 *Mantella v. Mantella*, 268 A.D. 2d 852 (3d Dep't 2000).

112 John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L. J. 929 (2005)(quoting Thorpe v. McCullum, 6 Ill (1Gilm.) 613, 626 (1844)).

113 *See, e.g.*, Cal. Prob. Code §4231; Colo. Rev. Stat. §15-14-606; Fla. Stat. ch. 709.08; 755 Ill. Comp. Stat.

imposed on other fiduciaries, i.e., the standard that would be observed by a prudent person dealing with the property of another.[114] This express standard of care is included to guide the Agent in the exercise of his or her duties.

2. Notice to the Agent

In addition to the statutory silence about an Agent's responsibilities, the statutory short form power of attorney is not required to contain a Notice advising the Agent that he or she has a fiduciary duty to the Principal.[115] Given that the power of attorney is a document the Agent will use on a regular basis, it seems appropriate that it contain some information for the Agent describing in lay person's terms the Agent's responsibilities. Not all Principals and Agents will have the benefit of legal advice about the concept of fiduciary duty, its requirements, and the consequences of its breach. Accordingly, the Commission recommends that in the interest of sound public policy, the form include a clear description of the Agent's fiduciary duty and the consequences of a violation of that duty. Such a notice will be especially beneficial for pro-se users. The notice is not intended to frighten the Agent, or to deter the Agent from accepting the appointment, but to inform the Agent of how the law expects her to act if she accepts the appointment and undertakes to act for the Principal. An Agent informed about these legal requirements and consequences will be better able to act for the benefit of the Principal.

Several states have followed this approach.[116] Of these, both California and Pennsylvania require the agent to sign the power of attorney and acknowledge these duties.[117] For example, in

---

45/2-7; Me. Rev. Stat. Ann. tit. 18-A §5-508.

[114] The Commission's proposal does not equate the agent to a trustee, who must take into account the interests of both current and remainder beneficiaries, and thus must observe the prudent investor standard in handling the property entrusted to him or her. Under a power of attorney, there are no remainder beneficiaries whose interests must be protected. Additionally, it may be impractical to hold an agent to an investment standard while the principal is still competent.

[115] Elizabeth Loewy, *Financial Crimes Involving Older Adults*, 17 Elder Law Attorney 14, 15 (2007).

[116] *See, e.g.*, Cal. Prob. Code §4128; 20 Pa. Cons. Stat. §560; Tex. Prob. Code Ann. §490; Colo. Rev. Stat. §15-1-1302; Okla. Stat. tit. 15, §1003.

[117] Section 4128 of the California Probate Code requires a valid power of attorney to include the following language:

> By acting or agreeing to act as the agent (attorney-in-fact) under this power of attorney you assume the fiduciary and other legal responsibilities of an agent. These responsibilities include:
>
> 1. The legal duty to act solely in the interest of the Principal and to avoid conflicts of interest.
>
> 2. The legal duty to keep the Principal's property separate and distinct from any other property owned or controlled by you. You may not transfer the Principal's property to yourself without full and adequate consideration or accept a gift of the Principal's property unless this power

Pennsylvania, an agent has no authority to act as agent under the power of attorney unless the agent has first executed and affixed to the power of attorney an acknowledgment in substantially the following form:[118]

> I, _____, have read the attached power of attorney and am the person identified as the agent for the Principal. I hereby acknowledge that in the absence of a specific provision to the contrary in the power of attorney or in 20 Pa.C.S. when I act as agent:
>
> I shall exercise the powers for the benefit of the Principal.
> I shall keep the assets of the Principal separate from my assets.
> I shall exercise reasonable caution and prudence.
> I shall keep a full and accurate record of all actions, receipts and disbursements on behalf of the Principal.
>
> _____ _____
> (Agent) (Date)

The Commission's proposal is based in large measure on these models as well as the format and language of the new uniform power of attorney.[119] Their overall intent is similar to that of the Commission, namely to educate the Principal and the Agent. The Commission recommends that the power of attorney include a notice to the Agent, followed by the Agent's signed acknowledgment.[120] The proposed notice and acknowledgment are as follows:

> IMPORTANT INFORMATION FOR THE AGENT:
> 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 on you legal duties that continue until you resign or the power of attorney is terminated or

---

> of attorney specifically authorizes you to transfer property to yourself or accept a gift of the Principal's property. If you transfer the Principal's property to yourself without specific authorization in the power of attorney, you may be prosecuted for fraud and/or embezzlement. If the Principal is 65 years of age or older at the time that the property is transferred to you without authority, you may also be prosecuted for elder abuse under Penal Code Section 368. In addition to criminal prosecution, you may also be sued in civil court.
>
> I have read the foregoing notice and I understand the legal and fiduciary duties that I assume by acting or agreeing to act as the agent (attorney-in- fact) under the terms of this power of attorney.

118 20 Pa. Cons. Stat. §5601.

119 See Uniform Power of Attorney Act, drafted by the National Conference of Commissioners on Uniform State Laws, approved July 7-14, 2006, *available at:* http://www.law.upenn.edu/bll/ulc/dpoaa/2006final.htm

120 *See also* the discussion on signature of the Agent, *infra*.

revoked. You must:

(1) act according to any instructions from the principal, or, where there are no instructions, in the principal's best interest;
(2) avoid conflicts that would impair your ability to act in the principal's best interest;
(3) keep the principal's property separate and distinct from any assets you own or control;
(4) keep a record of all receipts, payments, and transactions conducted for the principal; and
(5) disclose your identity as an agent whenever you act for the principal by writing or printing the principal's name and signing your own name as "agent" in the following manner: (Principal's Name) by (Your Signature) as Agent.

You may not use the principal's assets to benefit yourself or give gifts to yourself or anyone else unless there is a Major Gifts Rider attached to this power of attorney that specifically gives you that authority. If you have that authority, you must act according to any instructions or guidelines, or, where there are no such instructions or guidelines, in the principal's best interest.

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

Liability of Agent
The meaning of the authority given to you is defined in New York's General Obligations Law, Article 5, Title 15. If it is found that you have violated the General Obligations Law or acted outside the authority granted to you in the power of attorney, you may be liable under the law for your violation.

With this notice, the Agent is informed of his or her fiduciary duties from the start and of the significance of signing a document as Agent.

3. Signature of Agent

a. Acknowledgment of Fiduciary Duties

Under current law, an Agent is not required to sign the power of attorney. Modeled after the requirements of several states,[121] and consistent with the intent of educating the Agent as to the significance of the Agent's role, the Commission's proposal provides that the Agent must sign the power of attorney. In signing, the Agent acknowledges his or her fiduciary duties as explained in the notice.

I/we, _____, have read the foregoing Power of Attorney. I am/we are the person(s) identified therein as

121 *See, e.g.*, Cal. Prob. Code §4128; 20 Pa. Cons. Stat. §5601.

agent(s) for the principal named therein.

I/we acknowledge my/our legal responsibilities to the Principal.

Agent(s) sign(s) here: ==>_____

b. Lapse of Time Between Signatures

It is permissible for the Agent to sign and acknowledge the power of attorney at a date after the date on which the Principal has executed the instrument. This permissible lapse of time may appeal to a Principal who is reluctant to inform his or her designated Agent of the existence of a power of attorney prior to actual need for its use.

A successor Agent is not expected to execute the instrument unless the first named Agent is unwilling or unable to act. Here again, it is permissible for the successor to sign and acknowledge the form some time after the Principal has executed it.

c. Signature of Agent as Attestation of Validity

The lack of statutory guidance as to how the Agent must sign a document where he or she is acting on behalf of the Principal has given rise to problems in determining which transactions may be those of the Agent, and which are those that the Principal carried out without the benefit of the Agent.

The Commission's proposal prescribes the manner in which the Agent must sign whenever a handwritten signature is required in a transaction by the Agent on behalf of the Principal under the authority of the power of attorney. Specifically, the Agent must write the Principal's name and sign his or her own name as Agent for the Principal. This approach is consistent with New York agency law.[122]

In addition, the proposal provides that when the Agent engages in a transaction that purports to be on behalf of the Principal, the Agent is attesting that he or she has actual authority to engage in the transaction and has no notice that the power of attorney has been revoked or terminated or of any facts indicating that the power of attorney has been terminated or revoked. This provision takes into account both transactions requiring a handwritten signature and transactions that are accomplished electronically, such as the use of ATMs and electronic banking. Thus, if the Agent acts on behalf of the Principal even though he or she knows that the power of attorney is invalid, he or she will be liable for the consequences of the transaction. This approach is similar to that adopted in Minnesota.[123] Other states accomplish the attestation by permitting third parties to demand an affidavit from the Agent attesting to the validity of the

---

[122] *See* 2A NY Jur 2d Agency §198.

[123] *See* Minn. Stat §523.18. Other states accomplish the equivalent of an attestation by permitting third parties to demand an affidavit from the Agent attesting to the validity of the power of attorney. *See, e.g.*, Cal. Prob. Code §4305; Fla. Stat. §709.0; N.J. Stat. Ann. 46:2B-8.5(c).

power or attorney.[124]

4. Compensation

Statutory law in New York has no provision for compensation of an Agent unless he or she was acting with respect to the administration of an estate.[125] In all other matters, there is no express right to compensation or reimbursement for expenses incurred in the course of acting under the power of attorney. Although there are no published decisions dealing with compensation of an Agent who is unrelated to the Principal, where the two parties are related, "it is presumed that the services of the Agent to a Principal were rendered in consideration of love and affection, without expectation of payment."[126] Normally, if the Principal is not disabled, such service will be infrequent and will not involve substantial time. However, the prospect of the Principal's disability or incapacity, requiring the Agent's time, effort, and expense over a long period of time may make compensation important.[127]

Other states permit compensation and reimbursement to varying degrees. Arkansas[128] and California[129] provide that an Agent is *entitled* to reasonable compensation. Indiana,[130] Missouri,[131] New Jersey,[132] Pennsylvania[133] and Vermont[134] permit the Principal to limit compensation to which the Agent is otherwise entitled. In contrast, Arizona[135] does not permit compensation of an Agent unless the terms of compensation are detailed in the power of attorney. Similarly,

---

124 *See, e.g.*, Cal. Prob. Code §4305; Fl. Stat. §709.01; N.J. Stat §46:2-8.5.

125 *See* N.Y. Surr. Ct. Proc. Act §2112 (compensation of persons acting under powers of attorney or other instruments).

126 *See, e.g., Mantella v. Mantella*, 268 A.D.2d 852 (3d Dep't 2000); *Leonard Nursing Home v. Kay*, 2003 N.Y. Slip. Op. 50623U (Sup. Ct. Saratoga Co. 2003).

127 *See* California Law Revision Commission, Statutory Comment, Cal. Prob. Code §4204.

128 *See* Ark. Code Ann. §28-68-310.

129 *See* Cal. Prob. Code §4204.

130 *See* Ind. Code §30-5-4-5.

131 *See* Mo. Rev. Stat. §404.725.

132 *See* N.J. Stat. Ann. §46:2B-8.12.

133 *See* 20 Pa. Cons. Stat. Ann. §5609.

134 *See* Vt. Stat. Ann. tit. 14 §3504(d).

135 *See* Ariz. Rev. Stat. §14-5506..

Colorado,[136] Georgia,[137] and Illinois[138] permit the Principal to choose whether compensation should be permitted by so designating in the respective statutory short form power of attorney (i.e., the Principal must check the box, fill in the blank, strike out the sentence, etc.).

The compensation approach proposed by the Commission is a hybrid of these various models. It provides that an Agent is not entitled to compensation unless the Principal specifically authorizes it. Accordingly, the statutory short forms allow the Principal to override the default provision of no compensation by initialing a statement authorizing compensation. A Principal can elaborate on what the compensation should be by providing details in the Modifications section of the form.

The Commission's proposal would authorize certain persons, including an Agent, to commence a special proceeding to determine if an Agent is entitled to compensation, and whether compensation paid to an Agent is reasonable.

Finally, the Commission's proposal provides that the Agent is entitled to reimbursement for reasonable expenses actually incurred in connection with his or her duties as Agent. This approach is consistent with general agency rules and statutory rules governing trustees and fiduciaries.[139]

5. Accountability

The Agent has the obligation to maintain records under common law agency principles which are codified in the Commission's proposal at proposed section 5-1505. Under general agency law principles, "the duty of an agent to account for moneys of his or her Principal coming into the agent's hands is well recognized. Where one assumes to act for another he or she should willingly account for such stewardship."[140] In *In re Garson*,[141] the First Department stated, "[the Agent's] failure to produce contemporaneous records of the cash payments he made on [the Principal's] behalf, allegedly for her living expenses as well as to fund gifts, rendered him liable to her estate for the unaccounted amount."[142]

---

136 *See* Colo. Rev. Stat. § 15-1-1302.

137 *See* Ga. Code Ann. § 10-6-142.

138 *See* 755 Ill. Comp. Stat. 45/3-3.

139 *See, e.g., James T. Kelly Jr., P.E., P.C. v. Schroeter*, 209 A.D.2d 737 (3d Dep't 1994), N.Y. Est. Powers & Trusts L. §7-2.3(2); N.Y. Surr. Ct. Proc. Act §2307.

140 2A NY Jur 2d Agents & Indep. Contractors § 239.

141 *In re Garson*, 17 AD3d 243 (1st Dep't 2005).

142 *Id.* at 243. The guardianship court (Sup. Ct., N.Y. Co., 2 Misc.3d 847 (2003)), examining the attempted reconstruction of over three years of undocumented cash transactions, noted that the Agent claimed: to

The Commission concluded that to codify the common law obligation as a formal accounting would unduly impede the use of powers of attorney, so it avoided using the words "account" or "accountability," to make clear that the agent does not need to provide a formal accounting in the manner of an article 81 guardian, an executor serving pursuant to a will, or a trustee of a trust. To strike a balance, the proposal requires the agent to maintain a record of receipts, disbursements, and transactions, and to make that documentation available at all times to the Principal or to the monitor. In some instances such a record may be as modest as a check book, bank book or account, and receipts from credit cards.

The Agent has 15 days to respond to a request for the record by a limited group of other individuals, all of which otherwise have authority to investigate the financial circumstances of a Principal. These individuals are a co-Agent or a successor Agent, an official representing a government entity investigating an allegation of abuse, a court evaluator acting pursuant to a guardianship proceeding under article 81 of the mental hygiene law, a guardian ad litem appointed pursuant to section 1754 of the surrogate's court procedure act, the guardian or conservator of the principal's estate, or the personal representative of the estate of a deceased principal.

Quite apart from the common law fiduciary duty to keep records, it should be noted that the need to maintain records has a practical side. The Agent acting pursuant to a power of attorney in connection with any application to Medicaid for medical assistance for the Principal must keep meticulous records of five years' transactions to present to the local department of social services.

D. The Principal

1. Designated Recipient of Agent's Record of Transactions - A Monitor

The Commission's proposal permits the Principal to designate a person or persons who will have the authority to request and receive a complete record of all receipts, disbursements and transactions entered into by the Agent on behalf of the Principal.

The designation of a "monitor" is optional. It ensures that the Principal has a simple means to ensure that someone has the ability to review the Agent's acts without incurring the effort and expense of a court proceeding. This proposal is based on similar provisions in Wisconsin[143] and Minnesota.[144] The concept of a monitor is analogous to the concept of a "trust

---

have replenished the cash in the Principal's purse each week so that there was always $400-$600 on hand; to have made cash payments to the Principal's aides; to have paid rent, utilities, telephone, car service, club membership, and medical insurance in cash, although check registers indicate that those same items had been paid by check, and to have made cash payments for the Principal's dining expenses and for medications purchased at a local pharmacy, although the Principal's credit card statements indicated that these same items had sometimes been paid by this credit card. The attorney-in-fact's failure to keep *any* contemporary records of cash withdrawals and expenditures proved costly, as he was required to reimburse the Principal's estate $163,000 plus interest.

[143] Wis. Stat. Ann. §243.10.

protector." A trust protector can be appointed by the settlor of a trust for a number of purposes, including to ensure that the settlor's wishes and intent are honored and/or to protect the interests of the beneficiaries of the trust.[145] Similarly, a monitor of a power of attorney can ensure that the Principal's intentions and best interests are honored and respected by the Agent. This option is particularly important when the Principal has lost capacity and can no longer direct or remove an Agent.[146] The Agent and the Principal are disconnected from each other by the Principal's incapacity. While the continuation of the durable power or springing durable power of attorney is valuable for continuing financial management on behalf of the Principal, it is sound planning to arrange for a third party to be able to request the Agent to account for his actions.

2. Manner of Revocation or Termination

It is well settled that the Principal can revoke the power of attorney. The statutory short forms advise the Principal that the power of attorney "may be revoked by [the Principal] at any time,"[147] and the general obligations law provides that the Principal agrees "to indemnify and hold harmless any . . . third party" "unless and until actual notice of knowledge of such revocation or termination shall have been received by such third party."[148] However, the statute provides no guidance on how to revoke a power of attorney. Case law, likewise, provides little guidance. "As a general rule an Agent's authority may be revoked by the Principal either expressly or impliedly through words or conduct which are inconsistent with the continuation of authority."[149]

The Commission recommends that the statute should provide specific directions on how the Principal can revoke the powers of attorney as well as an explanation of when the power of attorney is terminated by operation of law.

a. Revocation by the Principal

The Commission's proposal provides three methods by which a Principal may revoke a power of attorney: (1) expressly providing for the method of revocation in the document; (2)

---

144 Minn. Stat. Ann. §523.23.

145 Jeffrey Evans Stake, *Trust Law in the 21st Century: A Brief Comment on Trust Protectors*, 27 Cardozo L. Rev. 2813, 2813, 2814 - 2816 (2006).

146 *See, e.g.,* Kelly Dedel Johnson, *Financial Crimes Against the Elderly* 24 (U.S.Department of Justice Office of Community Oriented Policing Services (2004)(citing the need for oversight of legal documents granting enormous decisionmaking authority over financial matters.).

147 *See* N.Y. Gen. Oblig. L. §§5-1501(1), 1(a) and 5-1506.

148 *Id.*

149 *Zaubler v. Picone*, 100 A.D. 2d 620, 621 (2d Dep't 1984), citing Restatement (Second) of Agency, § 119; *see also Edgarton v. Edgarton*, 54 N.Y.S. 2d 495 (N.Y. Sup. Ct. Madison Co. 1998) (holding that a naked power of attorney may be canceled by grantor by merely revoking the power, serving notice of such revocation on grantee of power, and forbidding him to act in grantor's behalf).

physically destroying all executed originals of the power of attorney and any copy of a power of attorney that has been retained by a third party; or (3) delivering a signed and dated revocation of power of attorney to the Agent.

Option two, physical destruction of all originals and copies retained by third parties, provides a straightforward method of revocation that also ensures that third parties are aware of the Principal's intent to revoke. Even if the Agent does not make the power of attorney available to the Principal for destruction, the Principal can put all third parties on notice of his or her intent to revoke by destroying any copies retained by those parties. The Principal can then deliver a written revocation to the Agent to complete the revocation.

Option three, delivery of a written revocation to the Agent, terminates the authority of the Agent to act, even where the Agent may contend that the Principal lacks the capacity to revoke. If the Agent continues to act, the Agent may be subject to liability.

However, the written revocation option also clarifies that third parties who have not received written notice of a revocation are not liable for acting in good faith upon the power of attorney. This is intended to prompt the Principal to deliver written notice to third parties. An actual notice requirement is consistent with section 5-1504(4), which currently provides:

> No financial institution receiving and retaining a statutory short form power of attorney properly executed in accordance with section 5-1501 or 5-1506 of this title . . . shall incur any liability by reason of acting upon the authority thereof unless the financial institution shall have *actually received*, at the office where the account is located, *written notice* of the revocation or termination of such power of attorney.[150] (emphasis supplied)

Similarly, a trustee of a lifetime trust must receive actual notice of a revocation of a trust before any liability can be incurred for acting in reliance on the trust instrument.[151]

Finally, the proposed revision provides that where a power of attorney has been recorded for property transactions pursuant to section 294 of the real property law, the Principal must also record the written revocation pursuant to section 326 of the real property law.

b. Termination by Operation of Law

The proposal provides that a power of attorney is terminated by operation of law in four circumstances: pursuant to court order, upon the death of the Principal, when the purpose of the power of attorney has been accomplished, and, for a nondurable power of attorney, upon the incapacity of the Principal. This represents a codification of common law.

---

150 *See also Ferrentino v. Dime Savings Bank*, 159 Misc. 2d 690 (N.Y. Sup. Ct. Suffolk Co. 1993).

151 *See* N.Y. Est. Powers & Trusts L. §7-1.17.

Revocation by court order is consistent with both the mental hygiene law (MHL) and proposed section 5-1510 (civil proceedings). MHL section 81.29(d) authorizes a court, upon a finding of incapacity and appointment of a guardian, to "modify, amend, or revoke any previously executed appointment, power, or delegation under section 5-1501, 5-1601, or 5-1602 of the general obligations law."

In addition, the proposal would authorize a court in a special proceeding brought pursuant to the general obligations law to revoke a power of attorney where it determines that the power of attorney was wrongfully procured, or where the Agent is unfit.

Second, a power of attorney terminates by operation of law upon the death of the Principal. However, the Agent's authority to act under the power of attorney, and/or a third party's reliance on the power of attorney are not terminated until such party has actual notice of the Principal's death. The approach set forth in this section is modeled on that adopted by California, Pennsylvania, and Minnesota, among others.[152]

Third, a power of attorney is terminated when its purpose has been accomplished.

Fourth, a nondurable power of attorney is revoked by operation of law when the Principal becomes incapacitated.

c. Termination of Agent's Authority and Authority to Gift to Former Spouse Upon Divorce from Principal

The proposal addresses two authorities affected by the divorce of a Principal. When the Principal names his or her spouse as Agent, and is later divorced, under the proposal the Agent's authority is terminated by operation of law. Similarly, when the Principal names his or her spouse as a permissible recipient of gifting in the power of attorney, and is later divorced, under the proposal the power to gift to the former spouse is revoked by operation of law. Both provisions are based on the assumption that a Principal who executed a power of attorney naming his or her spouse as Agent or as a permissible recipient of gifting and is subsequently divorced would not want the former spouse to serve as Agent or to receive gifts. The estates, powers, and trusts law contains similar provisions.[153] The proposal applies to the designation of the former spouse as Agent, and has no effect on the validity of the power of attorney for any joint or successor Agents. Proposed revocation of the authority to gift to the former spouse likewise does not affect gifting to other recipients. This revocation affects both the statutory gifting authority to the spouse ("to make gifts to my spouse, children and more remote descendants, and parents. . ."), and gifting where the spouse is included by name in the gifting class.

---

[152] *See, e.g.*, Cal. Prob. Code §§4152, 4153; 20 Pa. Cons. Stat. §5605; Minn. Stat. §523.20.

[153] *See, e.g.*, N.Y. Est. Powers & Trusts L. §§5-1.2(disqualification as surviving spouse) and 5-1.4 (revocatory effect of divorce, annulment or declaration of nullity, or dissolution of marriage on disposition, appointment or other provision in will to former spouse).

3. Notice to the Principal

New York law requires inclusion of a prescribed warning in a valid Power of Attorney. The current statutory language states:

> CAUTION: THIS IS AN IMPORTANT DOCUMENT. IT GIVES THE PERSON WHOM YOU DESIGNATE (YOUR "AGENT") BROAD POWERS TO HANDLE YOUR PROPERTY DURING YOUR LIFETIME, WHICH MAY INCLUDE POWERS TO MORTGAGE, SELL, OR OTHERWISE DISPOSE OF ANY REAL OR PERSONAL PROPERTY WITHOUT ADVANCE NOTICE TO YOU OR APPROVAL BY YOU. THESE POWERS WILL CONTINUE TO EXIST EVEN AFTER YOU BECOME DISABLED OR INCOMPETENT. THESE POWERS ARE EXPLAINED MORE FULLY IN NEW YORK GENERAL OBLIGATIONS LAW, ARTICLE 5, TITLE 15, SECTIONS 5-1502A THROUGH 5-1503, WHICH EXPRESSLY PERMIT THE USE OF ANY OTHER OR DIFFERENT FORM OF POWER OF ATTORNEY.
> THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL OR OTHER HEALTH CARE DECISIONS. YOU MAY EXECUTE A HEALTH CARE PROXY TO DO THIS.
> IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.[154]

An often heard complaint about this warning is that it is too difficult for most people to understand. Other states have developed simpler language that provides more information. Pennsylvania's notice, for example, states:

> NOTICE
>
> The purpose of this power of attorney is to give the person you designate (your "agent") broad powers to handle your property, which may include powers to sell or otherwise dispose of any real or personal property without advance notice to you or approval by you.
>
> This power of attorney does not impose a duty on your agent to exercise granted powers, but when powers are exercised, your agent must use due care to act for your benefit and in accordance with this power of attorney.
>
> Your agent may exercise the powers given here throughout your lifetime, even after you become incapacitated, unless you expressly limit the duration of these powers or you revoke these powers or a court acting on your behalf terminates your agent's authority.
>
> Your agent must keep your funds separate from your agent's funds.
>
> A court can take away the powers of your agent if it finds your agent is not

[154] N.Y. Gen. Oblig. L. §§5-1501(1) and (1-a), and 5-1506(4).

acting properly.

The powers and duties of an agent under a power of attorney are explained more fully in 20 Pa.C.S. Ch. 56.

If there is anything about this form that you do not understand, you should ask a lawyer of your own choosing to explain it to you.[155]

Based on this and other examples, the Commission recommends that the cautionary statement read as follows:

> CAUTION TO THE PRINCIPAL: Your Power of Attorney is an important document. As the "principal," you give the person whom you choose (your "agent") powers to spend your money and sell or dispose of your property during your lifetime without telling you. You do not lose your authority to act even though you have given your agent similar powers.
>
> When your agent exercises these powers, he or she must act according to any instructions you have provided, or, where there are no specific instructions, in your best interest. "Important Information for the Agent" near the end of this document describes your agent's responsibilities.
>
> Your agent can act on your behalf only after signing the Power of Attorney before a notary public.
>
> You can request information from your Agent at any time. You can revoke or terminate your Power of Attorney at any time as long as you are of sound mind. If you are no longer of sound mind, a court can remove an agent for acting improperly.
>
> Your agent cannot make health care decisions for you. You may execute a "Health Care Proxy" to do this.
>
> The law governing Powers of Attorney is contained in the New York General Obligations Law, Article 5, Title 15. This law is available at a law library, or online through the New York State Senate or Assembly websites, www.senate.state.ny.us or www.assembly.state.ny.us.
>
> If there is anything about this document that you do not understand, you should ask a lawyer of your own choosing to explain it to you."

This revised "caution" statement uses layperson's terms to explain to the Principal the legal effect of a power of attorney and the obligations of the Agent. A Principal who understands

---

[155] 20 Pa. Cons. Stat. §5601.

the risks and obligations created in a power of attorney can be more active or vigilant in ensuring that the Agent is acting appropriately. The instructions also provide notice to the Principal on how the instrument may be revoked, to facilitate revocation in those instances where the Principal has the capacity to revoke. That information is also intended to help the Principal avoid unnecessary legal consultation for the relatively simple matter of revocation.

E. Provisions Relating to Third Parties

1. Acceptance

An often heard complaint is that financial institutions are reluctant to accept statutory short form powers of attorney even though current law makes such refusal unlawful. Case law is scant on refusal to honor a power of attorney, and provides little guidance.

The Commission recommends amendments to section 5-1504 to encourage more routine acceptance of statutory short form powers of attorney. Several of these proposed provisions, together with provisions related to signatures and revocation, are intended to alleviate concerns about accepting powers of attorney. For example, the new reasonable cause provisions in this section are intended to clarify when a third party can refuse a power of attorney. At the same time, this and other sections clarify that a third party will not be liable for acting at the direction of an Agent unless the party has actual notice that the power of attorney is invalid for specific reasons. Most significant, perhaps, is the provision providing that the Agent's signature in a transaction made on behalf of the Principal constitutes an attestation to the validity of the power of attorney and his or her authority.[156] Thus, even where an Agent falsely attests to the validity of a power of attorney, the third party who relies on the signature of the Agent will avoid liability unless the third party had actual notice that the power of attorney was no longer valid.

2. Refusal to Honor Power of Attorney

a. Reasonable Cause

The Commission's proposal would permit third parties -- both financial institutions and persons as those terms are defined in section 5-1501 -- to refuse to honor a power of attorney for "reasonable cause." Reasonable cause is defined to include specific circumstances where the power of attorney is invalid or where the Agent's motives or exercise of authority are suspect. The circumstances listed are not exclusive.

One such circumstance is where the third party has made a good faith referral to Adult Protective Services, or where the third party has actual knowledge that someone else has reported alleged physical or financial abuse of the Principal by the Agent. This is the approach taken in a provision recently enacted in Pennsylvania which provides:

> [a]ny person who is given instructions by an agent in accordance with the terms of a power of attorney shall comply with the instructions . . . Reasonable cause under this subsection shall include, but not be limited to, a good faith report having been

156 *See* proposed section 5-1507.

made by the third party to the local protective services agency regarding abuse, neglect, exploitation or abandonment . . ."[157]

b. Third Party's Demand for Completion of its own Power of Attorney Unreasonable

Refusal to accept a power of attorney solely because it is not on the third party's own form does not constitute reasonable cause.

c. Third Party's Refusal Based on Lapse of Time Unreasonable

This revision provides that it is unreasonable for a third party to refuse to honor a power of attorney solely because there is a lapse of time between its execution by the Principal and presentment to the third party.[158]

Likewise, refusal to honor a power of attorney because there has been a lapse of time between the dates of the Principal's and Agent's signatures does not amount to reasonable cause.

d. Actual Notice of Revocation and Financial Institutions

This proposed revision protects third parties from liability for unknowingly acting upon a power of attorney that has been revoked either by the Principal or by operation of law. Specifically, the Commission proposes that a third party will not be liable for honoring a power of attorney if it has not received actual notice of revocation by the Principal or by operation of law.

e. Consequences of Refusal to Honor a Power of Attorney

Given the express direction and protection afforded third parties who honor a power of attorney, a refusal that is unreasonable may subject the third party to a court order compelling acceptance.

E. Provisions Relating to Civil Proceedings

1. Type of Proceeding

Under current law, legal challenge of any aspect of a power of attorney or any act by an Agent has to be brought by plenary action based on common-law principles. The proposed amendments to the general obligations law are intended to codify the common law in many respects, thus making it less burdensome to know the rules governing powers of attorney. The ready availability of this information in the statute should also facilitate bringing any action to challenge the Agent. Moreover, if the Principal's finances are in actual or potential jeopardy, speed and easy access to the courts are necessary. Therefore, the Commission recommends that a special proceeding pursuant to article four of the CPLR would be the appropriate method for bringing claims regarding powers of attorney. Use of special proceedings in this context is consistent with their use in other circumstances, such as in matters relating to health care

---

157 20 Pa. Cons. Stat. §5608.

158 This provision is modeled on Cal. Prob. Code §4127.

proxies[159] and express trusts.[160] Petitions brought under this section are limited to the jurisdiction of the supreme court.

2. Petition to Compel the Agent to Make Records Available

Although under common law, courts can require an accounting, *sua sponte*,[161] New York's general obligations law currently does not require that an Agent provide a record of transactions undertaken under the authority of a power of attorney. Section 81.44 of New York's mental hygiene law permits a guardian to petition the court to order an Agent to render an accounting. However, forcing an Agent to account under this section requires the commencement of an article 81 proceeding against the Principal and a judicial finding of the Principal's incapacity. The lack of a compulsory accounting mechanism under the general obligations law poses an obstacle for concerned third parties, who face substantial legal and financial obstacles if they seek court intervention in halting suspected financial abuse by the Agent. In addition, an Agent who knows that his or her actions may come under scrutiny may be less likely to abuse the power of attorney.

While the benefits of authorizing third parties to compel an accounting by the Agent are recognized, a critical issue is who should have standing to petition for such an accounting. Other states have adopted a variety of approaches, some restrictive and some more expansive. Some states, such as Illinois, require an agent for an incapacitated Principal to provide an accounting to certain elder abuse investigators.[162] Pennsylvania allows adult protective service investigators access to an agent's records without court intervention. If denied, they may petition the court to compel an accounting. However, the investigative agency bears the burden of establishing that the Principal is unable to consent to such disclosure. Additionally, Pennsylvania does not specifically allow any other interested third parties to seek an accounting, though the agent must account "whenever directed to do so by the court . . ."[163]

New Hampshire permits human service investigators to seek an accounting, but further expands this right to additional third parties including relatives,[164] who have a specific purpose. A

---

159 *See* N.Y. Pub. Health L. §2992.

160 *See* N.Y. C.P.L.R. §7701.

161 *See Matter of Morrison*, 268 A.D.2d 435 (2d Dep't 2000).

162 *See* 755 Ill. Comp. Stat. 45/2-7.5.

163 20 Pa. Cons. Stat. §5610.

164 N.H. Rev. Stat. Ann. §506:7(I). "A petition may be filed . . . (c) To compel the agent to submit an accounting or to report his acts as agent to any of the persons designated in subparagraph I(a)-(g), if such person has made a written request of the agent for an accounting or a report and the agent has not complied with the request within 60 days after the request was made. . ." N.H. Rev. Stat. Ann. §506:7(III).

New Hampshire court may also consider a petition from a third party if the party can demonstrate his or her interest in the welfare of the Principal and the lack of capacity of the Principal to bring the petition.[165]

Similarly to New Hampshire, California and Missouri identify interested persons who may petition a court to rule on the legality of a particular action by the Agent, compel accountings or terminate the power of attorney.[166]

New Jersey's statute gives the right to compel an accounting to other fiduciaries. An heir or "next friend" to the Principal may seek an accounting upon persuading the court that the Principal is incapacitated and the agent may be engaging in abusive conduct.[167]

The Commission recommends an approach that addresses the desire to make an Agent accountable, but does not subject the Agent to endless requests and court proceedings, and to limit public access to the Principal's affairs. The Commission's proposal is modeled both on other states' approaches, and on common law governing the authority of a court to order an accounting where four factors are present: (1) a fiduciary relationship; (2) entrustment of money or property; (3) no other remedy; and (4) a demand and refusal of an accounting.[168] Subdivision (1) of proposed section 5-1508 permits the Principal, the monitor, and limited categories of other persons and government agencies to petition to compel an Agent to produce a record of receipts, disbursements and transactions undertaken under the authority of the power of attorney where the record has been requested but refused.[169]

3. Determining Whether a Power of Attorney is Valid

Proposed section 5-1501B provides that, to be valid, every power of attorney must contain

---

165 "[T]he court may entertain a petition from any other interested party who demonstrates to the satisfaction of the court the following:(a) Sufficient knowledge of the Principal to demonstrate interest in the welfare of the Principal; and (b) The lack of capacity of the Principal to bring such a petition." N.H. Rev. Stat. Ann § 506:7(II) (2002).

166 Jonathan Federman & Meg Reed, *Abuse and the Durable Power of Attorney: Options for Reform,66* Government Law Center (1994).

167 N.J. Stat. Ann. §46:2B-8.13(b) provides: "The attorney-in-fact shall maintain accurate books and records of all financial transactions. The Principal, a guardian or conservator appointed for the Principal, and the personal representative of the Principal's estate may require the attorney-in-fact to render an accounting. The Superior Court may, upon application of any heir or other next friend of the Principal, require the attorney-in-fact to render an accounting if satisfied that the Principal is incapacitated and there is doubt or concern whether the attorney- in-fact is acting within the powers delegated by the power-of-attorney, or is acting solely for the benefit of the Principal."

168 *See Matter of Guardianship of Kent*, 188 Misc. 2d 509 (N.Y. Sup. Ct. Dutchess Co. 2001).

169 *See* proposed section 5-1505(2)(a)(3) requiring the Agent to provide a record of transactions within 15 days of written request for the record.

certain language and notices, and section 5-1503 provides the lawful modifications that may be made to a statutory short form power of attorney. Section 5-1510(2)(a) permits various persons to seek a determination from a court as to whether a power of attorney meets these and other requirements.

4. Determining Whether a Principal had Capacity to Execute a Power of Attorney

Pursuant to the definition set forth in proposed section 5-1501, the Principal must possess the requisite capacity to execute a lawful power of attorney. This means that the Principal is capable of comprehending the nature and consequences of the act of granting, revoking, or amending a power of attorney or any provision in a power of attorney. Proposed subdivision (2)(b) of 5-1510 permits various persons to seek a determination from a court as to whether a Principal possessed the requisite capacity when he or she executed the power of attorney.

5. Determining Whether the Power of Attorney was Wrongfully Procured

Under proposed section 5-1505(2)(b), an Agent is subject to liability if he or she wrongfully procures a power of attorney, for example, by misrepresenting the nature of the document the Principal is signing, or by threatening the Principal with physical abuse or nursing home placement. Section 5-1510(2)(c) provides the civil mechanism whereby a court may revoke the power of attorney or revoke the authority of the Agent where the power of attorney has been procured through fraud or undue influence.

6. Removal of Agent

This provision permits a petition to remove the Agent for breach of the fiduciary duties set forth in section 5-1505.

7. Compensation of Agent

Proposed section 5-1506 permits the Principal to determine whether the Agent is entitled to compensation. Subsection 5-1510(2)(d) permits the Agent or others to petition the court to determine if an Agent is entitled to compensation or, if compensation has been made, whether such compensation is reasonable. An instruction in the power of attorney form suggests that the Principal may define "reasonable compensation" in the section labeled "Modifications."

G. Other Provisions

1. Reorganization of the General Obligations Law

Current section 5-1501 provides model statutory short forms for durable and nondurable powers of attorney and 5-1506 provides the form for powers of attorney effective at a future time. This arrangement is confusing. Two different types of powers of attorney are addressed within one section and various statutory rules are included within and throughout the prescribed form language.

The Commission proposes reorganizing sections 5-1501 and 5-1506 into new section 5-1513, a model statutory short form durable power of attorney, with instructions on how to convert it to a nondurable or springing power of attorney. New section 5-1514 contains the statutory

major gifts rider.

This revision requires that certain safeguards be incorporated in every power of attorney, including those not based on the statutory short form. Accordingly, proposed section 1501B establishes that every power of attorney, to be valid, must include a cautionary statement to the Principal, notice to the Agent, and the signature of the Principal.

2. Definitions

a. Agent

In prior versions of the statute, the terms "attorney-in-fact" and "Agent" were used interchangeably in some sections. The Commission's proposal uses the more accessible term "agent" throughout.

b. Capacity

The Commission proposes that, following the approach adopted in other states, mental capacity for executing a power of attorney should be the same as for entering a contract,[170] i.e. "whether the [Principal] was capable of comprehending and understanding the nature of the transaction at issue."[171] Accordingly, the Commission proposes defining capacity to mean that at the time the power of attorney is executed, the Principal is capable of comprehending the nature and consequences of the act of executing and granting the power of attorney. The term "incapacitated" is defined to mean to be without capacity.

c. Compensation

The Commission proposes that the Principal be permitted to choose whether or not his or her Agent is entitled to reasonable compensation for services actually rendered on behalf of the Principal under the power of attorney.[172] The definition of compensation clarifies that payment should come from the assets of the Principal.

d. Financial Institution

Much of the definition of "financial institution" is taken verbatim from current section 5-1504(1). Although the definition of "financial institution" in section 5-1504 includes an extensive list of financial enterprises, there is no express reference to securities brokers, dealers, and firms, and insurance companies. Because an Agent may be authorized to perform transactions involving securities and insurance, the Commission recommends that brokerage firms and insurance companies be subject to the same rules as virtually all other financial institutions in regard to acceptance of a power of attorney.

---

170 *See generally,* Cal. Prob. Code. §4022.

171 *See Smith v. Comas*, 173 A.D.2d 535, 535 (2d Dep't 1991); *see also Ortelere v. Teachers Retirement Bd of City of N.Y.*, 25 N.Y.2d 196 (1969).

172 *See* proposed section 5-1506.

Under longstanding federal common law, states have the legitimate power to make laws that apply to all persons within their jurisdictions and to their own financial institutions, but cannot make special laws applicable to federal banks.[173] This rule is interpreted[174] to mean that states may make laws that apply generally to all banks, such as civil rights legislation prohibiting geographic discrimination in lending,[175] laws governing tax escrow accounts,[176] and statutes providing for the establishment of trusts,[177] and that these laws may apply to federal banks.[178] The definition of "financial institution" in current section 5-1504 and proposed section 5-1501, and 5-1504's requirement that financial institutions honor a properly executed statutory short form power of attorney apply generally to a wide range of institutions, and not specifically to federally regulated entities.

The newly adopted uniform power of attorney act[179] contains a provision similar to the one in 5-1504, requiring that a person accept an acknowledged power of attorney within five business days, or risk a court order mandating acceptance and liability for attorney's fees and costs incurred in the action.[180] The related definition of "person"[181] means "an individual, corporation, business trust, estate, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity." This definition is taken from section 11-A-1.2 of the estates, powers, and trusts law (definitions and fiduciary duties).

---

173 *Easton v. Iowa*, 23 S.Ct. 288, 292 (1903). "[N]ational banks are subject to the laws of a state in respect of their affairs, unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies, or conflict with the paramount law of the United States." *First Nat. Bank in St. Louis v. State of Missouri at inf.of Barrett*, 44 S.Ct. 213, 215 (1924). See also 12 USCA § 1846(a).

174 *People v. Calandra*, 164 A.D.2d 638 (1st Dep't. 1991).

175 Banking Law § 9-f(3).

176 Real Property Tax Law § 952 et seq.

177 Banking Law §§ 14(1)(c); 100-c (7).

178 *Calandra* at 642.

179 NCCUSL, www.law.upenn.edu/bll/ulc/dpoaa/2006annualmeeting_approved.htm. See also, e.g., Alaska Stat. § 13.26.353(c), Fla. Stat. § 709.08(11), Ind. Code § 30-5-9-9, Minn. Stat. § 523.20.

180 Section 120, "Liability for Refusal to Accept an Acknowledged Power of Attorney"

181 Section 102(6).

e. Person

The definition of "person" included in the Commission's proposal is taken from section 11-A-1.2 of the estates, powers, and trusts law (definitions and fiduciary duties). The Commission's proposal defines "third party" to mean a financial institution or person.

f. Sign

A definition of the term "sign"is included to clarify that the term applies to any method of authenticating or adopting a record, including electronic methods, as well as a definition of "record".

g. Statutory Short Form

The term "statutory short form" has been included.

3. Estate Matters Authority

The Commission proposes adding new language to section 5-1502G to clarify that the Agent who is authorized to engage in estate transactions has the authority to act with respect to any estate, trust or other fund, regardless of whether the estate, trust or other fund is specifically identified in the power of attorney or in existence at the time the Principal executes the power of attorney. Unless the Principal limits the attorney-in fact's authority, the Agent can act as to all estates, trusts or other funds.

4. Gifting Authority

The gifting authority at "(M)" on the statutory short form, and its corresponding construction section, 5-1502M, have been revised and renumbered to become the first part of the Major Gifts Rider and section 5-1514 to permit annual exclusion gifts as defined in the Internal Revenue Code, gifts to section 529 education accounts, and gift splitting from the Principal's assets, if the Principal's spouse consents.

This revision retains the gifting class (the Principal's spouse, children and more remote descendants, and parents) provided in the current gifting authority. A Principal who wishes to modify the class to exclude any of these persons or to include others may do so in the separate section of the Major Gifts Rider reserved for authorizing major gifts or other transfers.

a. Amount of Gifts

The current gifting authority at "(M)" limits gifts to $10,000 per person per year, reflecting the amount of the federal annual gift tax exclusion in effect when this authority was added to the general obligations law. Because the Internal Revenue Code now requires adjustment of this amount in $1,000 increments to keep pace with increases in the cost of living,[182] this proposed revision ties the permissible gifting amount to the gift tax exclusion in effect at the time of the gift. Linkage to the corresponding federal gift tax exclusion ensures that the gifting authority is not restricted to an amount lower than that authorized by law.

---

182 *See* section 2503(b)(2) of the Internal Revenue Code.

b. Section 529 Accounts

Current law allows gifts to be made either outright or in trust. This proposed revision to the statutory gifting authority permits gifts also to an existing or new account established for the benefit of a donee under section 529 of the Internal Revenue Code (qualified state tuition programs). Authorization for such accounts, commonly known as "529 accounts" or "section 529 accounts," was added to the Internal Revenue Code after the most recent revision of the general obligations law. The subsequent widespread use of 529 accounts for saving for higher education has prompted their inclusion in this proposed revision.

Section 529 allows a gift to a qualified account for a designated beneficiary to be treated as a completed gift to the beneficiary. As such, the gift is eligible for the annual gift tax exclusion under section 2503(b) of the Internal Revenue Code. The intent of this proposed revision in the construction of certain gift transactions is to allow only annual exclusion gifting (and gift splitting, where applicable). Thus, in a year when the annual gift tax exclusion amount is $12,000 per donee, a gift to a beneficiary's account in that year may not exceed $12,000, or $24,000 if the Principal's spouse consents to gift splitting. This provision does not authorize gifts in excess of the annual exclusion amount for the purpose of spreading an excess contribution over a 5-year period under section 529(c)(2)(B) of the Internal Code, unless the Major Gifts Rider contains additional language expressly authorizing it.

c. Gift Splitting

The Commission proposes allowing gift splitting from the Principal's assets. Gift splitting, authorized by section 2513 of the Internal Revenue Code, allows one spouse to gift up to twice the annual gift tax exclusion amount per donee, per year, with the consent of the non-donor spouse. In the context of a power of attorney, gift splitting allows the Agent to make such gifts from the Principal's assets, with the consent of the Principal's spouse. For example, in a year when the annual federal gift tax exclusion amount is $12,000, and where the married Principal has two children, one grandchild, and one parent, the Agent could gift up to $24,000 to any or all of these four people from the Principal's assets, with the consent of the Principal's spouse. If the maximum allowable gift of $24,000 is made to each of the four recipients, the total would come to $96,000.

The class of permissible split gifting recipients includes the Principal's parents, children and other descendants. Inclusion of the Principal's parents in this provision distinguishes it from the parallel split gifting provision at subdivision (6)(a)(3) of section 5-1514. This provision permits the Agent to consent, on behalf of the Principal, to gift spliting from the assets of the Principal's spouse. The gifting class includes only the Principal's issue, (but not the parents of either the Principal or the Principal's spouse) because only the children and other descendants would constitute the natural recipients of gifting from both spouses.

5. De Minimis Gifting Authority

The Commission proposes to add a new subdivision 14 to section 5-01502I, the construction section renamed "Personal and Family Maintenance," to allow the Agent acting under a basic power of attorney to continue de minimis gifts on behalf of the Principal, not to exceed a total of $500 per year to any person or charitable organization. This provision would allow any customary gifts for birthday, graduation, religious occasion, or other special occasions, to any person or charitable organization. No statutory gifting class is defined in order to obviate the need to identify all permissible recipients of gifts. However, a Principal who wishes to modify the form to identify the permissible de minimis gift recipients is free to do so on the statutory short form power of attorney. If the Principal wishes to authorize the Agent to make gifts in larger amounts, the Principal can do so by executing a Major Gifts Rider.

6. Multiple Agents and Successor Agents

The statute continues the requirement that if the Principal designates more than one Agent, the Agents must act jointly or separately in exercising their authority. In the absence of the Principal's instructions that the Agents are to act separately, the Agents must act jointly.

As a generally recognized practice, if a permanent vacancy occurs, the remaining Agents may exercise the authority conferred as if they are the only Agents. If an Agent is unavailable because of absence, illness, or other temporary incapacity, the other Agents may exercise the authority under the power of attorney as if they are the only Agents, where necessary to accomplish the purposes of the power of attorney or to avoid irreparable injury to the Principal's interests.

A Principal may designate one or more successor Agents to act if the authority of a predecessor Agent terminates. The successor Agent is subject to the same duties and liabilities as any other Agent.

7. Consistency with Guardianship Law

The language of former section 5-1505(2) giving a committee or guardian of a principal who has become incapacitated the authority to revoke, suspend or terminate a power of attorney has been deleted as inconsistent with section consistent with section 81.22(b)(2) of the mental hygiene law. Pursuant to section 81.22(b)(2), a guardian is prohibited from revoking any appointment or delegation made by the incapacitated person, including a power of attorney.

8. Powers of Attorney Executed in Other Jurisdictions

The Commission proposes to add section 5-1512 to make it clear that powers of attorney validly executed in other jurisdictions are valid in New York. The purpose of this provision is to facilitate use and enforceability of such documents. While many jurisdictions have requirements that are similar in nature to the ones included in the Commission's proposal, e.g., the requirement that the Agent sign the power of attorney, others do not have such requirements. Nevertheless, when a power of attorney is valid in the jurisdiction of execution, that validity should permit the power's use in another jurisdiction. Such treatment of a power of attorney is consistent with New

York's treatment of health care proxies and wills executed in other jurisdictions. [183]

9. Execution of a New Power of Attorney Revokes Prior Powers of Attorney

The Commission proposes that the execution of a new power of attorney revokes any and all prior powers of attorney executed by the Principal unless the Principal provides otherwise. This provision will assist third parties presented with multiple powers of attorney conveying the same authority to multiple Agents. When the Principal intends to grant the same authority to multiple Agents, she may indicate on the form whether such Agents are authorized to act together or separately in the exercise of the power. Revocation of a prior document by executing a new one mirrors the approach used in New York's health care proxy law.[184]

10. Provisions Relating to Abuse of Powers of Attorney

The Commission recommends a number of reforms to deter, uncover and halt abuse.[185] These proposed reforms, listed below, are discussed in greater depth in other sections of this report.

a. Deterring abuse

The Commission's proposals would assist in deterring abuse by educating both the Principal and the Agent.

The revised cautionary statement to the Principal will educate the Principal as to the extent of the Agent's authority.

The newly added notice to the Agent will educate the Agent and the Principal in layperson's terms about the fiduciary duty that the Agent owes the Principal, and warns the Agent that a violation of that fiduciary duty or other law may make the Agent liable under the law for those violations.

The Agent must acknowledge the fiduciary duty by signing the power of attorney. If the

---

183 *See* N.Y. Pub. Health L. §2990 (a health care proxy or similar instrument executed in another state or jurisdiction in compliance with the laws of that state or jurisdiction shall be considered validly executed for purposes of the Public Health Law) and N.Y. Est. Powers & Trusts L. §3-5.1(c) (a will disposing of personal property wherever situated, and real property in New York is valid and admissible to probate in this state if it is in writing, signed by the testator, and executed and attested in accordance with the law of the jurisdiction in which the will was executed, at the time of execution).

184 See N.Y. Pub. Health L. §2985(1)(c).

185 As noted elsewhere in this report, many of these proposals are based on initiatives undertaken in other states. In tandem with reforms to powers of attorney, many states, including New York, are pursuing other avenues to prevent, uncover, and halt financial abuse. Among these are new criminal statutes addressed at financial and other abuse of the elderly and disabled, training programs to help bank personnel spot trouble, expansion of the list of persons who must report suspected abuse, sting operations, and public awareness campaigns. *See* Julia C. Calvo, *Summary of Enacted DPA Legislation, 2000 - 2002*, <www.abanet.org/aging/summarydpastatutes.pdf>

Agent does not sign the power of attorney, the Agent has no authority to act.

The statutory short form notifies the Principal that he or she may appoint a monitor or monitors to have the authority to request information regarding the Agent's transactions on behalf of the Principal. Because the monitor or monitors will be listed on the form, the Agent will be on notice from the beginning of this third party with an independent right to request and scrutinize the record.

When the Agent acts under the authority of the power of attorney, and the handwritten signature of the Agent or Principal is required, the Agent must disclose his or her relationship as Agent to the Principal by writing the name of the Principal and signing his or her own name as "Agent." It attests that the Agent has authority to engage in the transaction and has no knowledge of the revocation of the power of attorney.

b. Uncovering abuse

The Commission's proposals would assist in uncovering abuse by permitting certain individuals to hold the Agent accountable and by permitting third parties to refuse to accept the power of attorney under certain circumstances, and to challenge the power of attorney.

The Principal's monitor may request information regarding the Agent's transactions on behalf of the Principal at any time.

The record of all receipts, disbursements, and transactions entered into by the Agent on behalf of the Principal must be made within 15 days of written request by (1) a co-Agent or a successor Agent acting under the power of attorney (2) a government entity or official acting in the course of investigating a report that the principal may be in need of protective or other services, or investigating a report of abuse or neglect, (3) a court evaluator pursuant to article 81 of the mental hygiene law in a proceeding alleging that the Principal is incapacitated, (4) a guardian ad litem appointed pursuant to section 1754 of the surrogate's court procedure act, (5) the guardian or conservator of the estate of the Principal if such record has not already been provided to the court evaluator, (6) the personal representative of the estate of the deceased Principal if such record has not already been provided to the guardian or conservator.

A third party can refuse to honor a power of attorney if (1) the Agent refuses to provide an original or certified copy of the power of attorney, (2) the third party has made a good faith referral of the Principal to local adult protective services unit, (3) the third party has actual knowledge of a report by any person to adult protective services regarding the physical or financial abuse, neglect or abandonment of the Principal by the Agent, (4) the third party has actual knowledge of the Principal's death, (5) the third party has actual knowledge of the incapacity of the Principal or a reasonable basis for believing that the Principal is incapacitated where the power of attorney tendered is a nondurable power of attorney, (6) the third party has actual knowledge or a reasonable basis for believing that the Principal was incapacitated at the time the power of attorney was executed, (7) the third party has actual knowledge or a reasonable basis for believing that the power of attorney was procured through fraud or undue influence, or

(8) the third party has actual notice of the termination or revocation of the power of attorney.

A civil proceeding may be commenced to determine (1) if the Principal had capacity to execute the power of attorney, (2) the validity of the power of attorney, or (3) if the power of attorney was procured through fraud or undue influence.

c. Halting Abuse

The Commission's proposals would assist in halting abuse by permitting third parties to challenge the power of attorney and to seek removal of the Agent.

A civil proceeding may be commenced to remove the Agent on the grounds that the Agent has violated or is unfit, unable or unwilling to perform the fiduciary duties.

A civil proceeding may also be commenced to determine (1) if the Principal had capacity to execute the power of attorney, (2) the validity of the power of attorney, or (3) if the power of attorney was wrongfully procured.

The Agent may be subject to if he or she: (1) transfers property to himself or herself without specific authorization in the power of attorney, (2) acts wrongfully in procuring any power of attorney or any authority provided in a power of attorney, and takes control of the Principal's assets or property, (3) acts in an unauthorized manner or violates the standard of care or fiduciary duty, or (4) acts under a power of attorney with actual knowledge that it has been revoked.