Law Revision Commission Commentary

I. Definitions

A. Substitution of "Attorney-in-Fact" for "Agent"

The terms "agent" and "attorney-in-fact" were used interchangeably in prior versions of the statute. Subsection (1) eliminates the confusion.

B. Capacity

Case law suggests that a person executing a power of attorney requires the same mental capacity as one who enters 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).) Accordingly, capacity is expressly defined to mean that the principal is capable of comprehending the nature and consequences of the act of executing, granting, revoking, amending, or modifying the power of attorney. This definition is consistent with the definition of capacity in section 81.02(b)(2) of the mental hygiene law. The term "incapacitated" is defined to mean to be without capacity.

C. Compensation

This revision of the power of attorney law expressly permits the principal to choose whether or not his or her attorney-in-fact is entitled to reasonable compensation for services actually rendered on behalf of the principal under the power of attorney. (*See* section 5-1506.) The definition of compensation clarifies that payment should come from the assets of the principal.

D. Inclusion of Insurance Companies and Securities Brokers and Firms as "Financial Institutions"

Much of the definition of "financial institution" derives verbatim from former section 5-1504(1). Although the definition of "financial institution" in former section 5-1504 included an extensive list of financial enterprises, there was no express reference to insurance companies or securities brokers, dealers, and firms. Because an attorney-in-fact may be authorized to perform transactions involving insurance and securities, insurance companies and brokerage firms are now subject to the same rules as virtually all other financial institutions in regard to acceptance of a power of attorney.

E. Person

The definition of "person" is taken from section 11-A-1.2 of the estates, powers, and trusts law.

F. Inclusion of "Vulnerable Adult" as Concept Within Power of Attorney Law

The term "vulnerable adult" is modeled on the language used in section 473(1) of the social services law.

See comment to section 5-1508 for consequences of showing that an individual is a vulnerable adult.

II. General Requirements for Valid Powers of Attorney and Amendments to Statutory Short Forms

Former section 5-1501 provided model statutory short forms for durable and nondurable powers of attorney and former 5-1506 provided the form for powers of attorney effective at a future time. These sections also prescribed the basic requirements of short forms including incorporation of notice and directions to the principal.

Experience has shown that the former law had several shortcomings: (1) not addressing non-statutory forms of powers of attorney; (2) overly legalistic language in both the caution statement to the principal and in the short form generally; (3) not advising the attorney-in-fact of his or her rights and obligations; and (4) not addressing how to revoke a power of attorney. As explained below, this revision addresses all four.

In addition, former sections 5-1501 and 5-1506 were confusing: section 5-1501 included two different types of powers of attorney, and both sections incorporated various rules within and throughout the prescribed form language. This revision reorganized former 5-1501 and 5-1506 into new sections 5-1501A (nondurable general power of attorney), 5-1501B (durable general power of attorney), and 5-1501C (durable general power of attorney effective at a future time). In order to create a more reader-friendly format, each section leads off with the requirements for that power of attorney, followed by a model statutory short form.

A. Requirements for All Powers of Attorney

This revision requires that certain safeguards be incorporated in every power of attorney, including those not based on the statutory short form. Accordingly, new sections 5-1501A, 1501B, and 1501C establish that every power of attorney, to be valid, must include a cautionary statement to the principal, notice to the attorney-in-fact, and the signature of the attorney-in-fact.

1. **Modification of the "Caution" Statement to the Principal**

The revised "caution" statement uses layperson's terms to explain to the principal the legal effect of a power of attorney, the obligations of the attorney-in-fact, and how to revoke the power of attorney. A principal who understands the risks and obligations created in a power of attorney can be more active or vigilant in ensuring that the attorney-in-fact is acting appropriately.

2. **Attorney-in-Fact Notice and Signature Requirements**

Under prior law, an attorney-in-fact was not required to sign a power of attorney. This revision includes a notice to the attorney-in-fact and the requirement that the attorney-in-fact sign the power of attorney in order for his or her appointment to take effect. In signing the power of attorney, the attorney-in-fact also acknowledges his or her fiduciary duties as explained in the notice.

The notice informs the attorney-in-fact of his or her fiduciary duties and of the significance of signing a document as attorney-in-fact.

3. **Lapse of Time Between Date of Signatures**

This provision clarifies that it is permissible for the attorney-in-fact to sign and acknowledge the power of attorney at some date after 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 attorney-in-fact of the existence of a power of attorney prior to actual need for its use.

A successor attorney-in-fact is not expected to execute the instrument unless the first named attorney-in-fact 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.

4**. Multiple Attorneys-in-Fact and Successor Attorneys-in-Fact**

As in prior law, the current statute allows the principal to name more than one attorney-in-fact, and then to designate whether the attorneys-in-fact must act jointly or separately in exercising their authority. In the absence of the principal's instructions that the attorneys-in-fact are to act separately, the attorneys-in-fact must act jointly.

When there are multiple attorneys-in-fact, there may be a lapse of time between the dates the attorneys-in-fact sign and acknowledge the power of attorney. This time lapse will not invalidate an otherwise valid power of attorney. If the attorneys-in-fact are designated to act separately, the power of attorney is effective as to an attorney-in-fact when he or she has signed and acknowledged the document.

As a generally recognized practice, if a permanent vacancy occurs, the remaining attorneys-in-fact may exercise the authority conferred as if they are the only attorneys-in-fact. If an attorney-in-fact is unavailable because of absence, illness, other temporary incapacity, or death, the other attorneys-in-fact may exercise the authority under the power of attorney as if they are the only attorneys-in- fact, 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 attorneys-in-fact to act if the authority of a predecessor attorney-in-fact terminates. The power of attorney is effective as to a successor attorney-

in-fact when the successor attorney-in-fact has signed and acknowledged the document. The successor attorney-in-fact is subject to the same duties and liabilities as any other attorney-in-fact.

5. **Instruction as to How to Revoke a Power of Attorney**

Although the former statutory short forms informed the principal that the power of attorney "may be revoked at any time," the general obligations law provided no guidance on how to revoke a power of attorney. To fill this gap, this revision creates a new section specifically addressing revocation (*see* section 5-1509), and, in the three new sections detailing short forms, requires that the statutory short forms include revocation instructions. To facilitate revocation in those instances where the principal has the capacity to revoke, the instructions provide notice to the principal on how to do so. Inclusion of the instructions is also intended to avoid unnecessary legal consultation for the relatively simple matter of revocation.

B. Omission in prior section 5-1505

This provision eliminates the word "guardian" to make this 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.

III. Authorization for the Release of Protected Health Information Related to Capacity

These new, separate forms are intended to accompany a nondurable general power of attorney, or a durable general power of attorney effective at a future time if the triggering event is the principal's incapacity. In the former, the principal wants the document to cease to be effective when he or she becomes incapacitated, and in the latter, the principal wants it to take effect when he or she becomes incapacitated. This form is necessary to obtain from a medical provider a written statement of the principal's incapacity.

The need for such a form derives from the recently implemented "Privacy Rule" under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which creates national standards protecting the privacy of an individual's medical records. Under the Privacy Rule, a provider may not disclose an individual's protected health information without a valid authorization. *See* 45 C.F.R. section 164.508(a)(1).

Without a valid authorization, a doctor's written certification that an individual is incapacitated, necessary for either triggering or terminating the abovementioned powers of attorney, could not be disclosed to the attorney-in-fact, financial institutions, or other third parties, thwarting the principal's intention in creating the Power of Attorney.

These forms meet the requirements for a valid authorization listed in the Privacy Rule at 45 C.F.R. section 164.508(c), namely: a description of the information to be disclosed, the person or class of

persons authorized to request disclosure, a description of the purpose for the disclosure (e.g. "at that person's request"), an expiration date, the signature of the principal or, alternatively, his or her "personal representative," the date of signature, and several required statements.

If the principal is unable to execute this form due to incapacity, the principal's health care agent appointed under the principal's health care proxy could do so in his or her role as "personal representative," since the health care agent's authority begins when the principal becomes incapacitated. *See* 45 C.F.R. section 164.502(g) and New York public health law section 2981(4). Unless the attorney-in-fact is also the principal's health care agent, the attorney-in-fact cannot execute this document. Where the principal has no health care agent, the principal should be aware that the effectiveness of his or her power of attorney may depend upon the principal's execution of this authorization form at the same time as the power of attorney. For further discussion of the relationship between the Privacy Rule and powers of attorney, *see* the commentary to section 5-1502K(1).

IV. Grammatical Changes to Construction Sections

In the construction sections (5-1502A through 5-1502O), the prior statute used the term "agent" to refer either to an agent, generally, or to an attorney-in-fact. This revision substitutes "attorney-in-fact" for "agent" where appropriate, to make the usage of these terms consistent throughout the statute. In addition, to make these sections gender-neutral in line with the rest of the statute, "his" has been changed to "his or her."

V. Estate Matters

New language added to section 5-1502G clarifies that the attorney-in-fact 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 or in existence at the time the principal executes the power of attorney. Unless the principal limits the attorney-in fact's authority, the attorney-in-fact can act as to all estates, trusts or other funds.

VI. Health Care Billing and Payment Matters; Records, Reports and Statements

The authority with respect to "records, reports and statements" at "K" on all three statutory short forms has been revised to include "health care billing and payment matters." The corresponding new paragraph (1) added to construction section 5-1502K clarifies that the authorization to act with respect to records, reports and statements includes the authorization to access records relating to the provision of health care and to make decisions relating to payment for health care services to which the principal or the principal's health care agent has consented. This clarification removes any ambiguity about whether an attorney-in-fact acting under an existing or future power of attorney can access health care records in connection with the payment of health care bills. The amendment does not change current law, which limits the authority of a third party to make health care decisions to a health care agent acting under a health care proxy or a guardian appointed by the court.

The ambiguity over the attorney-in fact's authority arose out of two factors. The first was the lack of express reference to medical records in previous subdivision K on the three statutory short forms and in construction section 5-1502K. As a result, many health care providers have refused to make records available to an attorney-in-fact who was seeking clarification of a medical bill, without express language included within the power of attorney document authorizing such release. The providers have based their refusal on physician-patient confidentiality under medical ethics rules and on the statutory physician-patient privilege. The new language in section 5-1502K eliminates the need to add express permission in the power of attorney. Second, the ambiguity created by the lack of express reference to medical records in section 5-1502K was compounded by the recently implemented "Privacy Rule" under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 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 attorney-in-fact only if the attorney-in-fact 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 . . ." 45 C.F.R. section 164.502(g)(2).

The general obligations law limits the authority of the attorney-in-fact to financial matters, and expressly prohibits the attorney-in-fact from making health care decisions for the principal. *See* general obligations law sections 5-1501A, 5-1501B, and 5-1501C, along with section 5-1502K which now carries over language formerly contained at section 5-1502O. The public health law defines a health care decision as "any decision to consent or refuse to consent to health care." "Health care," in turn, is defined as "any treatment, service or procedure to diagnose or treat an individual's physical or mental condition." Public health law sections 2980(4) and (6).

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 clears that financial liability for health care decisions remains the obligation of the principal. *See* section 2987 of the public health law. As a practical matter, payment issues are left to the principal or the principal's attorney-in-fact. The Privacy Rule regarding access to records does not take into account a statutory structure such as New York's, which divides responsibilities for health care decisions and bill paying between two representatives, the health care agent and the attorney-in-fact. The amendment to section 5-1502K makes clear that an attorney-in-fact is an individual's personal representative for purposes of accessing medical records in connection with paying medical bills. The amendment in no way affects the authority of the health care agent to access medical records in connection with making health care decisions.

VII. Gifting Authority

The gifting authority at "(M)" on all three statutory short forms, and its corresponding construction section, 5-1502M, have been revised 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) included in the prior version of the gifting authority. A principal who wishes to modify the class to exclude any of these persons or to include others may do so as a permissible modification under section 5-1503.

A. Amount of Gifts

The prior gifting authority at "(M)" limited 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 (*see* section 2503(b)(2) of the Internal Revenue Code), this 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.

B. Section 529 Accounts

Prior law allowed gifts to be made either outright or in trust. This revision 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 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 newly added provision 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 $11,000 per donee, a gift to a beneficiary's account in that year may not exceed $11,000, or $22,000 if the principal's spouse consents to gift splitting. This provision does not authorize a gift 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 statutory short form power of attorney contains additional language expressly authorizing it.

C. Gift Splitting

New to this revision is authorization for 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 attorney-in-fact 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 $11,000, and where the married principal has two children, one grandchild, and one parent, the attorney-in-fact could gift up to $22,000 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 $22,000 is made to each of the four recipients, the total would come to $88,000.

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 newly renumbered subdivision (3) of construction section 5-1502M. Subdivision (3) permits the attorney-in-fact to consent, on behalf of the principal, to split gifting from the assets of the principal's spouse. The subdivision (3) gifting class includes only the principal's issue, (but not the parents of either the principal or the principal's spouse) presumably because only the children and other descendants would constitute the natural recipients of gifting from both spouses.

VIII. All Other Matters

The language prohibiting the attorney-in-fact from making health care decisions for the principal has been removed from this section. The statement now appears in amended section 5-1502K(1), which clarifies that the attorney-in-fact has the authority to make decisions relating to payment for health care services, while the authority to make decisions relating to the provision of health care services is limited to the principal or the principal's health care agent.

IX. Modifications to Statutory Short Forms

Prior section 5-1503(1), (2), and (3) described three permissible ways of modifying a statutory short form power of attorney. The amendment to this section provides two additional modifications that may be included without invalidating the instrument as a statutory short form. The revised statutory short form advises the principal of all five permissible modifications. The principal includes any modifications in the section reserved for "Special Instructions."

A. Prescribed Duty to Act

New subdivision (4) permits the inclusion of a statement that the attorney-in-fact must act for the principal as to specified transactions or types of transactions. The signature of the attorney-in-fact indicates his or her acceptance of the principal's instructions.

Despite the emphasis on the advantages of a power of attorney as an inexpensive and effective alternative to a guardianship proceeding when and if the principal becomes incapacitated, a power of attorney is wholly *ineffective* if the attorney-in-fact refuses to act on its authority. As one commentator explained, "[t]he current law in most states is that an attorney-in-fact can pick and choose when to act, even after the principal loses competence." *See* Carolyn Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 Neb. L. Rev. 574, 610 (1996).

New York's few published cases on the subject do not provide a clear answer as to whether an

attorney-in-fact is under a duty to act. In *Matter of Wingate*, 169 Misc. 2d 701 (Queens County Sup. Ct., 1996) the court revoked a power of attorney in a guardianship proceeding for the principal. The court determined that the attorney-in-fact's failure to sell shares in the principal's cooperative apartment so that the principal could remain in a nursing home constituted a breach of fiduciary duty. However, the court imposed no liability on the attorney-in-fact for failure to act. In *Matter of Rochester Hospital*, 158 Misc. 2d 522 (Monroe County Sup. Ct. 1993), the court revoked a power of attorney appointing the principal's son as attorney-in-fact, where the attorney-in-fact, without any apparent reason, failed to assist in the completion of a Medicaid application for the hospitalized and incapacitated principal. Although the court did not explicitly state that the attorney-in-fact had breached his fiduciary duty, the court cited the son's unwillingness or inability to act as the reason for revoking the power of attorney. While these cases suggest that an attorney-in-fact has a duty to act, both courts chose to revoke the power of attorney without imposing liability on the attorney-in-fact who failed to act.

Under common law agency principles, if an agent is employed by a unilateral contract in which the agent does not promise to act, the agent has no duty to act and cannot be held liable for failing to act. The agent does have a duty to act if the agent has undertaken to act or has caused the principal to rely on the assumption that he or she will do so. *See* 2A NY Jur. 2d Agency & Indep. Contractors section 210 *citing* Restatement 2d, Agency sections 377 and 378. In the context of powers of attorney, a principal might execute a durable power of attorney but avoid informing the designated attorney-in-fact. When the designation is later discovered, the designee may be unwilling or unable to accept the duties of an attorney-in-fact. Here the attorney-in-fact has made no promise to act, and under agency principles has no duty to act. A designee who has agreed to act as attorney-in-fact may likewise be unwilling or unable to accept the duties of attorney-in-fact when the time comes to act. Here the attorney-in-fact has caused the principal to rely on the assumption that the designee will act. While it seems harsh to hold a reluctant or unwilling attorney-in-fact liable for failing to exercise the authority accepted earlier under what may have been different circumstances, if the principal is, in fact, incapacitated when the time comes for the attorney-in-fact to act, the principal's affairs will be left unattended.

This revision of the power of attorney law adopts the approach used in other states which permit the principal and attorney-in-fact to form an enforceable agreement within the power of attorney instrument. *See* Cal. Prob. Code § 4230(c) (West 2003); Mo. Rev. Stat. § 404.705(4) (2002); and Vt. Stat Ann. tit. 14 § 3506(c) (2002). If the attorney-in-fact agrees to act, he or she will be liable for any harm caused by his or her action or inaction. With this approach, the attorney-in-fact's liability is clearly prescribed from the onset and the principal has a means of ensuring that his or her intent and interests are reasonably protected. However, if the power of attorney instrument does not impose a duty to act on the attorney-in-fact, or if the attorney-in-fact refuses to agree to accept such duty, the attorney-in-fact will not be held liable for failing to act.

B. Designated Recipient of Attorney-in-Fact's Record of Transactions

New subdivision (5) 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 attorney-in-fact on behalf of the principal. The attorney-in-fact has the obligation to maintain such

records pursuant to section 5-1505. Subdivision (5) provides the principal with a simple means to ensure that someone has the ability to review the attorney-in-fact's acts without incurring the effort and expense of a court proceeding. The attorney-in-fact must provide a copy of the record, upon request, to the person designated by the principal. *See* section 5-1505(3)(a)(3). The attorney-in-fact is entitled to compensation for reasonable expenses incurred in making the record available. *See* section 5-1506(b).

X. Acceptance of Powers of Attorney

To encourage routine acceptance of statutory short form powers of attorney, the following amendments to section 5-1504 have been made:

A. Refusal to Honor Power of Attorney for Reasonable Cause

The amendments to this section 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." Subdivision (1) defines reasonable cause to include specific circumstances where the power of attorney is invalid or where the attorney-in-fact's motives or exercise of authority are suspect. One such circumstance is where the third party has made a good faith report to Adult Protective Services of suspected abuse of the principal, or where the third party has actual knowledge that someone else has made such a report. The circumstances listed are not exclusive.

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.

Likewise, refusal to honor a power of attorney because there has been a lapse of time between the dates of the principal's and attorney-in-fact's signatures or because there has been a lapse of time between the dates of the signatures of attorneys-in-fact designated to act separately do not amount to reasonable cause.

D. Actual Notice of Revocation and Financial Institutions

Subdivision (3) 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, 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.

In addition, subdivision (3) provides that actual notice for a financial institution occurs when written notice of the event causing revocation is received at the office where the account is located, or three days after written notice is received at another branch or office of the financial institution.

To improve the effectiveness of an attempted revocation, this revision gives a financial institution a reasonable amount of time to act on a revocation sent to an office other than the one where the account is located. In addition, to assist all third parties in recognizing a revocation, this revision creates a revocation form for the principal to use. *See* section 5-1509(6).

E. Consequences of Refusal to Honor a Power of Attorney

Several of the provisions of this section, coupled 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 attorney-in-fact 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 attorney-in-fact'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. (*See* section 5-1507.) Thus, even where an attorney-in-fact falsely attests to the validity of a power of attorney, the third party who relies on the signature of the attorney-in-fact will escape liability unless the third party had actual notice that the power of attorney was no longer valid.

Those who refuse to honor a power of attorney without reasonable cause can be compelled to honor a power of attorney via a special proceeding described in section 5-1508. The petitioner in such a proceeding may be entitled to attorney's fees upon a court's determination that the refusal to honor was made without reasonable cause. Section 5-1504 further provides that a civil proceeding pursuant to new section 5-1508 shall be the exclusive remedy to compel acceptance of a power of attorney.

XI. Duties of an Attorney-in-Fact

Because prior versions of the general obligations law did not prescribe the duties of the attorney-in-fact, prosecutors had to rely on common-law principles of fiduciary duty. The general obligations law now expressly prescribes the duties and liabilities of the attorney-in-fact under a power of attorney. This approach is consistent with those used in the estates, powers and trust law (EPTL) and the surrogate's court procedure act (SCPA), which specifically address the duties and obligations of other types of fiduciaries. *See, e.g.*, EPTL sections 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 SCPA sections 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).

A. The Attorney-in-Fact's Duty to Act

Pursuant to section 5-1503, the principal may require the attorney-in-fact to exercise the powers granted in the power of attorney. To be enforceable, the attorney-in-fact must sign and acknowledge his or her acceptance of this obligation. *See* comments to section 5-1503 (modifications to statutory short forms). Amended section 5-1505 provides that where an attorney-in-fact has agreed to exercise designated powers on behalf of the principal, but is no longer able or willing to fulfill this obligation, and the principal is incapacitated, the attorney-in-fact has two choices. The attorney-in-fact can notify the successor attorney-in-fact that he or she intends to resign and secure the successor attorney-in-fact's signature on the power of attorney. The attorney-in-fact's resignation is effective upon the successor attorney-in-fact's signing of the power of attorney. In the alternative, the attorney-in-fact can seek court approval of his or her resignation by commencing a special proceeding pursuant to section 5-1508. If there is no successor attorney-in-fact who is willing and able to act, the attorney-in-fact must seek court approval of his or her resignation. The requirement of court approval in this instance is intended to safeguard a principal who had taken steps to ensure that his or her affairs will be attended to upon incapacity.

Pursuant to subdivision (3)(a)(4), an attorney-in-fact who is not under a duty to act has a fiduciary duty to notify the successor attorney-in-fact that he or she intends to resign.

B. Standard of Care

Subdivision (2) sets forth the standard of care imposed on other fiduciaries, i.e., the standard that would be observed by a prudent person dealing with the property of another. An express standard of care is included to guide the attorney-in-fact in the exercise of his or her duties.

C. Inclusion of a Clear Statement of Fiduciary Duties

Subdivision (3) codifies the common law duties of an attorney-in-fact. The Third Department recently summarized the duties to act in the best interest of the principal and to keep the principal's property separate from the property of the attorney-in-fact 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' (*Moglia v. Moglia*, 144 AD2d 347, 348). 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 (*see Semmler v. Naples*, 166 AD2d 751, 752, appeal dismissed 77 N.Y.2d 936). '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' (*id.*). 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 (*see id.*)." *Mantella v.Mantella*, 268 AD2d 852 (2000).

The obligation to keep records and provide them upon demand to specific individuals likewise stems from common law. 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."(2A NY Jur 2d Agents & Indep. Contractors section 239). However, to codify the common law obligation as a formal accounting would unduly impede the use of powers of attorney. To strike a balance, this section requires the attorney-in-fact to maintain a record of receipts, disbursements, and transactions, and to make that documentation available at all times to the principal or the person designated by the principal to request and receive the record. The attorney-in-fact has 15 days to respond to a request for the record by other individuals, including 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, the guardian or conservator of the principal's estate, or the personal representative of the estate of a deceased principal.

An attorney-in-fact who is unwilling or unable to act must provide written notice to the successor attorneys-in-fact in the order of their appointment. Under a nondurable general power of attorney, the attorney-in-fact who is unwilling or unable to act must also provide written notice to the principal.

D. Consequences for Breach and Wrongful Procurement

Subdivision (4) provides that the attorney-in-fact may be subject to civil liability and criminal prosecution where an attorney-in-fact violates an enumerated duty, or where the attorney-in-fact acted wrongfully (e.g., fraudulently or coercively) in procuring a power of attorney or any power authorized in the power of attorney.

E. Limits on the Liability of Attorney-in-Fact

Subdivision (4)(b) establishes that the attorney-in-fact is not liable to third persons where the attorney-in-fact's action is authorized under a valid power of attorney and is consistent with the prescribed fiduciary duties and obligations set forth in this section.

F. Personal Jurisdiction

Subdivision (5) provides that a New York court has personal jurisdiction over an attorney-in-fact who, pursuant to the power of attorney, acts in this state or acts elsewhere on behalf of a principal residing in New York, or whose actions involve property located in this state. This rule is consistent with analogous fiduciary rules.

XII. Compensation

Prior law had no provision for compensation of an attorney-in-fact unless he or she was acting with respect to the administration of an estate. *See* surrogate's court procedure act section 2112. In all other matters, there was 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 attorney-in-fact who is unrelated to the principal, where the two parties are related, "it is presumed that the services of the attorney-in-fact to a principal were rendered in consideration of love and affection, without expectation of payment." *Mantella v. Mantella*, 268 AD2d 852 (3d Dept. 2000).

"Normally, while the principal is not disabled, such service will be infrequent and will not involve substantial time. However, with the prospect that if the principal becomes disabled or incapacitated, substantial time, effort, and expense may be required of the attorney-in-fact and any successor attorneys-in-fact extending over a long period of time, compensation may be important." *See* California Law Revision Commission, Statutory Comment, Cal. Prob. Code § 4204 (West 1994).

Other states permit compensation and reimbursement to varying degrees. Arkansas and California provide that an attorney-in-fact is *entitled* to reasonable compensation. Indiana, Missouri, New Jersey, Pennsylvania and Vermont permit the principal to limit compensation to which the attorney-in-fact is otherwise entitled. In contrast, Arizona does not permit compensation of an attorney-in-fact unless the terms of compensation are detailed in the power of attorney. Similarly, Colorado, Georgia, and Illinois 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 adopted here is a hybrid of several of these initiatives. It provides that an attorney-in-fact is not entitled to compensation unless the principal specifically authorizes it. Accordingly, the statutory short forms allow the principal to list each attorney-in-fact who will be entitled to receive compensation. This approach allows the principal to designate all, some, or none of the designated attorneys-in-fact to receive compensation.

New section 5-1508 authorizes certain persons, including an attorney-in-fact, to commence a special proceeding to determine if an attorney-in-fact is entitled to compensation, and whether compensation paid to an attorney-in-fact is reasonable.

Finally, section 5-1506 provides that the attorney-in-fact is entitled to reimbursement for reasonable expenses actually incurred in connection with his or her duties as attorney-in-fact. This approach is consistent with general agency rules and statutory rules governing trustees and fiduciaries. *See, e.g.*, *James T. Kelly Jr., P.E., P.C. v. Schroeter*, 209 A.D.2d 737 (3d Dept. 1994), estates, powers and trusts law section 7-2.3(2); and surrogate's court procedure act section 2307.

XIII. Signatures

A. Signature of Attorney-in-Fact as Attestation of Validity

The lack of statutory guidance as to how the attorney-in-fact must sign a document where he or she is acting on behalf of the principal gave rise to problems in determining which transactions were the

attorney-in-fact's, and which were the principal's.

Section 5-1507 prescribes the manner in which the attorney-in-fact must sign whenever he or she is acting on behalf of the principal under the authority of the power of attorney. Specifically, the attorney-in-fact must write the principal's name and sign his or her own name as attorney-in-fact for the principal. This approach is consistent with New York agency law. *See* 2A NY Jur 2d Agency and Independent Contractors § 198.

In addition, the section provides that such a signature constitutes an attestation by the attorney-in-fact that he or she is acting under the authority and within the scope of a valid power of attorney. This follows the approach adopted in Minnesota. *See* Minn. Stat. Ann. § 523.18 (West 2002).

This new provision will facilitate the identification of relevant transactions when there are allegations of abuse of a power of attorney.

XIV. Civil Proceedings

Under prior law, legal challenge of any aspect of a power of attorney or any act by an attorney-in-fact had to be brought by plenary action based on common-law principles. New section 1508 authorizes a special proceeding pursuant to CPLR article four for the following purposes: (1) compelling the attorney-in-fact to make records of transactions available; (2) determining the validity of the power of attorney, (3) determining whether the principal had capacity when the power of attorney was executed; (4) determining if the power of attorney was wrongfully procured; (5) determining compensation issues; (6) approving the resignation of the attorney-in-fact; (7) compelling a third person or financial institution to honor a power of attorney, and (8) removing the attorney-in-fact.

It is assumed that the majority of petitions under this section will be brought because the principal's finances are in actual or potential jeopardy. The speed and ease of special proceedings make them the appropriate procedural choice for such petitions. Use of special proceedings in this context is consistent with their use in other circumstances, such as in matters relating to health care proxies (*see* public health law section 2992) and express trusts (*see* civil practice law and rules section 7701). Petitions brought under this section are limited to the jurisdiction of the supreme court.

A. Petition to Compel the Attorney-in-Fact to Make Records Available

With the exception of mental hygiene law section 81.44, prior New York law did not have a statutory requirement that an attorney-in-fact provide a record of transactions undertaken under the authority of a power of attorney. MHL section 81.44 permits a guardian to petition the court to order an attorney-in-fact to render an accounting. To force an attorney-in-fact to account, it was necessary to commence an article 81 proceeding and then for the court to issue a finding of incapacity.

Subdivision (1) permits certain persons and government agencies to petition to compel an attorney-in-

fact 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. (*See* section 5-1505(3)(a)(3) requiring the attorney-in-fact to provide a record of transactions upon or within 15 days of written request.) This approach is modeled 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. *See Matter of Guardianship of Kent*, 188 Misc. 2d 509 (Sup. Ct. Dutchess Co., 2001).

However, permitting unrestricted access to an incapacitated principal's affairs is inconsistent with public policy. Thus, to minimize frivolous fishing expeditions, this section authorizes only specific persons to request and receive the record or to compel production of the record.

The attorney-in-fact is entitled to reimbursement for reasonable expenses incurred in making the record available. *See* section 5-1506(b).

B. Determining Whether a Power of Attorney is Valid

Sections 5-1501A, 5-1501B, and 5-1501C provide that, to be valid, every power of attorney must contain certain language and notices, and section 5-1503 provides the lawful modifications that may be made to a statutory short form power of attorney. Subdivision 5-1508(2)(a) permits various persons to seek a determination from a court as to whether a power of attorney meets these and other requirements.

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

Pursuant to the definition set forth in 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. Subdivision 5-1508(2)(b) 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.

D. Determining Whether the Power of Attorney was Wrongfully Procured

Under section 5-1505(4)(a)(2), an attorney-in-fact may subject to civil liability and criminal prosecution if he or she wrongfully procures a power of attorney, for example, by misrepresenting the nature of the document he or she is signing, or by threatening the principal with physical abuse or nursing home placement. Section 5-1508(2)(c) provides the civil mechanism whereby a court may revoke the power of attorney or revoke the authority of the attorney-in-fact where the power of attorney has been wrongfully procured.

E. Burden of Proof

Where there are allegations of the principal's incapacity at the time of execution, wrongful procurement

of the power of attorney, or violation by the attorney-in-fact of his or her fiduciary duties, this section places the burden of proof on the attorney-in-fact if it has been shown that the principal was a vulnerable adult at the time in question. Ordinarily, the party challenging the capacity of a party to a contract has the burden of proof. *See, e.g., Matter of Estate of Obermeier*, 150 AD2d 863 (3d Dept. 1989). However, courts have shifted the burden of proof to the party asserting capacity in proceedings alleging fraudulent procurement or fiduciary misconduct where there is a fiduciary or confidential relationship. *See Matter of Greiff v. Greiff*, 92 NY2d 341 (1998); *Matter of Gordon v. Bialystoker Center & Bikur Cholim*, 45 NY2d 692 (1978); *Ten Eyck v. Whitebeck*, 156 NY 341 (1898); *Sepulveda v. Aviles*, 762 N.Y.S.2d 358 (1st Dept. 2003). In *Greiff*, the Court of Appeals stated, "[t]his court has held, in analogous contractual contexts, that where the parties to an agreement find or place themselves in a relationship of trust and confidence at the time of execution, a special burden may be shifted to the party in whom the trust is reposed . . . to disprove fraud or overreaching." This rule was recently applied to invalidate certain beneficial transfers made by an attorney-in-fact under a power of attorney executed by "an elderly person, in declining health" for whose care the attorney-in-fact "had assumed complete responsibility." *Hill v. Bolden*, 191 Misc2d 354, 361 (Sup. Ct., Putnam County 2002).

F. Removal of Attorney-in-Fact

This provision permits a petition to remove the attorney-in-fact for breach of the fiduciary duties set forth in section 5-1505, including those instances where the attorney-in-fact is subject to an express agreement in the power of attorney to act in certain transactions or types of transactions, but refuses to act.

G. Compensation

Section 5-1506 permits the principal to determine whether the attorney-in-fact is entitled to compensation. Subsection 5-1508(2)(e) permits the attorney-in-fact or others to petition the court to determine if an attorney-in-fact is entitled to compensation or, if compensation has been made, whether such compensation is reasonable.

H. Order Approving Resignation of Attorney-in-Fact

Subdivision (2)(e) provides the procedure by which an attorney-in-fact may resign as attorney-in-fact once the principal has become incapacitated and is thus unable to appoint a successor attorney-in-fact. Sections 5-1503 and 5-1505 now permit the principal to require the attorney-in-fact to exercise the powers authorized in the power of attorney in specific situations. An attorney-in-fact subject to this duty must seek court approval of his or her resignation to terminate liability as attorney-in-fact, if there is no successor attorney-in-fact willing and able to assume responsibility. This approach also provides notice to the court that an incapacitated principal may be in need of a guardian or some other intervention.

I. Compelling Third Parties to Honor a Power of Attorney

Pursuant to the amendments to section 5-1504, a third party must accept a valid power of attorney unless reasonable cause exists to refuse. This paragraph permits the petitioner to enforce the provisions of section 5-1504.

J. Award of Attorney's Fees

The court has the discretion to award reasonable attorney's fees to the petitioner if the attorney-in-fact has violated his or her fiduciary duty or unjustifiably failed to produce a record of transactions upon request, or to the attorney-in-fact if it determines the proceeding was commenced without reasonable cause.

The authority to award attorney's fees is consistent with the approach taken in other New York statutes and common law. For example, mental hygiene law section 81.35 provides that "the court may fix the compensation of any attorney or person prosecuting the motion [to remove a guardian who is guilty of misconduct]. It may compel the guardian to pay personally the costs of the motion if granted." A court may award fees to an estate's fiduciary in a will contest where the contest is found to be frivolous or brought in bad faith. *See* surrogate's court procedure act section 2302(3)*; see also* civil practice law and rules section 8303-a (court may award costs upon frivolous claims and counterclaims in actions to recover damages for personal injury, injury to property or wrongful death); *Entertainment Partners Group v Davis*, 198 AD2d 63 (1st Dept. 1993) (award of attorney's fees in SLAPP suit when suit is brought in bad faith, without a reasonable basis in law or fact and cannot be supported by a good faith argument).

In addition, in proceedings commenced to compel a third party to honor a power of attorney, subdivision (7) permits the court to award attorney's fees to the petitioner if the court determines that the refusal was made without reasonable cause, as expressed in section 5-1504.

XV. Revocation

Prior statutory law provided no specific guidance on how to revoke a power of attorney. Rather, each form of power of attorney stated that "[t]his [nondurable, durable or general - effective at a future time] power of attorney may be revoked by me at any time." *See* prior sections 5-1501(1), 1(a) and 5-1506. The principal had to agree 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. . ." *Id.* Case law, too, provided little guidance. "As a general rule an attorney in fact's authority may be revoked by the principal either expressly or impliedly through words or conduct which are inconsistent with the continuation of authority." *Zaubler v. Picone*, 100 AD2d 620 (2d Dept. 1984), citing Restatement (Second) of Agency, § 119; *see also Edgarton v. Edgarton*, 54 NYS2d 495 (N.Y.Sup.,1944) ("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.") New section 5-1509 provides specific direction for the revocation of powers of attorney by the principal and by operation of law.

A. Revocation by the Principal

Section 5-1509 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) physically destroying all executed originals of the power of attorney and any copy of a power of attorney that has been honored and retained by a third party; or (3) delivering a signed and dated revocation of power of attorney to the attorney-in-fact.

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 attorney-in-fact 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 the power by destroying any copies retained by those parties. The principal can then deliver a written revocation to the attorney-in-fact to complete the revocation.

Option three, delivery of a written revocation to the attorney-in-fact, terminates the authority of the attorney-in-fact to act, even where the attorney-in-fact may contend that the principal lacks the capacity to revoke. If the attorney-in-fact continues to act, the attorney-in-fact may be subject to civil and criminal liability pursuant to the proposed new section authorizing civil proceedings.

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 prior section 5-1504(4), which provided:

> "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" (emphasis supplied).

See also Ferrentino v. Dime Savings Bank, 159 Misc 2d 690 (Sup. Ct. Suffolk Co. 1993). 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. *See* estates, powers and trusts law section 7-1.17.

Finally, the subsection 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. Revocation by Operation of Law

Subdivision (3) directs that a power of attorney is revoked by operation of law in three circumstances: pursuant to court order, upon the death of the principal, and, for a nondurable power of attorney, upon the incapacity of the principal.

Revocation by court order is consistent with both the mental hygiene law and new section 5-1508. 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, new section 5-1508 authorizes a court to revoke a power of attorney where it determines that the power of attorney was wrongfully procured, or where the attorney-in-fact is unfit or the court has approved the resignation of an attorney-in-fact and there is no alternate attorney-in-fact appointed.

Second, a power of attorney is revoked by operation of law upon the death of the principal. However, the attorney-in-fact'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.

Third, a non-durable general power of attorney will be revoked by operation of law when the principal becomes incapacitated.

C. Revocation of Attorney-in-Fact's Authority and Authority to Gift to Former Spouse Upon Divorce from Principal

Subdivision (4) addresses two authorities affected by the divorce of a principal. When the principal names his or her spouse as attorney-in-fact, and is later divorced, the attorney-in-fact's authority is revoked 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, 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 attorney-in-fact or as a permissible recipient of gifting and is subsequently divorced would not want the former spouse to serve as attorney-in-fact or to receive gifts. The estates, powers, and trusts law contains similar provisions. *See, e.g.*, estates, powers and trusts law sections 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). Subdivision (4) applies to the designation of the former spouse as attorney-in-fact, and has no effect on the validity of the power of attorney for any joint or successor attorneys-in-fact. 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 ("making gifts to my spouse, children and more remote descendants, and parents . . ."), where the gifting class is determined at the time of the contemplated gift, rather than at the time of execution of the power of attorney, and gifting where the spouse is included by name in the gifting class.

D. Revocation Form

Subdivision (6) provides a revocation form for the principal to use, if he or she wishes.

XVI. Powers of Attorney Executed in Other Jurisdictions

This section is added to make it clear that powers of attorney validly executed in other jurisdictions

must be accepted as valid for use 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 New York has enacted, e.g., the requirement that the attorney-in-fact 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. *See* section 2990 of the public health law (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 section 3-5.1(c) of the estates, powers and trusts law (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).