RE:

Submitted by: New York State Law Revision Commission

MEMORANDUM IN SUPPORT

TITLE OF BILL: An act to amend the general obligations law in relation to powers of attorney, to provide definitions and general requirements for valid powers of attorney, provide for the duties of the agent, require the agent to sign the power of attorney form, provide procedures for the revocation of the power of attorney, and provide for civil proceedings with respect to powers of attorney.

PURPOSE: This bill fills in several gaps in the general obligations law and clarifies several ambiguities in the statute. It amends the general obligations law to address the impact of HIPAA's Privacy Rule on powers of attorney, the Agent's fiduciary obligations, the Principal's execution of a Power of Attorney that delegates authority to the Agent to make major gifts and other asset transfers, the circumstances under which the Agent is authorized to make gifts to himself or herself, the Principal's ability to revoke the power of attorney and appoint a designee to monitor the Agent's actions, the circumstances under which a third party's refusal to accept the instrument is reasonable, and the procedure for challenging a power of attorney or the acts of the Agent.

SUMMARY OF MAJOR SPECIFIC PROVISIONS: The major changes to the statute recommended by the Commission are as follows:

A. Major Gifts and Other Property Transfers: The bill requires that authority to make major gifts and other asset transfers must be granted through a statutory Major Gifts Rider or in a non-statutory power of attorney, both of which must be signed by the Principal and Agent, their signatures acknowledged and be executed by two witnesses in the same manner as a Will. The creation of a Major Gifts Rider with its the heightened execution requirements 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. Such authority can be granted in a non-statutory power of attorney executed in the same manner as a Will but the statutory Major Gifts Rider is the preferred approach. In either case, the execution requirements alert the Principal to the gravity of granting the Agent this type of authority. An Agent acting pursuant to gifting authority must act in accordance with the instructions of the Principal and in the absence of such instructions, in the Principal's best interests. *See Matter of Ferrara,* 7 N.Y.3d 244, 253-254 (2006).

B. Health Insurance Portability and Accountability Act (HIPAA)'s 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 construction section 5-1502K, so that an Agent can examine, question, and pay medical bills in the event the Principal grants the Agent power with respect to records, reports and statements without fear that the HIPAA Privacy Rule would prevent his or her access to the records. *See* 45 C.F.R. Parts 160, 164.

C. Agent: The bill includes a statutory explanation of the Agent's fiduciary duties, codifying the common law recognition of an agent as a fiduciary. *See, e.g., Mantella v. Mantella*, 268 A.D. 2d 852 (3rd Dep't 2000); *Moglia v. Moglia*, 144 A.D.2d 347, 348 (1988); *Musacchio v. Romagnoli*,

235 N.Y.L.J. 116 (Sup. Ct. Westchester Co. 2006). A Notice to the Agent is added to the statutory short form explaining the Agent's role, the Agent's fiduciary obligations and the legal limitations on the Agent's authority. In order to accept the appointment, the Agent must 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. *See* 2A NY Jur. 2d Agency §198. 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 provision, 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 reflect the transactions the Agent has carried out for the Principal. This accountability of the Agent is consistent with common law requirement that where one assumes to act for another he or she should willingly account for such stewardship. *See, e.g., In re Garson*, 17 A.D.3d 243 (1st Dept. 2005); *Matter of Kent*, 188 Misc. 2d 509, 511 (Sup. Ct. Dutchess Co. 2001).

E. Third Parties: The bill provides that third parties can refuse to accept powers of attorney based on reasonable cause. The basis for a reasonable refusal includes, but is not limited to, the Agent's refusal to provide an original or certified copy of the power of attorney, the third party's questions about the validity of the power of attorney based on 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 actual knowledge of the Principal's incapacity when she executed the document or when acceptance of a nondurable power of attorney is sought on her behalf. When a third party unreasonably refuses to accept a power of attorney, the statute, as does present law, authorizes a the agent to seek a court order compelling acceptance of the power of attorney through a special proceeding. *See generally Mazzuka v. Bank of North America*, 53 Misc. 2d 1053 (NY City Civ. Ct. 1967); *Security Trust Co. of Rochester v. Magar Homes*, 92 AD 2d 714 (4th Dep't 1983). *See also* section 5-1510. The remedy available in such circumstances is limited to injunctive relief. 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 financial institution is deemed to have actual notice of revocation after the financial institution receives written notice at the office where the account is located and has had a reasonable opportunity to take action.

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.

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.

STATEMENT IN SUPPORT:

The New York State Law Revision Commission recommends that title 15 of the general obligations law be amended to clarify certain ambiguous gifting provisions, to address statutory silence about the Agent's fiduciary relationship to the Principal, and to reflect recent developments in related areas of law that impact powers of attorney including the Internal Revenue Code and the HIPAA Privacy Rule.

For the past eight years the Commission engaged in a study of the use of powers of attorney in New York. During that time, the Commission convened a Roundtable Meeting and had numerous meetings with attorneys from trust and estates and elder law practices, members of the Judiciary, prosecutors and adult protective service investigators from around the state, and representatives from various state agencies and the Legislature. By 2004 the Commission had drafted a proposal drawing from New York case law, statutes of other jurisdictions and proposed reforms to the uniform durable power of attorney under consideration by the National Conference of Commissioners of Uniform State Laws. It also considered various studies and surveys, including one national survey that 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 safeguards against abuse by an Agent. Over the last several years, input from various individuals and groups, including representatives from the Trusts & Estates Section and the Elder Law Section of the New York State Bar, the banking community, and the title insurance community, helped the Commission refine its proposal.

Throughout this process, the Commission recognized that the power of attorney is a very useful and popular arrangement. Indeed, the statutory provisions which authorize the creation of a durable power of attorney allowing the Agent to act for an incapacitated Principal, and provisions permitting the Principal to authorize the Agent to make gifts and other transfers of the Principal's property have greatly increased the popularity of the durable power of attorney. Together these provisions allow the Agent to accomplish financial and estate planning on behalf of an incapacitated Principal and allow a Principal to avoid the expense and stigma of guardianship. In the years that have passed since these provisions were added, however, it has become clear that while durable powers of attorney are useful and adaptable to various situations, several areas of the law need attention. Taken as whole, the statute's provisions regarding gift-giving authority and authority to make other property transfers, including self-gifting, are ambiguous and confusing. The existing statutory form makes 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. Additionally, existing statutory language and case law appear to be at odds over what authority can be granted in the statutory

form power of attorney. 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 current statutory obfuscation. The proposed Major Gifts Rider, heightened execution requirements when a Principal grants an Agent authority to make gifts, including self-gifts, and the section construing the gifting provisions address that concern.

The emphasis in all prior amendments to title 15 have focused on the Principal – providing a cautionary statement to educate the Principal about powers of attorney, providing for the Principal's easy execution of the document, and expanding the gifting authority a Principal can give the Agent. Meanwhile, the statute has remained silent about the concomitant responsibilities of an Agent. The statute should be amended to reflect the common law principles that govern an Agent's conduct, and the statutory short form power of attorney should contain a Notice to the Agent outlining those responsibilities so that both the Agent and the Principal are aware of the law's expectations. The Agent's signature on the power of attorney will insure that the Agent has indeed agreed to serve and has acknowledged that she serves in a fiduciary capacity.

The lack of express reference in the statute to an Agent's authority to obtain medical records in order to verify the accuracy of the Principal's bills is exacerbated by HIPAA Privacy Rule, which limits access to an individual's medical and billing records to an individual and the individual's "personal representative." If the Agent does not also hold the Principal's heath care proxy, the Agent is not considered a "personal representative" for HIPAA purposes and thus is prohibited from seeing the Principal's medical records for a legitimate purpose.

If a Principal becomes incapacitated, the Agent acting pursuant to a durable power of attorney can continue to act, a reversal of the result at common law; however, the incapacitated Principal can no longer direct the Agent. While the continuation of the durable power of attorney is valuable for continuing financial management on behalf of an incapacitated Principal, it is sound policy to require that the Agent be held accountable to selected third parties for his or her actions and to permit the Principal to arrange for a third party "monitor" to be able to request the Agent to account for his actions as the Commission proposes.

One of the goals of the original power of attorney legislation in 1948 and the creation of the statutory short form was to encourage financial institutions to accept such documents. The anticipated results did not follow. Neither did they follow when title 15 was amended in 1986 to make it unlawful for a financial institution to refuse to accept a statutory short form power of attorney, because in essence there was no remedy identified in the statute. Moreover, the different types of financial institutions with which an Agent might have to transact business have increased, but the statute does not recognize the expanded universe of such institutions. The Commission's proposal takes into account the diversity of financial institutions and provides a remedy of a summary proceeding for injunctive relief when a financial institution's refusal to accept the power of attorney is unreasonable.

Given an aging population and the concomitant increase in the potential for incapacity, which is likely to make the use of the durable power of attorney even more widespread, New York's law should be updated and refined to allow for the use of a power of attorney that serves both the Principal and Agent well.

FISCAL IMPLICATIONS: None

EFFECTIVE DATE: This act shall take effect on the first day of March next succeeding the date on which it shall have become law.