THE NEW YORK STATE LAW REVISION COMMISSION

REPORT

on

POWERS OF ATTORNEY

January 1, 2012

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I. Introduction

Based on the recommendation of the Law Revision Commission,[1] the Legislature enacted and the Governor signed into law a new statute governing powers of attorney for financial and estate planning which became effective on September 1, 2009.[2] Subsequently, in 2010, technical amendments were made to the new law. As part of those technical amendments, the Commission was directed to submit a preliminary report on the statutory Gifts Rider component of powers of attorney by September 1, 2010 and a final report on all aspects of powers of attorney by January 1, 2012.[3] The Commission's preliminary report was submitted as required.[4] Presented here is the Commission's final report.

II. Background

A power of attorney is a written instrument whereby an individual (the "principal") appoints another person (the "agent") to act on his or her behalf. This relationship is governed by the law of agency.[5] A common law general power of attorney spells out in detail each power given to the agent. In 1948, the Legislature created a statutory short form as an alternative to the typically lengthy common law power of attorney. The statutory short form simply listed an abbreviated statement for each of the powers an agent could be granted. A full description of each power was set out in the statute rather than on the form.[6] Like a common law power of

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[1] The Law Revision Commission was created by Chapter 597 of the Laws of 1934, which enacted Article 4-A of the Legislative Law. Additional background information about the Commission can be viewed at its website: http://www.lawrevision.state.ny.us.

[2] Laws of 2008, c. 644.

[3] Laws of 2010, c. 340.

[4] A copy of the Commission's Preliminary Report is available at the Commission's website, http://www.lawrevision.state.ny.us/poa.php.

[5] *See, e.g., Semmler v. Naples,* 166 A.D. 2d 751, 752 (3rd Dept.1990) ("The relationship between an attorney-in-fact and his principal has been characterized as agent and principal (*see Cymbol v. Cymbol*, 122 A.D. 2d 771, 772; *Matter of De Belardino*, 77 Misc. 2d 253, 256, *aff'd* 47 A.D. 2d 589)"). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency §1.01. *See also* Restatement (Third) of Agency §§3.07 and 3.08; N.Y. Jur. Agency §63.

[6] 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."). This approach was modeled after New York's statutory short form deeds and mortgages. Report of the Law Revision Commission for 1946, 37, Legislative Document No. 65 (1946). *See also* N.Y. Real Prop. Law §258.

attorney, the 1948 statutory short form power of attorney terminated when the principal revoked it, or when the principal died or became incapacitated.

In 1975, the General Obligations Law was amended to create a "durable" power of attorney.[7] This instrument permitted the agent to continue to act when a principal became incapacitated, provided the power of attorney contained language of "durability."[8] Over the past 36 years, the durable power of attorney has been widely used for financial and estate planning for older adults primarily because it obviates the need for a court appointed guardian if the principal becomes mentally incapacitated.

In 1996, further amendments to the General Obligations Law permitted the principal to authorize the agent to make gifts from the principal's property and change beneficiaries of retirement benefit plans.[9] These amendments, coupled with the already existing statutory authority of an agent to create trusts, change beneficiaries to a life insurance policy, and establish joint bank accounts and totten trusts, made it possible to tailor a power of attorney which permitted an agent to alter the principal's estate through gifts of the principal's assets to others or to the agent.[10] Such assets could include securities and tangible personal property (assets that are subject to probate), jointly owned real property and jointly owned bank accounts (assets that pass by operation of law), property held in trust (assets that pass by contract) and proceeds from employee benefit plans and individual retirement accounts, life insurance policies, and annuity contracts (assets that pass by beneficiary designation).

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[7] Laws of 1975, 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.

[8] 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, N.Y. Men. Hyg. L. §§78.1 et seq., as repealed by 1992 Laws of New York, c. 698, or conservator, N.Y. Men. Hyg. L. §§77.1 et seq., as repealed by 1992 Laws of New York, c. 698. These alternatives had their own limitations. A representative payee and a joint bank account are confined to certain assets. Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 5 (2001). The creation of a trust or the involuntary appointment of a third party were viewed as expensive and time consuming. *Id.* Judicial appointments were considered stigmatizing. *See generally,* 1992 New York State Law Revision Commission Report On Conservators and Committees. In 1988, the General Obligations Law again was amended to allow creation of a springing power of attorney, an instrument which did not become effective until the occurrence of an event defined in the document. Laws of 1988, c. 210, as codified at N.Y. Gen. Oblig. Law §5-1602, as amended and renumbered by Laws of 1994, c. 694, as codified at N.Y. Gen. Oblig. Law §5-1506. The springing power of attorney has not proved as useful as originally thought, largely because of questions as to whether the triggering event (such as incapacity) has, in fact, occurred.

[9] Laws of 1996, c. 499. 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 (which could be modified pursuant to section 5-1503 to change the statutory gifting class and amount). The statute was also amended at that time to include powers for tax matters which allowed the agent to prepare, sign and file tax returns on behalf of the principal, and for retirement benefit transactions, which allowed contributions to and withdrawals from retirement plans, change of investments and change of beneficiary designations.

[10] *Id*.

As a result, the breadth of the authority granted under a power of attorney has evolved over the years far beyond those originally envisioned by the 1948 or even the 1975 law. These gift-giving powers can be used to: minimize the principal's income, estate, generation-skipping transfer or gift taxes; make the principal eligible for Medicaid; and continue a principal's past practice of making gifts. They can also be used to permit the agent to self-gift. The agent's gifting and self-gifting powers may deplete a principal's assets and leave him or her with little if any assets or income on which to live.[11]

Notably, the breadth of the agent's authority was not evident on the statutory form and thus there was no reason for the principal to know he or she was granting such expansive gifting authority upon signing the document.[12] Indeed, given the general nature of the authority listed on the form, the principal probably would have been thinking of only more routine matters, such as the withdrawal of funds to pay bills, the need for more insurance or a different type of insurance, and communicating with personnel of a retirement plan. Unless someone explained the consequences, he or she could very well have been unaware that the agent automatically was empowered to alter his or her estate.

The power of attorney under prior law was deceptively simple to create. It could be obtained from any number of websites on the Internet or in a stationery store. The execution requirement – notarization of the principal's signature, disparagingly referred to as a "drive-through" signing by some attorneys – had remained unchanged for 60 years despite the fact that this simple execution, like the provisions of the form itself, did little if anything to convey to the principal that he or she was authorizing the agent to handle his or her money and property in a way that could significantly affect his or her financial well-being.

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[11] *See, e.g., Semmler v. Naples*, 166 A.D. 2d 751 (3rd Dep't 1990)(joint brokerage accounts with right of survivorship); *Mantella v. Mantella*, 268 A.D. 2d 852 (3rd Dep't 2000)(transfer of real property); *Moglia v. Moglia*, 144 A.D. 2d 347 (2d Dep't 1988)(conveyance of real property); *Matter of Francis,* 19 Misc.3d 536 (Surr. Ct., Westchester Co., 2008)(bank accounts, certificates of deposit, life tenancy with right of survivorship in real property); *Seeley v. Wisniewski*, Index No. 2286-03 (Sup. Ct., Suffolk Co., 2006)(real property as joint tenants with right of survivorship, changed the beneficiary on the IRA, cashed checks); *In re Rice*, 8 Misc.3d 1001(A) (Surr. Ct., Nassau Co., 2005)(gifts totaling $483,500, some of which were in excess of amount authorized in the power of attorney, and to persons outside the statutory gifting class); *Matter of Clinton*, 1 Misc.3d 913(A) (Surr. Ct., NY Co., 2004)(totten trust); *Mandala v. Mandala*, Index: 003329/04 (Sup. Ct., Nassau Co., 2004)(beneficiary designation on life insurance policy); *In re Griffin,* 160 Misc. 2d 871 (Surr. Ct., Bronx Co., 1994)(beneficiary designation on retirement benefits); *In re Iannone*, 104 Misc. 2d 5 (Surr. Ct., Monroe Co., 1980)(joint bank account). *See also In re Ferrara*, 7 N.Y. 3d 244, 249, 819 N.Y.S. 2d 215, 217 (2006)(decedent died shortly after nephew had used power of attorney to self-gift approximately $800,000).

[12] The only statement on the form about gifting appeared at section M, the authority to make gifts in an annual amount of $10,000. The terms "(D) banking transactions," "(F) insurance transactions," and "(L) retirement benefit transactions" listed on the statutory form gave no hint that by initialing those terms, the principal was authorizing the agent to open joint bank accounts and totten trust accounts, and change beneficiary designations of insurance and retirement plans. Rather, the authority for those transactions was spelled out in separate statutory construction sections 5-1502D, 5-1502F, and 5-1502L.

Despite the broad authority associated with this important legal tool, monitoring the agent's exercise of authority could be difficult. The agent can act immediately and without notice to the principal, even a principal with capacity.[13] With a durable power of attorney, 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.

Not only was the lack of any oversight troubling, the General Obligations Law, which governs the use of powers of attorney, was 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[14] 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 also could create problems about whether the exercise of such authority was permissible, particularly when an incapacitated principal can no longer clarify his or her intent.

III. The 2009 Power of Attorney Law

A. The Role of the Commission

After a lengthy study begun in 2000 and consultation with diverse groups and individuals,[15] the Commission 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 its easy creation, statutory silence about an agent's responsibilities, and statutory ambiguities about the authority to transfer assets can frustrate the

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[13] 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.

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

[15] Throughout the course of its review, the Commission met with or heard from representatives from the State Office for Aging, the Office of Children and Family Services, the Office for the Prevention of Domestic Violence, the Attorney General's office, county district attorneys, the New York City Department for Aging, local area agencies on aging, hospitals, nursing homes, legal service providers, not-for-profit service providers, the land title insurance industry, the banking industry, attorneys representing various bar associations across the state, including the New York State Bar Association, and social workers and other attorneys in private practice.

proper use of the power of attorney, particularly when a principal is incapacitated and can no longer take steps to ensure its proper use.

B. The Commission's recommendation led to the following changes in the law:

i. Gifts:

Section 5-1514 requires that a grant of authority to make gifts must be set out in a Gifts Rider, which is executed by the principal and signed by two witnesses, one of whom may be a notary public. The Gifts Rider allows the principal to make an informed decision as to whether the agent may make gifts 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. An agent acting pursuant to authority granted in a Gifts Rider must act in accordance with the instructions of the principal, and in the absence of such instructions, in the principal's best interests.[16]

Authority to make gifts can also be created using a non-statutory form power of attorney which is signed by the principal, contains an acknowledgment of the principal's signature and is executed in the same manner as a will.

Section 5-1514 codifies 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, popular tax-advantaged savings accounts for education expenses, are authorized in the Internal Revenue Code at section 529. It also amends former 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. **Agent**:

Section 5-1505 explains the agent's fiduciary duties, codifying the common law recognition of an agent as a fiduciary.[17] A "Notice to the Agent" is added to the statutory short form power of attorney set out in section 5-1513 explaining the agent's role, the agent's fiduciary obligations and the legal limitations on the agent's authority. If the agent intends to accept the appointment, pursuant to section 5-1501B, the agent must sign the power of attorney as an acknowledgment of the agent's fiduciary obligations.

Pursuant to section 5-1507, in transactions on behalf of the principal, the agent's legal relationship to the principal must be disclosed where a handwritten signature is required. Also pursuant to section 5-1507, in all transactions (including electronic transactions) where the agent

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[16] *See Matter of Ferrara,* 7 N.Y.3d 244, 819 N.Y.S. 2d 215 (2006).

[17] *See, e.g., Mantella v. Mantella*, 268 A.D. 2d 852 (3rd Dep't 2000); *Moglia v. Moglia*, 144 A.D. 2d 347, 348 (2nd Dep't 1988); *Musacchio v. Romagnoli*, 235 N.Y.L.J. 116 (Sup. Ct. Westchester Co., 2006).

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 principal may provide in the power of attorney that the agent receive reasonable compensation if the principal so desires, in accordance with section 5-1506. Without this designation, the agent is not entitled to compensation.

iii. Principal:

Section 5-1501B expands the "Caution to the Principal" so that the principal will be better informed about the serious nature of the document.

Section 5-1509 authorizes 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. This accountability of the agent is consistent with the common law requirement that where one assumes to act for another, he or she should willingly account for such stewardship.[18]

Section 5-1511 explains how the power of attorney can be revoked.

iv. Third Parties:

The definition of "financial institution" subject to the provisions of the General Obligations Law, now includes securities brokers, securities dealers, securities firms, and insurance companies at section 5-1501. Section 5-1504 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.

Section 5-1504 also provides that third parties have the ability to refuse to accept powers of attorney based on reasonable cause. The basis for a reasonable refusal includes the agent's refusal to provide an original or certified copy of the power of attorney, and 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 his or her behalf.

When a third party unreasonably refuses to accept a power of attorney, section 5-1510 authorizes the agent to seek a court order compelling acceptance of the power of attorney.[19]

Section 5-1504 provides that a 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

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[18] *See, e.g., In re Garson*, 17 A.D. 3d 243 (1st Dep't 2005); *Matter of Kent*, 188 Misc. 2d 509, 511 (Sup. Ct. Dutchess Co., 2001). *See also* 2A NY Jur 2d Agents & Indep. Contractors §239.

[19] *See Security Trust Co. of Rochester v. Magar Homes*, 92 A.D. 2d 714 (4th Dep't 1983); *Mazzuka v. Bank of North America*, 53 Misc. 2d 1053 (N.Y. City Civ. Ct., 1967). *See also* N.Y. Gen. Oblig. Law §5-1510.

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.

v. HIPAA Privacy Rule:

Section 5-1502K, the construction section for "records, reports and statements," now includes the term "health care billing and payment matters" 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, without fear that the HIPAA Privacy Rule would prevent his or her access to the records.[20]

C. The 2010 Technical Amendments

After the enactment of the 2009 statute, the Commission, the sponsors of the bill, and numerous interested parties, including attorneys who practice in the field, developed a technical amendments bill that passed both houses of the Legislature and was signed by the Governor on August 13, 2010 as Chapter 340. This legislation clarified, among other things, that:

- certain powers of attorney used for business and commercial purposes are excluded from the statute, section 5-1501C;
- the Gifts Rider is unnecessary to authorize transactions that are not gifts, e.g., regular sales of real property, section 5-1501;
- executing a new power of attorney does not automatically revoke a prior power of attorney unless the principal expressly revokes it, section 5-1511; and
- a notary who takes the acknowledgment of the signature on the power of attorney can also act as a witness to a Gifts Rider or non-statutory power of attorney with gifting authority, section 5-1514.

As noted earlier, Chapter 340 also directed the Commission to study the Gifts Rider and the implementation of the 2009 and 2010 amendments in their entirety.

IV. 2010-2011 Study

In the course of studying the implementation of the statute, the Commission spoke or met with, or heard from, attorneys, social services providers, and other individuals and organizations concerned about powers of attorney, including many of the same groups and individuals consulted prior to the statute's enactment. We surveyed legal service providers and area agencies on aging about their experience with the new law and the desirability of educating the public and service providers about the new law. We spoke with the chair of the State Bar's working group on powers of attorney. We monitored the listservs of the Elder Law and Trust and Estates Sections of the New York State Bar Association. Finally, as we were preparing this Final

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[20] *See* 45 C.F.R. Parts 160, 164.

Report, we wrote to the President of the State Bar to inquire if the association had any additional comments that reflected the bar's experience with the statute during the past year.[21] In his response, the President noted that notwithstanding the improvements to the statute achieved by the 2010 technical amendments, the association, as a result of its studies, still favors repeal of the Gifts Rider because the Gifts Rider makes execution of a power of attorney more complex, confusing, and expensive.

A. Gifts Rider

The goal of the 2009 statute – to better inform individuals about the power of attorney and the gifting authority of the agent – seems to be universally acknowledged as laudable.[22]

The Gifts Rider was central to that goal. The Honorable C. Raymond Radigan explains the role of the Gifts Rider in his article, *Making Gifts and Property Transfers under New Power of Attorney Law*, 3/9/2009 N.Y.L.J. 3 (col. 1)(co-author David R. Schoenhaar):

> To understand the amendments affecting gifts . . . it is helpful to first review the issues sought to be remedied. The commission's study concluded that the following deficiencies existed: (1) the statutory form was ambiguous and did not capture the principal's informed decision-making with respect to gifts . . . , (2) case law and the POA statute were inconsistent with respect to the type of authority required to allow the agent to make certain [gratuitous] property transfers, and most notably, (3) the procedure for granting authority to make substantial gifts or transfer property was not commensurate with such an important delegation and thus, was subject to inadvertent actions by the principal. Given the gravity of the issues, the commission deemed it appropriate to completely restructure the procedures for granting authority to make substantial gifts . . . .

The concept of a Gifts Rider as a way to emphasize the significance of an agent's gifting authority was developed through collaborative discussions throughout 2004, 2005 and 2006 with the leadership of the Trusts and Estates and Elder Law sections of the New York State Bar Association, representatives of the American Bar Association and the Association of the Bar of the City of New York, and other attorneys. On October 6, 2006, the Commission hosted a roundtable meeting at Brooklyn Law School on the proposed Gifts Rider, among other topics. Further refinements to the Gifts Rider occurred during the drafting process, and the Commission's Recommendation was adopted by the Legislature and signed by the Governor as Chapter 644, on January 27, 2009.

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[21] The State Bar working group's survey and report, which we were told would be ready at some time after September 1, 2010, have not yet been made available to us.

[22] *See, e.g.,* Stephen C. F. Diamond, *With a Name Like SmuGeR It Has to be Good*, 42 NYSBA Trusts and Estates Law Section Newsletter 4 (Winter 2009).

i. Highlighting an Agent's Gifting Authority

Section 5-1514 provides that the principal using a statutory short form power of attorney must use the statutory Gifts Rider to authorize the agent to:

- make gifts up to a specified dollar amount, or unlimited in amount, and to any person or persons;[23]
- open, modify or terminate a deposit account in the name of the principal and other joint tenants;
- open, modify or terminate any other joint account in the name of the principal and other joint tenants;
- open, modify or terminate a bank account in trust form and designate or change the beneficiary or beneficiaries of such account;
- open, modify or terminate a transfer on death account and designate or change the beneficiary or beneficiaries of such account;
- change the beneficiary or beneficiaries of any contract of insurance on the life of the principal or annuity contract for the benefit of the principal;
- procure new, different or additional contracts of insurance on the life of the principal or annuity contracts for the benefit of the principal and designate the beneficiary or beneficiaries of any such contract;
- designate or change the beneficiary or beneficiaries of any type of retirement benefit or plan;
- create, amend, revoke, or terminate an inter vivos trust;[24] and
- create, change or terminate other property interests or rights of survivorship, and designate or change the beneficiary or beneficiaries therein.

Consolidating this expansive list of an agent's potential gifting authority provisions reduces, if not eliminates altogether, the ambiguity and confusion about the gifting authority inherent in the prior law and the prior statutory form.[25] It also highlights the importance of

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[23] A gift or other transfer to an individual authorized by this subdivision may be made outright, to a trust established or created for such individual, to a Uniform Transfers to Minors Act account for such individual (regardless of who is the custodian), or to a tuition savings account or prepaid tuition plan as defined under section 529 of the Internal Revenue Code for the benefit of such individual (without regard to who is the account owner or responsible individual for such account). *See* N.Y. Gen. Oblig. Law § 5-1514(3).

[24] The trust powers, like the others moved to section 5-1514, may allow the agent to make significant changes to the principal's estate plan. Whether alone or coordinated with gifting and analogous powers, a trust can be an important vehicle for asset protection, tax planning, or planning for the long term benefit of family, among other goals.

[25] The former statutory form did nothing to direct a layperson's attention to gifting powers. As explained above, the numerous default gifting provisions were mostly contained in the separate construction sections. Custom-drafted powers, including any additional or tailored gifting powers, typically began somewhere in the middle of the second page of a three page form, below the list of statutory powers (A) through (P). If the drafter had organized the execution so that the principal needed to initial only an omnibus list of powers at (Q) (between the statutory and custom-drafted powers), the custom powers might not stand out, as they did not have to be initialed separately.

bringing this information to the principal's attention, permits the principal to give informed consent to any gifting authority, and advises the agent and third parties of the agent's authority.

As the comment to a similar gifting provision in the Uniform Power of Attorney Act (UPOAA) notes,

> [t]he rationale for requiring a grant of specific authority to perform [these acts] is the risk those acts pose to the principal's property and estate plan. Although risky, such authority may nevertheless be necessary to effectuate the principal's property management and estate planning objectives. Ideally, these are matters about which the principal will seek advice before granting authority to an agent.[26]

Notably, this is not the first time that the statute governing powers of attorney has been amended to call the principal's attention to the significance of his or her decisions. A 1994 amendment that required the principal to initial each power granted to the agent was intended to assure the principal's participation in the choice of powers rather than, as the Memorandum of the Assembly Rules Committee noted, "passive acceptance of what was on the form."[27]

Spotlighting an important decision through the use of a separate document is similar to the New York requirement for attorney-executors. Under the Surrogate's Court Procedure Act, an attorney who is also designated as executor under a will must disclose to the testator in a separate document the commissions to which the attorney-executor is entitled.[28] That document must be signed by the testator and one witness. Requiring the testator to sign a second document is designed to educate the testator about the additional fees from the estate to which the attorney would be entitled.

Focusing the principal's attention on an agent's authority to self-gift is similar to what New York already requires for self-gifting by trustees. Before 2003, the law prohibited a settlor from creating any self-gifting provisions for the trustee, for fear that doing so would create a "general power of appointment," which would lead to the trust property being included in the estate of the trustee. Section 10-10.1 of the Estates, Powers and Trusts Law permits a trust to authorize a trustee to make gifts to himself or herself, provided the gifts are for the trustee's health, education, maintenance or support (collectively known as an "ascertainable standard" under the Internal Revenue Code). The settlor can override the ascertainable standard only by express reference to the language of section 10-10.1.[29]

Requiring express authorization for specific gifts reflects a national trend "among states to require express specific authority for such actions as making a gift, creating or revoking a trust, and using other non-probate estate planning devices such as survivorship interests and

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[26] UPOAA §201(a), Comment, available at http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2006final.htm#TOC1_36.

[27] 1994 Memorandum of the Assembly Rules Committee, c. 694 of the Laws of 1994.

[28] N.Y. Surr. Ct. Proc. Act § 2307-a, as amended by the Laws of 2003, c. 633.

[29] Laws of 2004, c. 82.

beneficiary designations."[30] This specificity is required by section 201 and the model form of the UPOAA, adopted in 2006 by the National Conference of Commissioners on Uniform State Laws. The catalyst for this approach came from the results of a national survey conducted by the joint Editorial Board for Uniform Trust and Estate Acts.[31] The survey results "demonstrated a consensus of opinion in excess of seventy percent that a power of attorney statute should [among other things] require gift making authority to be expressly stated in the grant of authority . . . ."[32]

Alabama,[33] Arkansas,[34] and Virginia[35] are among the most recent states to adopt the UPOAA approach.[36] Maryland's 2010 statute[37] significantly expands on the UPOAA approach, "contain[ing] provisions unique to Maryland law,"[38] and adopts two long form statutory powers of attorney: an 8-page "personal financial power of attorney" without gifting authority, and which cannot be modified,[39] and a 19-page "limited power of attorney" with optional gifting authority, which can be modified.[40] Florida's 2011 statute,[41] likewise influenced by the UPOAA approach, and which does not include a statutory form, requires the principal's signature or initials next to

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[30] Uniform Power of Attorney Act §201(a), Comment (citations omitted), available at http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2006final.htm#TOC1_36.

[31] UPOAA, Prefatory Note, available at http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2008_final.htm.

[32] *Id*.

[33] 2011 Ala. Acts 683, eff. January 1, 2012.

[34] 2011 Ark. Acts 805, eff. January 1, 2012.

[35] 2010 Va. Acts chs. 455 and 632.

[36] The UPOAA has also been adopted by Colorado (Colo. Rev. Stat. 15-14-701), Delaware (2010 Del. ALS 467), Idaho (Idaho Code § 15-12-101), Maine (18-A Me. Rev. Stat. § 5-901), Nevada (Nev. Rev. Stat. Ann. § 162A.200), New Mexico (N.M. Stat. Ann. § 45-5B-101), Wisconsin (Wis. Stat. § 244.01), and the US Virgin Islands (15 V.I.C. §1-201).

[37] 2010 Md. Laws chs. 689 and 690, eff. October 1, 2010.

[38] Yale M. Ginsburg and Robert M. Horne, *2010 Maryland General and Limited Power of Attorney Act*, Md. Bar J., Oct. 2010, available at http://www.msba.org/departments/commpubl/publications/bar_bult/2010/october/et_2010.asp.

[39] Md. Code Ann. Est. & Trusts §17-202.

[40] Md. Code Ann. Est. & Trusts §17-203.

[41] 2011 Fla. Laws ch. 210, effective October 1, 2011.

each specific enumeration of gifting authority.[42] Maryland's new law also requires two witnesses for each of the two statutory forms,[43] as does Florida's, for its non-statutory power of attorney.[44]

New Jersey's Law Revision Commission recently issued a report on proposed amendments to the state's power of attorney law.[45] It recommended that if the principal intends to authorize the agent to make gifts, gratuitous transfers, and self-gifts, that the power of attorney expressly list those gifting powers.[46] The New Jersey proposal incorporated elements of New York's 2009 law as well as the UPOAA.[47]

Critics of the Gifts Rider claim that it is not user-friendly, urging instead the adoption of the model form of the UPOAA (section 301) which specifically lists all the potential gifts that an agent might be authorized to make. Indeed, at one time during the development of the Gifts Rider, it was suggested that all the powers listed under 5-1514 appear on the face of the Gifts Rider, as is the case with the UPOAA. This suggestion was not adopted because it raised concerns on the one hand, that such a list would not be helpful to a principal who would be unlikely to understand the meaning and scope of such authority without legal advice, and on the other hand, that a detailed list of gifting powers on the Gifts Rider would be a road map for larceny by an agent intent on exploiting a principal. It was thought that the best course was for a principal to have the assistance of an attorney when contemplating gifting authority.

B. The Formalities of Execution

The heightened execution requirements of the Gifts Rider, or a non-statutory power of attorney granting gifting authority, is designed to draw the principal's attention to the importance of the document and its potential effect on his or her estate.

This level of formality is consistent with similar requirements under New York law for wills, trusts and health care proxies. Thus, section 3-2.1 of the Estates, Powers and Trusts Law requires that a will be signed by the testator in the presence of at least two witnesses. Until 1977, the creation of a trust could be implied from the conduct of the settlor without the formalities

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42 Fla. Stat. § 709.2202(1).

43 Md. Code Ann. Est. & Trusts §§17-202 and 17-203.

44 Fla. Stat. § 709.2106(2).

45 New Jersey Law Revision Commission, Final Report Relating to General Durable Power of Attorney Act (May 13, 2010) (NJLRC Final Report).

46 NJLRC Final Report at 21.

47 NJLRC Final Report at 21, Comment to proposed section 46:2B-20.22. New Jersey does not have a statutory form power of attorney and it did not adopt the concept of a gifts rider. It opted to "permit authority to make gifts and other gratuitous transfers by express and specific provision in the power of attorney itself . . ." *Id.*

associated with a will.[48] Section 7-1.17(a) of the Estates, Powers and Trusts Law changed the execution rules for a trust to be more consistent with those for a will, requiring the signatures of the settlor and the trustee, and either notarization or the signatures of two witnesses. As the Sponsor's Memorandum to section 7-1.17(a) noted, "[s]ome degree of formality helps the parties involved realize the serious nature of the instrument being executed and reduces substantially the potential for foul play."[49] Health care proxies currently require the principal's signature as well as the signatures of two witnesses.[50] A 2010 legislative effort to reduce this number to one was vetoed by the Governor based on concerns that having a single witness increased the potential for forged health care proxies.[51] The veto message concludes that in light of "the relative ease of finding a second person to witness the execution of a health care proxy in most cases," two witnesses should be required because of "the potential for significant and irreparable harm resulting from a person wrongfully exercising control over another's personal health care decisions."[52]

A formal execution requirement for a power of attorney is not unique to New York. Maryland, which also requires two witnesses for each of its two statutory forms, is among the states that have recently adopted heightened execution requirements.[53] Other states that have heightened execution requirements include Wisconsin (two witnesses and a notary),[54] Oklahoma (two witnesses and a notary),[55] Florida (two witnesses),[56] South Carolina (two witnesses),[57] Arizona (one witness and a notary),[58] Delaware (one witness and a notary)[59] and Illinois (one

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48 *See Matter of Marcus*, 2 A.D.3d 640, 769 N.Y.S.2d 56 (2d Dep't 2003).

49 Memorandum in Support, 1997 S.B. 4223.

50 *See* N.Y. Pub. Health Law §2981(5)(d).

51 Veto No. 6788 of 2010.

52 Veto No. 6788 of 2010.

53 Md. Code Ann. Est. & Trusts §§17-202 and 17-203.

54 Wis. Stat. Ann. §§243.07; 243.10(2).

55 Ok. Stat. Ann. §58-1072.2.

56 Fla. Stat. Ann §§709.2106(2); 689.01.

57 S. C. Code Ann. §§62-5-501(c); 62-2-502.

58 Ariz. Stat. Ann. §14-5502.

59 12 Del. Code Ann. § 49A-105.

witness and a notary).[60] Pennsylvania requires two witnesses if the power of attorney is signed by a third party on behalf of the principal.[61]

A formal execution requirement is seen as providing a number of protections. First, it alerts the principal to the significance of the instrument he or she is executing. Second, it "may lessen the chance that a dishonest agent will obtain a durable power of attorney from a vulnerable principal without the knowledge of third persons."[62] Third, it certifies that it is the principal who is executing the document and that he or she is competent and free from undue influence.[63] Finally, it makes the document acceptable in states such as Florida, which have, as noted earlier, a requirement that one or more witnesses attest to the principal's signing of the power of attorney.[64]

Not only were leaders of the State Bar involved in the development of the Gifts Rider, but many of the Bar's members appreciate its usefulness.[65]

The Gifts Rider also enjoys the support of social workers and prosecutors who recognize that the Gifts Rider alerts the principal to proceed cautiously in executing such a document.

New York's statutory Gifts Rider (as it appears on the NYSBA website) is a straightforward 3-page document with three parts relating to gifts that the principal may authorize the agent to make.[66] Many Gifts Riders may be that brief, others quite lengthy – the document's ultimate length will depend on the breadth and complexity of the authority that the principal has chosen for the agent.

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[60] 755 Ill. Comp. Stat. §45/3-3.

[61] 20 Pa.C.S.A. § 5601(b). *See also Powers of Attorney: Proposed Amendments to the Probate, Estates and Fiduciaries Code* 16-17 (Report of the Advisory Committee on Decedents' Estates March 2010), available at http://jsg.legis.state.pa.us/POWERS%20OF%20ATTORNEY%20March%2023%202010.pdf.

[62] Jennifer L. Rhein, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 Elder L.J. 165, 195-96 (2009).

[63] *Id. 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.); Margaret Z. Reed and Jonathan Federman, *Abuse and the Durable Power of Attorney: Options for Reform* 48-49 (Albany Law School Government Law Center 1994).

[64] Howard S. Krooks, *Should They Stay or Should They Go? A Primer for New York Attorneys Advising Their Florida Snowbird Clients,* 83 N.Y. St. B.J. 48 (July/August 2011).

[65] *See, e.g.,* Stephen C. F. Diamond, *With a Name Like SmuGeR It Has to be Good*, 42 NYSBA Trusts and Estates Law Section Newsletter 4 (Winter 2009).

[66] http://www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=53341.

Paragraph (a) allows the principal to authorize gifts by the agent up to the annual federal gift tax exclusion, to a defined class of close relatives. The language in paragraph (a) is virtually identical to that in the former power of attorney form.

Paragraph (b) allows the principal to authorize all other types of gifts by the agent including:

1) gifts in amounts lesser than or in excess of the federal gift tax exclusion,

2) gifts to persons other than the class of beneficiaries covered by the federal gift tax exclusion in paragraph (a), and

3) gifts in forms other than cash.

Paragraph (c) allows the principal to authorize the agent to give gifts to himself or herself.

The Gifts Rider also contains a warning to the principal that authorizing gifts can radically alter the principal's estate. The Gifts Rider must be signed by the principal before two witnesses, one of whom may be the notary who has taken the acknowledgment.

Other than initialing paragraph (a) to authorize gifting in the amount of the federal gift tax exclusion, if the principal intends to authorize further gifting by the agent, such authority must be expressed in the Gifts Rider in language chosen by the principal, hopefully in consultation with his or her attorney. The description of the gifting authority added by the principal to the Gifts Rider may mirror the former default gifting provisions contained within the construction sections, and otherwise is no different than language that could be included in the Modifications provision of the former statutory short form power of attorney. The significant difference is that the gifting authority is not buried among other diverse modifications to a statutory short form power of attorney.

Certain members of the State Bar have repeatedly made claims regarding the confusion, complexity and expense associated with the Gifts Rider. We propose certain technical amendments to the statutory language of the Gifts Rider in this Final Report. We are unpersuaded, however, that the Gifts Rider should be repealed in favor of returning to the former ways of addressing an agent's gifting authority.

C. Technical Amendments to the Statutory Gifts Rider

i. Eliminate confusion about the relationship between paragraph (a) and paragraph (b) of the statutory Gifts Rider.

Paragraph (a) of the statutory Gifts Rider authorizes only federal annual gift tax exclusion gifts (currently $13,000) to a defined class of donees – the principal's spouse, parents, children and more remote descendants. Paragraph (b), which authorizes other gifts, may include authority for the agent to make gifts larger than the gift tax exclusion to the same class as defined in paragraph (a). So, for example, taking advantage of the permissible gifting under paragraph (b), the principal may authorize the agent to make annual gifts of $25,000 to each of the principal's three children.

Confusion has arisen as to whether a principal wishing to authorize an agent to make gifts in excess of the gift tax exclusion amount ($25,000 in the example) to the principal's three children, must execute both paragraphs (a) and (b) or may execute only paragraph (b).

The Commission recommends a clarification to reduce confusion and also recommends elimination of some repetitive language.

5-1514(10)

(a) ~~GRANT OF LIMITED AUTHORITY TO MAKE GIFTS~~ **ANNUAL GIFT TAX EXCLUSION GIFTS**

~~Granting gifting authority to your agent gives your agent the authority to take actions which could significantly reduce your property.~~ **If you wish to grant your agent authority to make gifts in excess of the annual federal gift tax exclusion amount to the class of beneficiaries identified in this section, use section (b) below and not this section.**

If you wish to allow your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.

To grant your agent the gifting authority provided below, initial the bracket to the left of the authority.

( ) I grant authority to my agent to make gifts to my spouse, children and more remote descendants, and parents, not to exceed, for each donee, the annual federal gift tax exclusion amount pursuant to the Internal Revenue Code. For gifts to my children and more remote descendants, and parents, the maximum amount of the gift to each donee shall not exceed twice the gift tax exclusion amount, if my spouse agrees to split gift treatment pursuant to the Internal Revenue Code.

This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(b) ~~MODIFICATIONS~~ **OTHER GIFTS**:

Use this section if you wish to authorize gifts in amounts smaller than the gift tax exclusion amount, in amounts in excess of the gift tax exclusion amount, gifts to other beneficiaries, or other gift transactions.

~~Granting such authority to your agent gives your agent the authority to take actions which could significantly reduce your property and/or change how your property is distributed at your death.~~

If you wish to authorize your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.

( ) I grant the following authority to my agent to make gifts pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest:

(c) GRANT OF SPECIFIC AUTHORITY FOR AN AGENT TO MAKE GIFTS TO HIMSELF OR HERSELF: (OPTIONAL)

If you wish to authorize your agent to make gifts to himself or herself, you must grant that authority in this section, indicating to which agent(s) the authorization is granted, and any limitations and guidelines.

( ) I grant specific authority for the following agent(s) to make the following gifts to himself or herself:
This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

ii. De Minimis Gifts

Some confusion persists about whether the authority to engage in de minimis gifting pursuant to "personal and family maintenance" on the statutory short form power of attorney, 5-1513(1)(f)(I) requires the execution of a statutory Gifts Rider. The intent behind the de minimis provision is to avoid the need for the statutory Gifts Rider to authorize very small gifts.

The Commission recommends the following amendments to sections 5-1502I, 5-1513(I) and 5-1514(I) to avoid the confusion.

Section 5-1502I(14)
. . . to continue gifts that the principal customarily made to individuals and charitable organizations prior to the creation of the agency, provided that in any one calendar year all such gifts shall not exceed five hundred dollars in the aggregate; **de minimis gifting granted pursuant to this subdivision may be exercised without an express grant under section 5-1514.**

Section 5-1513(1)(f)(I)
personal and family maintenance. If you grant your agent this authority, it will allow the agent to make gifts that you customarily have made to individuals, including the agent, and charitable organizations. The total amount of all such gifts in any one calendar year cannot exceed five hundred dollars~~;~~**. If you grant your agent this authority, it may be exercised without executing a statutory gifts rider or an express grant under section 5-1514;**

Section 15-1514(6)(c)
The authority explicitly authorized in this section shall be construed to include any like authority authorized in any other section of this title. Accordingly, such like authorities as are authorized in any other section of this title may not be exercised by the agent unless they are expressly granted to the agent in the statutory gifts rider or in a non-statutory power of attorney executed pursuant to the requirements of paragraph (b) of subdivision nine of this section. **Notwithstanding the foregoing, de minimis gifting granted pursuant to section 5-1513 (1)(f)(I) may be exercised without an express grant under this section.**

D. Amendments to Other Provisions of the Statute

i. Agent's Access to Health Care Records Pursuant to Section 5-1502K.

Section 5-1502K was amended in 2009 to extend an agent's authority over the records and reports relating to the principal to include authority to access records regarding the provision of health care, in order to make decisions relating to payment for health care services. Thus, an agent given authority at "K" would be able to verify the accuracy of billing statements related to the principal's health care. The intent was to remove any ambiguity about whether an agent acting under an existing or future power of attorney can access health care records in connection with the payment of health care bills. The names of the construction section and the corresponding power at (K) in the statutory form were renamed to comport with the authority conveyed by the amended section.

It has been suggested that construction section (K) contains limitations on the agent's authority that frustrate the intent of 5-1402K:[67]

1. By limiting the agent's access to records of health care to which the principal has consented, the current provision does not include access to information regarding emergency health care provided to the principal.

2. The current provision is silent about the agent's authority to determine or obtain any health benefit payments to which the principal may be entitled through insurance coverage, employer health plans or government programs (other construction sections regarding insurance and government programs likewise do not explicitly grant this authority).

3. The current provision is silent about the agent's authority to discuss the principal's health care information with providers in order to determine and pay the principal's health care payment obligations, to determine and obtain the principal's health care benefit entitlements, to represent the principal in any dispute with respect to the principal's health care payment obligations or health care benefit entitlements, and to pay for appropriate care for the principal as determined by the principal or his or her authorized representative.

4. While 5-1502K provides the appropriate federal statutory reference to the Health Insurance Portability and Accountability Act of 1996 (HIPAA),[68] health care providers may nevertheless be deterred from allowing the agent access to health care information because neither 5-1502K nor the statutory short form paragraph (K) expressly references the term "HIPAA" or state law, which in some instances may be more stringent than HIPAA.

It has also been suggested that 5-1501C, which excludes other types of powers of attorney from the coverage of the General Obligations Law, should explicitly exclude HIPAA authorizations.

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[67] *See* Albert Feuer, *Common Sense Suggestions to Reduce Legal Barriers Facing New Yorkers who Wish to Choose an Agent to Help Them in Obtaining and Paying for their Health Care*, 16 NYSBA Health Law J. 41 (Summer/Fall 2011).

[68] HIPAA creates national standards limiting access to an individual's medical and billing records to the individual and the individual's "personal representative."

The Commission finds merit in these suggestions, and thus recommends changes to section 5-1501C, 5-1502K, and the statutory short form power of attorney at section 5-1513.

Section 5-1501C. Powers of attorney excluded from this title

The provisions of this title shall not apply to the following powers of attorney:
11. a power created pursuant to authorization provided by a federal or state statute, other than this title, that specifically contemplates creation of the power, including without limitation a power to make health care decisions, ~~or~~ decisions involving the disposition of remains**, or HIPAA authorizations pursuant to sections 1171 through 1179 of the Social Security Act, as added by sections 262 and 264 of Public Law 104-191, and applicable regulations**.

Section 5-1502K.

Construction – ~~health care billing and payment matters;~~ records, reports and statements**; health information relating to health care payment and benefit matters under HIPAA and state law**
In a statutory short form power of attorney, the language conferring general authority with respect to "~~health care billing and payment matters;~~ records, reports and statements**; health information relating to health care payment and benefit matters under HIPAA and state law**," or in a statutory short form power of attorney properly executed in accordance with the laws in effect at the time of its execution, the language conferring authority with respect to "records, reports and statements," must be construed to mean that the principal authorizes the agent:

1. ~~To access records relating to the provision of health care and to make decisions relating to the past, present or future payment for the provision of health care consented to by or on behalf of the principal or the principal's health care agent authorized under state law. In so doing the agent is acting as the principal's personal representative pursuant to sections 1171 through 1179 of the Social Security Act, as added by sections 262 and 264 of Public Law 104-191, and applicable regulations.~~
To determine and pay the principal's health care payment obligations, to determine and obtain the principal's health care benefit entitlements, to represent the principal in any dispute with respect to the principal's health care payment obligations or health care benefit entitlements, and to obtain appropriate care for the principal as determined by the principal or the person with authority to make such decisions. To access all of the principal's health care information relevant to the representation described in this section. To discuss with the principal's past, present or future health care providers, employers, and health care plans any of the principal's health care information relevant to the authority described in this section.
Notwithstanding any law to the contrary, the agent shall have the right to receive and discuss the principal's health care information relevant to the authority described in this section. In so doing the agent is acting as the principal's personal representative pursuant

to sections 1171 through 1179 of the Social Security Act, as added by sections 262 and 264 of Public Law 104-191, and applicable regulations. This authority shall not include authorization for the agent to make other medical or health care decisions for the principal;

Section 5-1513(f) GRANT OF AUTHORITY:
To grant your agent some or all of the authority below, either
(1) Initial the bracket at each authority you grant, or
(2) Write or type the letters for each authority you grant on the blank line at (P), and initial the bracket at (P). If you initial (P), you do not need to initial the other lines.
I grant authority to my agent(s) with respect to the following subjects as defined in sections 5-1502A through 5-1502N of the New York General Obligations Law:
( ) (A) real estate transactions;
( ) (B) chattel and goods transactions;
( ) (C) bond, share, and commodity transactions;
( ) (D) banking transactions;
( ) (E) business operating transactions;
( ) (F) insurance transactions;
( ) (G) estate transactions;
( ) (H) claims and litigation;
( ) (I) personal and family maintenance. If you grant your agent this authority, it will allow the agent to make gifts that you customarily have made to individuals, including the agent, and charitable organizations. The total amount of all such gifts in any one calendar year cannot exceed five hundred dollars;[69]
( ) (J) benefits from governmental programs or civil or military service;
( ) (K) ~~health care billing and payment matters;~~ records, reports and statements**;**
health information relating to health care payment and benefit matters under HIPAA and state law;
( ) (L) retirement benefit transactions;
( ) (M) tax matters;
( ) (N) all other matters;
( ) (O) full and unqualified authority to my agent(s) to delegate any or all of the foregoing powers to any person or persons whom my agent(s) select;
( ) (P) EACH of the matters identified by the following letters.....
You need not initial the other lines if you initial line (P).

[69] Additional language proposed for this provision is set forth above in the section labeled "De Minimis Gifts."

ii. Permitting a Third Party to Sign the Power of Attorney and Statutory Gifts Rider on Behalf of a Principal.

The General Obligations Law is silent as to whether a third party can sign a power of attorney for a principal who has the requisite mental capacity but is physically unable to sign his or her name. Adding a provision to allow for execution of the power of attorney by a third party under these circumstances is consistent with current law for wills and health care proxies. Section 3-2.1 of the Estates, Powers and Trusts Law permits another individual to sign a will on behalf of the testator, provided the signing takes place in the testator's presence.[70] Section 2981 of the public health law permits another individual to sign a health care proxy on behalf of the principal.[71]

The Commission recommends changes to sections 5-1501B and 5-1514 to allow a third party to sign a power of attorney and a statutory Gifts Rider on the principal's behalf.

Section 5-1501B. Creation of a valid power of attorney; when effective

1. To be valid, except as otherwise provided in section 5-1512 of this title, a statutory short form power of attorney, or a non-statutory power of attorney, executed in this state by a principal, must:
(a) Be typed or printed using letters which are legible or of clear type no less than twelve point in size, or, if in writing, a reasonable equivalent thereof.
(b) Be signed and dated by a principal with capacity, **or in the name of the principal, if the principal is unable to sign, by another person in the principal's presence and at the principal's direction** with the signature ~~of the principal~~ duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property. **In the event the power of attorney is signed by a third party pursuant to this section, the third party shall affix the principal's initials on the power of attorney, at the principal's direction and in the principal's presence.**
(c) Be signed and dated by any agent acting on behalf of the principal with the signature of the agent duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property. A power of attorney executed pursuant to this section is not invalid solely because

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[70] N.Y. Est. Powers & Trusts Law §3-2.1(a)(1)("Except for nuncupative and holographic wills authorized by 3-2.2, every will must be in writing, and executed and attested in the following manner: (1) It shall be signed at the end thereof by the testator or, in the name of the testator, by another person in his presence and by his direction . . . .").

[71] N.Y. Pub. Health Law §2981(2)(a)("A competent adult may appoint a health care agent by a health care proxy, signed and dated by the adult in the presence of two adult witnesses who shall also sign the proxy. *Another person may sign and date the health care proxy for the adult if the adult is unable to do so, at the adult's direction and in the adult's presence, and in the presence of two adult witnesses who shall sign the proxy. The witnesses shall state that the principal appeared to execute the proxy willingly and free from duress.* The person appointed as agent shall not act as witness to execution of the health care proxy.")(emphasis added).

there has been a lapse of time between the date of acknowledgment of the signature of the principal and the date or dates of acknowledgment of the signature or signatures of any agent or agents or successor agent or successor agents authorized to act on behalf of the principal or because the principal became incapacitated during any such lapse of time.

Section 5-1514. Certain gift transactions; formal requirements; statutory form

(9)To be valid, a statutory gifts rider to a statutory short form power of attorney must:
(a) Be typed or printed using letters which are legible or of clear type no less than twelve point in size, or, if in writing, a reasonable equivalent thereof.
(b) Be signed and dated by a principal with capacity, with the signature of the principal duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property, and witnessed by two persons who are not named in the instrument as permissible recipients of gifts, in the manner described in subparagraph two of paragraph (a) of section 3-2.1 of the estates, powers and trusts law. The person who takes the acknowledgment, under this paragraph, may also serve as one of the witnesses. **Another person may sign and date the statutory gifts rider for the principal if the principal is unable to do so, in the principal's presence and at the principal's direction, and in the presence of two adult witnesses who sign the statutory gifts rider. A witness shall not be the individual who signed the power of attorney for the principal. In the event the statutory gifts rider is signed by a third party pursuant to this section, the third party shall affix the principal's initials on the statutory gifts rider, at the principal's direction and in the principal's presence.**
(c) Be accompanied by a statutory short form power of attorney in which the authority (SGR) is initialed by the principal.
(d) Be executed simultaneously with the statutory short form power of attorney and in the manner provided in this section.

iii. Exact Language

One persistent concern is the requirement that the statutory forms for a power of attorney and Gifts Rider be in the "exact wording" of the statutory forms at sections 5-1513 and 5-1514.[72] This requirement has been part of the rules governing statutory form powers of attorney since 1948.[73] The goal of the exact language requirement has been and continues to be one of facilitating acceptance of statutory powers of attorney by third parties, most notably financial institutions. While the requirement of exact language has been somewhat relaxed by the new

[72] *See* N.Y. Gen Oblig. Law §5-1501(n) and (o).

[73] *See* 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.

law,[74] the continuation of the requirement in general serves to promote the acceptance of statutory short form powers of attorney and statutory Gifts Riders by financial institutions.

Another concern related to the acceptance of statutory forms by financial institutions is the limited remedy available when a financial institution refuses to accept a statutory short form power of attorney/statutory Gifts Rider. Currently, section 5-1510(2)(I) provides that the remedy for unreasonably refusing to accept a properly executed power of attorney is limited to injunctive relief compelling acceptance. Critics suggest that the remedy against a financial institution should include compensatory and consequential damages as well as attorneys' fees.

In 2007, legislation was proposed that would have amended the General Obligations Law to address this issue.[75] The legislation contained several bases upon which a financial institution could refuse to accept a statutory form power of attorney without incurring a penalty. However, if the refusal were unreasonable, the legislation proposed that the financial institution would be charged with damages and attorneys' fees. The Commission supported the 2007 legislation.[76] The legislation was vetoed, however, on the grounds that its provisions were too vague and punitive.[77]

Although the Commission weighed the merits of including compensatory damages and attorneys' fees in addition to injunctive relief in the 2009 legislation, it concluded that substantial anecdotal evidence of unreasonable refusals would be necessary to avoid another veto.

It is likely too soon to tell whether the combination of the availability of reasonable grounds for refusing to accept a statutory form power of attorney under 5-1504 and the potential of injunctive relief in 5-1510 have defused the problem. There has been no further suggestion that 5-1510 be amended regarding compensatory damages and attorneys' fees, nor has substantial evidence been offered which would support such an amendment.

In view of its intention to retain the "exact wording" requirement, the Commission recommends the correction of certain typographical errors in the statutory forms.

Section 5-1513(d).

(d) This POWER OF ATTORNEY shall not be affected by my subsequent incapacity unless I have stated otherwise below, under "Modifications.":

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[74] N.Y. Gen. Oblig. Law §§5-1501(2)(n)(A mistake in wording, such as in spelling, punctuation or formatting, or the use of bold or italic type, shall not prevent a statutory gifts rider from being deemed a statutory gifts rider, but the wording of the form set forth in subdivision ten of section 5-1514 of this title shall govern.); (o)(A mistake in wording, such as in spelling, punctuation or formatting, or the use of bold or italic type, shall not prevent a power of attorney from being deemed a statutory short form power of attorney, but the wording of the form set forth in section 5-1513 of this title shall govern.).

[75] S. 2602./A.2692 (2007)

[76] *See* June 13, 2007 Letter to David Nocenti, Counsel to the Governor from Professor Robert M. Pitler, Chairman of the Commission, and Rose Mary Bailly, Executive Director of the Commission, Bill Jacket for Veto No. 23 of 2007, available at http://image.iarchives.nysed.gov/images/images/95429.pdf.

[77] *See* Veto No. 23 of 2007.

Section 5-1513(j).

(j) COMPENSATION OF AGENT(S): (OPTIONAL)
Your agent is entitled to be reimbursed from your assets for reasonable expenses incurred on your behalf. If you ALSO wish your agent(s) to be compensated from your assets for services rendered on your behalf, initial the statement below. If you wish to define "reasonable compensation**,**"~~;~~ you may do so above, under "Modifications**.**"~~:~~

Section 5-1513(1)(n)(4) (important information for the agent).

keep a record ~~or~~ **of** all receipts, payments, and transactions conducted for the principal; and

Section 5-1513(n)(5).

(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 either of the following manners: (Principal's Name) by (Your Signature) as Agent, or (your signature) as Agent for (Principal's Name).
You may not use the principal's assets to benefit yourself or anyone else or make gifts to yourself or anyone else unless the principal has specifically granted you that authority in ~~this document, which is either~~ a Statutory Gifts Rider attached to a Statutory Short Form Power of Attorney or a Non-Statutory Power of Attorney. If you have that authority, you must act according to any instructions of the principal or, where there are no such instructions, in the principal's best interest. You may resign by giving written notice to the principal and to any co-agent, successor agent, monitor if one has been named in this document, or the principal's guardian if one has been appointed. If there is anything about this document or your responsibilities 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 law or acted outside the authority granted to you in the Power of Attorney, you may be liable under the law for your violation.

Section 5-1513(1)(o):

(o) AGENT'S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT:
It is not required that the principal and the agent(s) sign at the same time, nor that multiple agents sign at the same time.
I/we,----------, have read the foregoing Power of Attorney. I am/we are the person(s) identified therein as agent(s) for the principal named therein.
I/we acknowledge my/our legal responsibilities.
In Witness Whereof I/we have hereunto signed my/our names on ------,20----.
Agent(s) sign(s) here: = = >----------

(acknowledgment(s))

Section 5-1513(1)(p):

(p) SUCCESSOR AGENT'S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT:

It is not required that the principal and the SUCCESSOR agent(s), if any, sign at the same time, nor that multiple SUCCESSOR agents sign at the same time. Furthermore, successor agents can not use this power of attorney unless the agent(s) designated above is/are unable or unwilling to serve.

I/we, ----------, have read the foregoing Power of Attorney. I am/we are the person(s) identified therein as SUCCESSOR agent(s) for the principal named therein.

I/we acknowledge my/our legal responsibilities.

In Witness Whereof I/we have hereunto signed my/our name(s) on ------,20----.

Successor Agent(s) sign(s) here: = = >----------

(acknowledgment(s))

iv. Severability of a Properly Executed Statutory Short Form Power of Attorney from a Defective Statutory Gifts Rider

Subparagraphs (n) and (o) of section 5-1501(2) provide that a statutory short form power of attorney and a statutory Gifts Rider must be read together as a single instrument. A statutory Gifts Rider, even if properly executed, cannot stand alone as a separate document independent of a statutory short form power of attorney because the statutory Gifts Rider supplements a statutory short form power of attorney.[78] On the other hand, a properly executed statutory short form power of attorney is valid, even if no statutory Gifts Rider is executed.[79] In other words, a statutory short form power of attorney can exist by itself, whereas a statutory Gifts Rider cannot.

The statute does not directly address the question of the viability of a power of attorney – either the statutory short form or a non-statutory power of attorney – when the execution requirements under section 5-1514 to authorize gifting have not been met.

Permitting the continued validity of a properly executed statutory form power of attorney accompanied by a defective Gifts Rider is consistent with section 5-1501B. The prerequisites for a valid statutory power of attorney contained in section 5-1501B do not include a requirement that, if accompanied by a statutory Gifts Rider, the statutory Gifts Rider must also be validly executed in order for the statutory short form power of attorney to be valid. Rather, the language of 5-1501B (2) provides that a statutory short form power of attorney must contain the authority (SGR) initialed by the principal and be accompanied by a valid statutory Gifts Rider *"to be valid for the purpose of authorizing the agent to make certain gift transactions described in section*

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[78] N.Y. Gen. Oblig. Law §5-1501(2)(n).

[79] N.Y. Gen. Oblig. Law §5-1501(2)(o).

5-1514 of this title . . . .”[80] Thus, any infirmity in the statutory Gifts Rider should not disturb the validity of the statutory short form power of attorney and the authority of the agent conveyed therein, if that document has been properly executed in accordance with the requirements of subdivision one of section 5-1501B and otherwise satisfies all of the other conditions of that subdivision for a statutory short form power of attorney.

The same result holds true for a non-statutory power of attorney. In such a document, the gift giving provisions are part of the same document as the agent's other authorities. A non-statutory power of attorney must be executed in accordance with the provisions of 5-1501B(2); if it purports to authorize the agent to make gift transactions described in section 5-1514, it must also satisfy the execution requirements of paragraph (b) of subdivision nine of section 5-1514 (namely, contain the signatures of two witnesses). The execution of a non-statutory power of attorney in the manner as prescribed by section 5-1514 (9)(b) only goes to the validity of the non-statutory power of attorney's conveyance of authority to make those gift giving transactions described in section 5-1514 and not to the validity of the entirety of the power of attorney. If, apart from a defect in the execution requirements of 5-1514, a non-statutory power of attorney satisfies all of the conditions of subdivision one of section 5-1501B, including the execution requirements, the power of attorney should be treated as valid for all intents and purposes, other than for conveying any gift giving authority provided for in section 5 -1514.

To clarify the severability of a defective statutory Gifts Rider accompanying a statutory Gifts Rider and the severability of gifting provisions of a non-statutory power of attorney that does not meet the execution requirements of section 5-1514(9)(b), the Commission recommends the following changes to section 5-1501B.

Section 5-1501B. Creation of a valid power of attorney; when effective

1. To be valid, except as otherwise provided in section 5-1512 of this title, a statutory short form power of attorney, or a non-statutory power of attorney, executed in this state by a principal, must:
(a) Be typed or printed using letters which are legible or of clear type no less than twelve point in size, or, if in writing, a reasonable equivalent thereof.
(b) Be signed and dated by a principal with capacity, with the signature of the principal duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property.
(c) Be signed and dated by any agent acting on behalf of the principal with the signature of the agent duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property. A power of attorney executed pursuant to this section is not invalid solely because there has been a lapse of time between the date of acknowledgment of the signature of the principal and the date or dates of acknowledgment of the signature or signatures of any agent or agents or successor agent or successor agents authorized to act on behalf of the principal or because the principal became incapacitated during any such lapse of time.
(d) Contain the exact wording of the:

[80] N.Y. Gen. Oblig. Law §5-1501B (emphasis added).

(1) "Caution to the Principal" in paragraph (a) of subdivision one of section 5-1513 of this title; and
(2) "Important Information for the Agent" in paragraph (n) of subdivision one of section 5-1513 of this title.
2. In addition to the requirements of subdivision one of this section, to be valid for the purpose of authorizing the agent to make certain gift transactions described in section 5-1514 of this title:
(a) a statutory short form power of attorney must contain the authority (SGR) initialed by the principal and be accompanied by a valid statutory gifts rider; and
(b) a non-statutory power of attorney must be executed pursuant to the requirements of paragraph (b) of subdivision nine of section 5-1514 of this title.
If a statutory short form power of attorney properly executed in accordance with subdivision (1) of this section is accompanied by a statutory gifts rider that does not meet the requirements of subdivision (2)(a) of this section, the statutory short form power of attorney remains valid for all other purposes which can be accomplished by a properly executed short form power of attorney other than the gift transactions described in section 5-1514 of this title. If a non-statutory power of attorney properly executed in accordance with subdivision (1) of this section does not meet the requirements of subdivision (2)(b) of this section, the non-statutory power of attorney remains valid for all other purposes which can be accomplished by a properly executed non-statutory power of attorney other than the gift transactions described in section 5-1514 of this title.

v. Capacity to Execute a Power of Attorney

Concerns have been raised that the new forms are too complex for a client with diminished capacity. "Capacity" is defined under the 2009 statute as the "ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney."[81] Whether the principal has the mental capacity to appreciate all the elements of the power of attorney is likely to emerge during the discussions about the power of attorney between the lawyer and the principal[82] – counseling for which the statutory form is no substitute.[83]

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[81] N.Y. Gen. Oblig. Law § 5-1501(2)(c).

[82] Apparently, there are circumstances where the drafting attorney is in communication with the agent, but not the principal. *See, e.g. In re Ferrara*, 7 N.Y.3d 244, 249, 819 N.Y.S.2d 215, 217 (2006).

[83] "To function as an alternative to an attorney-prepared document, the statutory form must, somehow, fulfill the attorney's counseling function." David M. English, *The UPC and The New Durable Powers*, 27 Real Prop. Prob. & Trust J. 333, 352 (1992-93). For this very reason, Florida declined to adopt a statutory form in its recent revision of the laws governing powers of attorney. The "laundry list" of powers included in early drafts of the statute was removed in the final version, to avoid "an undesirable risk that principals will execute instruments containing less than obvious terms which they either do not intend or that they do not fully appreciate and understand. The Act cannot guarantee that all principals will carefully consider the terms of the instruments they execute. It can, however, facilitate awareness and understanding for those who do." *Chapter 709 White Paper* at 1.65, available at floridaprobatelitigation.com/uploads/file/ACT11_Conetta.pdf. *See also* Laurie Menzies, *What's*

New York's Standards of Professional Conduct do not hold any clear-cut answers for drafting attorneys faced with questions about a client's capacity.[84] However, the consequences of a lack of capacity are addressed in the General Obligations Law. If a person cannot meet the statutory standard of capacity, described by one leading treatise as "functional,"[85] he or she cannot legally create a valid power of attorney[86] or Gifts Rider.[87] A third party may refuse to accept a power of attorney if it has actual knowledge or a reasonable basis for believing that the principal was incapacitated at the time the power of attorney was executed.[88] Various parties may bring a special proceeding to ask a court to determine if the person had capacity at the time the power of attorney was executed.[89]

Many advocates have urged an educational campaign that promotes the importance of pre-crisis planning to avoid situations where execution of a power of attorney is made difficult if not impossible by an individual's diminished mental capacity. Certainly no one can disagree that both clients and their lawyers would be better served if planning were done in advance of a crisis.

vi. Validity of Powers of Attorney Created under Prior Law

Concerns have been raised as to whether a power of attorney executed by the principal after August 31, 2009 but not signed and dated by the agent prior to the technical amendments of 2010, is valid. The statute otherwise makes clear the intent of the legislature that a power of attorney is not invalid solely because there was a lapse of time between execution by the principal and acknowledgment by the agent.[90] The Commission recommends that the effective date of chapter 340 of the laws of 2010 be amended to clarify that intention with respect to powers of attorney created under the 2009 law.

Wrong with Most Estate Plans? NYSBA Elder Law Attorney, Summer 2008, at 8; Mark B. Edwards, Through the Looking Glass: the Future of Estate and Financial Planning, SM003 ALI-ABA 1289 (July 19-21, 2006) noting that "[t]he durable power of attorney is like the hub of a wheel, the piece around which everything else turns. We must treat this document with the care it deserves, taking the extra time (and charging the extra fees) to do the job well."

84 *See* N.Y. Rules of Professional Conduct § 1.14.

85 2-17 Klipstein, Drafting New York Wills § 17.03 (3rd ed. Lexis Nexis Matthew Bender).

86 N.Y. Gen. Oblig. Law § 5-1501B(1)(b).

87 N.Y. Gen. Oblig. Law § 5-1514(9)(b).

88 N.Y. Gen. Oblig. Law § 5-1504(1)(a)(6).

89 N.Y. Gen. Oblig. Law §§ 5-1505(2)(a), 5-1510(2)(b), and 5-1510(3).

90 N.Y. Gen. Oblig. Law §§ 5-1501B(1)(3) and 5-1513(1)(o).

Effective date:

This act shall take effect on the thirtieth day after it shall have become a law. Provided, that any statutory short form power of attorney and any statutory gifts rider executed **by the principal** after August 31, 2009 shall remain valid as will any revocation of a prior power of attorney that was delivered to the agent before the effective date of this act.

V. Conclusion

The goal of the 2009 statute – to better inform individuals about the power of attorney and the gifting authority of the agent – seems to be universally acknowledged as laudable. The Commission believes that the amendments proposed herein will further that goal.