PROBLEMS/BENEFITS OF THE NEW POWER OF ATTORNEY STATUTE: THREE YEARS LATER

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New York State's Power of Attorney statute is codified at General Obligations Law, Article 5, Title 15. This law has been in effect since 1964. The New York State Law Revision Commission analyzed law, made recommendations, and proposed and had passed amendments to the law. Effective, September 1, 2009, the new Power of Attorney law was in effect. While the original amendment to the General Obligations Law Article 15 was passed in late January 2009 with an effective date of March 1, 2009, strong lobbying efforts were undertaken to delay effective date. However, even with a delayed effective date pushed from March to September, there remained technical glitches in the law and so technical amendments to the law took effect as of September 12, 2010.

A thorough reading of General Obligations Law, Article 5 is always advisable for any practitioner seeking to familiarize himself or herself with the law before commencing drafting. Then, a terrific place to begin is to download the statutory short form Power of Attorney from the New York State Bar Association website. www.nysba.org. Members can download the form free of charge; non-members have a nominal $20 charge. From these templates, customization of the statutory short form Power of Attorney form and its sibling document, the Statutory Gifts Rider, must be made carefully and with due consideration to the objectives of each particular client.

This customization is specifically permitted under New York law. However, the provisions of General Obligations Law, Article 5 specifies the ways in which this customization this can happen. Before delving into the customization of a statutory short form Power of Attorney and the Statutory Gifts Rider, a practitioner should familiarize oneself with the seminal case that many believe spurred the overhaul of New York's Power of Attorney law, *Matter of Ferrara*, 7 NY3d 244 (2008). A reading of the lower court decisions in *Ferrara* is also instructive as one endeavors to begin customizing a statutory short form Power of Attorney and Statutory Gifts Rider.

Most Notable Change

The most notable change in the "new" Power of Attorney law is the separation of traditional authority designations and the ability of the Agent to make gifts. Formerly referred to as the Statutory Major Gifts Rider under the 2009 law, the Statutory Gifts Rider amended effective September 12, 2010 is a standalone document that, when read together with the Power of Attorney, comprises one document. A Statutory Gifts Rider and the statutory short form Power of Attorney that it supplements must be read together as a single instrument. See General Obligations Law §5-1514(9)(c)-(d). The easiest way for a practitioner who might be reviewing a client's Power of Attorney to see if the Statutory Gifts Rider was executed is to look for two (2) signatures of the Principal – one at the end of the statutory short form Power of Attorney, and another at the end of the Statutory Gifts Rider. This second full signature must be notarized, and two witnesses must have signed. Assuming both signatures are there, the practitioner must then

ensure that initials have been placed earlier in the statutory short form Power of Attorney in Paragraph (h), indicating that the Statutory Gifts Rider will be signed. Absent these strict execution protocols, the Statutory Gifts Rider is not a valid document and the authority of the Agent to engage in gifting or transfers on behalf of the Principal is severely limited. The extent of that limitation can have a dramatically chilling effect on the Agent's ability to engage in estate and long term care planning on the Principal's behalf.

Advantages to Using Statutory Short Form Power of Attorney

General Obligations Law, Article 5 contains the statutory short form Power of Attorney. See General Obligations Law 5-1513. The recommended download from the New York State Bar Association is a statutory short form. While General Obligations Law, Article 5 permits the use of any writing that complies with statutory requirements to serve as a Power of Attorney, there are benefits to using the statutory short form. For example, General Obligations Law §5-1504, which relates to acceptance by third parties, states that there is nothing that requires the acceptance of a form that is not a statutory short form. Practically speaking, a financial institution will be accustomed to seeing and reviewing a statutory short form, so proffering a document that is not a statutory short form may just result in delay or frustration in having to demonstrate to the legal department that it is an acceptable document.

Universal Application of the 2010 Law to All Powers of Attorney Used in New York

Acceptance

The September 12, 2010 law encompasses some provisions that are applicable to **all** Powers of Attorney, regardless of the date the document was executed. For example, General Obligations Law §5-1504 contains the provisions mandating acceptance of a Power of Attorney by third parties. The law states that "No third party located in this state shall refuse without reasonable cause to honor a statutory short form power of attorney properly executed in accordance [with this law] or [one that was] properly executed in accordance with the laws in effect at the time of execution."

Reasonable cause "shall include, but not be limited to: (1) the refusal by the agent to provide an original power of attorney or a copy certified by an attorney…; (2) the third party's good faith referral of the principal and the agent to the local adult protective services unit; (3) actual knowledge of a report having been made by any person to the local adult protective services unit alleging physical or financial abuse, neglect, exploitation or abandonment of the principal by the agent; (4) actual knowledge of the principal's death or a reasonable basis for believing the principal has died; (5) actual knowledge of the incapacity of the principal or a reasonable basis for believing that the principal is incapacitated where the power of attorney tendered is a nondurable power of attorney; (6) actual knowledge or a reasonable basis for believing that the principal was incapacitated at the time the power of attorney was executed; (7) actual knowledge or a reasonable basis for believing that the power of attorney was procured through fraud, duress or undue influence; (8) actual notice, pursuant to subdivision three of this section, of the termination or revocation of the power of attorney; or (9) the refusal by a title insurance company to underwrite title insurance for a transfer of real property made pursuant to a major gifts rider or non-statutory power of attorney that does not contain express instructions or purposes of the principal." See General Obligations Law §5-1504(1)(a).

Even with this definition of reasonable cause for refusing to honor a Power of Attorney, it is still perfectly acceptable for third parties to require the agent to sign an acknowledged affidavit stating that the power of attorney is still in full force and effect. See General Obligations Law §5-1504(5).

Fiduciary Duties

Another provision of the law now applicable to all Powers of Attorney concerns the Agent's fiduciary duties. General Obligations Law §5-1505 contains the Agent's fiduciary duties. It may be good practice, when a practitioner assists a principal in executing a Power of Attorney, to discuss with the principal whether the Principal intends to have the Agent sign immediately. Regardless of whether the Agent is signing contemporaneously with the Principal, it is important that the Principal and the practitioner discuss who is going to be highlighting to the Agent his or her duties under the document and advise the Agent of the right to seek counsel to explain those rights and obligations.

If a practitioner is counseling an Agent, the Agent must be made aware that the Agent must act with the standard of care "of a prudent person dealing with the property of another." The Agent owes the Principal a fiduciary duty, including the obligation to act according to the Principal's instructions, or in the absence of those instructions, in the best interest of the Principal. The Agent must avoid conflicts of interest. The Agent must keep assets separate. The Agent must keep a record of all receipts, disbursements, and transactions entered into by the Agent on behalf of the Principal and to make such record available at the request of the Principal. In addition, another class of persons may request the records kept by the Agent, including the Monitor (if any), a co-agent or successor agent under the power of attorney; court-appointed person, or the Executor of deceased Principal's estate.

The definition of "best interests" was first embodied in the *Ferrara* case that played in integral part in the new law. *Matter of Ferrara*, 7 NY3d 244 (2008). That case held that "[General Obligations Law] unambiguously imposes a duty on the attorney-in-fact to exercise gift-giving authority in the best interest of the principal. Nothing in [General Obligations Law] indicates that the best interest requirement is waived when additional language increases the gift amount or expands the potential beneficiaries pursuant to [the law]." *Id.* at 142-143.

Best interests, in the statute as highlighted in this case, were defined to include "minimization of income, estate, inheritance, generation-skipping transfer or gift taxes…In short, the Legislature sought to empower individuals to appoint an attorney-in-fact to make annual gifts consistent with financial, estate or tax planning techniques and objectives—not to create gift-giving authority generally, and certainly not to supplant a will." *Id.* It is clear that the Agent's mere statement that 'this is what the Principal wanted' or 'I have the authority in the Power of Attorney to do this' is not sufficient to rise to the level of acting in the Principal's best interests.

A recent case highlighted this and further offered support for the need for the amended Power of Attorney law. *Matter of Absolut Care of Three Rivers v. Shah*, 101 AD3d 1327 (3d Dept. 2012), was decided under the prior Power of Attorney law, but demonstrates the abuses sought to be prevented by the enactment of the modified General Obligations Law Article 5. In this case, a woman had executed a Power of Attorney naming her daughter as Agent. The Power of

Attorney permitted the Agent to engage in banking transactions. The Power of Attorney did not authorize gifting. The daughter opened a joint bank account for herself and the principal, her Mother. When the Principal's Mother died, a trust made distributions to Principal. Those distributions went into that newly created joint bank account. The Agent then utilized the authority afforded a joint account holder under the Banking Law and withdrew money. The Court found that the Power of Attorney did grant the Agent/Daughter authority to open the bank account, and that the Agent/Daughter's actions in withdrawing money from that account were done under the authority of the Banking Law and not under the Power of Attorney. In other words, the Agent/Daughter acted as a joint account owner and not as an Agent in making the withdrawals. The Court, in a footnote, does indicate that this type of step transaction would now be impermissible under the September 12, 2010 General Obligations Law, since the establishment of a joint account is a gift for which specific authority under the Statutory Gifts Rider must be granted. [Interestingly, this case was related to Medicaid, in that the local Department of Social Services denied chronic care Medicaid benefits on the Mother's behalf after the nursing home in which the Mother was residing submitted a Medicaid application. DSS deemed those actions of the Agent/Daughter to be transfers of assets. Upon a fair hearing, the denial was upheld and despite the nursing home arguing that the transfers were made for purposes other than to qualify for Medicaid, the determination was upheld through an Article 78.]

While the *Absolut Care* case highlights the potential for misuse and abuse of a fiduciary's authority, it is important to remember that a 6 year statute of limitations applies for violations of one's fiduciary duties. *Matter of Liosis (Hiletzaris)*, 2011 NY Slip Op 51924, 105 AD3d 740 (2d Dept. 2011) investigates whether such statute of limitations can be tolled. In this case, the Agent under a Power of Attorney was also the estate fiduciary. Allegations were raised that the fiduciary lied on the estate accounting. The Court denied summary judgment because triable issues of fact existed as to whether the statute of limitations was tolled.

Notably, there is no requirement that allegations of wrongdoing by the Agent exist prior to the request for an accounting from such Agent. *Kaufman v Kaufman*, 2011 NY Slip Op 32159(U), (Sup. Ct., NY Cty, 2011) stated that "an allegation of wrongdoing is not an indispensable element of a demand for an accounting where the complaint indicates a fiduciary relationship between the parties or some other special circumstance warranting equitable relief" (internal citations omitted). "Fundamental to the fiduciary relationship is the duty to account. Such duty extends to an attorney-in-fact acting pursuant to a power of attorney" (internal citations omitted).

HIPAA

In addition to the third party acceptance provisions and the fiduciary duty provisions discussed above, the new law also contains a new expansion and inclusion of HIPAA language expansion and military benefits expansion. The prior law gave an Agent authority with respect to "records, reports and statements." The new law now gives "health care billing and payment matters, records, reports and statements." This new language include access to all records pertaining to health care, in effect serving as a general HIPAA release to the Agent as it relates to health care billing records. See General Obligations Law §5-1502K. Even documents containing the old language now have this expanded coverage included in them.

Litigation and Proceedings Related to Powers of Attorney

Finally, the new law contains provisions concerning litigation that may be commenced about all Powers of Attorneys. General Obligations Law §5-1510 authorizes a special proceeding for the following reasons: if agent fails to turn over a power of attorney or records to an authorized person (see General Obligations Law §5-1510(1)); to determine whether the power of attorney is valid (see General Obligations Law §5-1510(2)(a)); to determine whether the principal had capacity at the time the power of attorney was executed (Uee General Obligations Law §5-1510(2)(b)); to determine whether the power of attorney was procured through duress, fraud or undue influence (see General Obligations Law §5-1510(2)(c)); to determine whether the agent is entitled to receive compensation or whether the compensation received by the agent is reasonable for the responsibilities performed (see General Obligations Law §5-1510(2)(d)); to approve the record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal (see General Obligations Law §5-1510(2)(e)); to remove the agent upon the grounds that the agent has violated, or is unfit, unable, or unwilling to perform, the fiduciary duties under the power of attorney (see General Obligations Law §5-1510(2)(f)); to determine how multiple agents must act (see General Obligations Law §5-1510(2)(g)); to construe any provision of a power of attorney (see General Obligations Law §5-1510(2)(h)); and to compel acceptance of the power of attorney in which event the relief to be granted is limited to an order compelling acceptance (see General Obligations Law §5-1510(2)(i)).

A special proceeding may also be commenced by an agent who wishes to obtain court approval of his or her resignation. See General Obligations Law §5-1510(2). An Agent (including co-agents and successor agents), the spouse, child or parent of the Principal, the Principal's successor in interest, any third party who may be required to accept a power of attorney, the Monitor, the government entity or official who investigates report of abuse or neglect, a Court Evaluator, *guardian ad litem*, guardian, or personal representative of estate are all permitted to commence the special proceeding. See General Obligations Law §5-1510(3). Notably absent is the principal himself or herself.

The use of this statutory permission for the commencement of lawsuit should not be ignored or disfavored. *Matter of Imre B.R. (I.B.R.)*, 40 Misc. 3d 464 (Sup. Ct. Dutchess County 2013), highlighted that the use of the statutory provisions must be pursued before returning to a Court under other provisions of law for relief. In *Imre*, a statutory Power of Attorney was in place for a now-incapacitated Principal. Merrill Lynch refused to honor the Power of Attorney, and so the Agent commenced a limited guardianship under Mental Hygiene Law Article 81. The Court in *Imre* determined that guardianship under Mental Hygiene Law Article 81 is a remedy of last resort. Where an individual, even if incapacitated individual, has a Power of Attorney in place, the law provides mechanisms for compelling the acceptance of that Power of Attorney. "The General Obligations Law provides a remedy to compel Merrill Lynch to accept the power of attorney (§§5-1504[2] and 5-1510([2][i]). Mental Hygiene Law Article 81 requires treating a guardianship as a last resort. In light of the remedy available under the GOL, it would be an inappropriate use of judicial resources to appoint a guardian in this case." *Id.*

Preparation and Execution of the Power of Attorney

These provisions of the 2010 law graft onto **all** Powers of Attorneys these rights, obligations, protections, and duties. And while there are grandfathering provisions protecting the validity of

previously executed Powers of Attorney, the 2010 law makes changes to how a new Power of Attorney must be prepared and executed.

A Power of Attorney prepared after the enactment of the new law must be signed by Principal **and** the Agent(s). See General Obligations Law §5-1501B(1)(b)-(c). If multiple Agents are required to act together (which is the default under the law), both Agents must sign the document in order for it to be effective. In addition, if the Statutory Gifts Rider is to be signed, it must be signed and notarized in front of two (2) witnesses, who are persons over the age of 18 who are not named in the document as agents or alternate agents. It is also advisable that the Monitor not serve as a witness, although the notary of the Principal's signature on the Statutory Gifts Rider may be a witness as well.

Because the Power of Attorney must now have the Agent sign as well as the Principal, the effective date of the Agent's authority to act under the Power of Attorney is the date on which the named Agent signs in front of a notary. The mere lapse in time between the Principal's signing and the Agent's signing does not affect the validity of the document. See General Obligations Law §5-1501B(1)(c). From a practitioner's standpoint, query whether you, as a practitioner, are comfortable assisting the Principal in preparing and executing a Power of Attorney and then holding the original until such time as the Agent will sign. Some dialogues have concluded that this is a means for creating a type of "springing" document. However, from a practical point of view, does the practitioner who holds an original document without an Agent's signature and who later is asked by the Agent for permission to sign take on an additional duty to the Principal to investigate and/or determine whether the Principal might want the Agent to sign?

Powers of Attorney, whether the statutory short form or otherwise, must be typed or printed in at least 12 point font. See General Obligations Law §5-1501B(a). Furthermore, to be considered a statutory short form Power of Attorney, the only changes are permitted to the form are allowed in the modifications section, Part G.

General Obligations Law §5-1501 contains numerous definitions that are help to a practitioner and a Principal in understanding the Power of Attorney. Notably, General Obligations Law §5-1501(2)(c) defines capacity 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." Similarly, incapacitated is defined "to be without capacity." See General Obligations Law §5-1501(2)(f).

During the duration of the 2009 law, General Obligations Law §5-1501 defined a Statutory Short Form Power of Attorney to mean "a power of attorney that meets the requirements of paragraphs (a), (b) and (c) of subdivision one of section 5-1501B of this title, and that contains the exact wording of the form set forth in section 5-1513 of this title." This requirement of precision meant that even typographical or spacing errors must be carried forward; it resulted in ambiguity as to whether inserting page numbers was a modification of the form, thereby resulting in not having a Statutory Short Form. The modified provision, and the current law under General Obligations Law §5-1501 contains a clarifying phrase, "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." See General Obligations Law §5-1501(2)(o).

Any practitioner reviewing the statutory short form Power of Attorney sees that the form now requires the Principal to place his or her initials in multiple places and to sign at the end of both the statutory short form Power of Attorney and supplementing Statutory Gifts Rider, if that document is to be signed. The law does contain, however, some relief for persons of limited physical capabilities. Specifically, General Obligations Law § 5-1501(2)(m), defines what it means to 'sign' a Power of Attorney. Sign "means to place any memorandum, mark or sign, written, printed, stamped, photographed, engraved or otherwise upon an instrument or writing, or to use an electronic signature as that term is defined in subdivision three of section three hundred two of the state technology law, with the intent to execute the instrument, writing or electronic record. In accordance with the requirements of section three hundred seven of the state technology law, a power of attorney or any other instrument executed by the principal or agent that is recordable under the real property law shall not be executed with an electronic signature." Therefore, in situations where it is difficult for the Principal to sign the document using his or her full signature, a mark may be sufficient.

Caution, however, must be taken that, where the Principal can sign a Power of Attorney, that true compliance with the General Obligations Law occur. In *Matter of Marriott*, 86 A.D.3d 943 (4t Dept. 2011), the Principal had signed a valid Power of Attorney but, instead of initialing in the box granting the scope of authority, placed an "X" in the box. Such Power of Attorney was then used by the Agent to convey real property. The Court found that the Power of Attorney itself was void, and hence the real property transaction stemming from its use was void. The statutory short form Power of Attorney in General Obligations Law 5-1513 specifically requires "initialing" the box(es) granting authority, and not marking or checking.

Designation of Authority Given to Agent

In preparing and/or reviewing a Power of Attorney, it is important to understand the scope and extent of the powers that can be granted in the Statutory Short Form document, without the inclusion of a Statutory Gifts Rider. While the Power of Attorney carries forward the letter structure, with the option of initialing only the last letter (Letter P) to select all the powers, it is important to understand that the line following Letter P must have all the letters typed out (A, B, C, D. for example) and not abbreviated (A-D). In addition, initials must be placed in the brackets, and not simply an "X" or check mark. See discussion above and *Matter of Marriott*, supra. Furthermore, while the provision for "banking transactions" might lead one to believe that the addition or removal of a joint owner would be covered under this provision, pursuant to General Obligations Law §5-1502D, that power must now be granted in the Statutory Gift Rider, as it is considered a gift under New York law. Similarly, General Obligations Law §5-1502F deals with insurance transactions, but does not allow the agent to change beneficiary designations. General Obligations Law §5-1502G, dealing with estate transactions, does not include the ability to create or fund trusts, another power that must be granted in the statutory gifts rider.

General Obligations Law §5-1502G is entitled "estate transactions." A recent case, *Matter of Perosi v. LiGreci*, 98 A.D.3d 230 (2d Dept. 2012), evaluated this provision and explored the issue of whether a properly drafted Power of Attorney with Statutory Gifts Rider could be

utilized in an Estates Powers and Trusts Law Section 7-1.9 situation. This provision of law permits an irrevocable trust to be amended or revoked in whole or in part by the creator of the trust with the written consent of all the trust beneficiaries. This case examined whether the Agent under a Power of Attorney can stand in the stead of the Principal to exercise this authority. The Supreme Court held that the creator intended for the Trust to be irrevocable and that the Trust's language did not permit the creator, or his agent, to amend the Trust. Acknowledging that the creator could have amended the Trust pursuant to *EPTL 7-1.9*, the Supreme Court determined that the power of attorney granted the attorney-in-fact no power to amend estate planning devices that were created prior to the execution of a power of attorney. The Supreme Court reasoned that the power of attorney language grants "forward looking" powers, and it is silent as to the restructuring of past estate planning devices (*Perosi v LiGreci, 31 Misc 3d 594, 599, 918 NYS2d 294 [2011])*. The Supreme Court further concluded that the statutory right to amend or revoke an irrevocable trust is a personal right, which, unless the trust or power of attorney states otherwise, may only be exercised by the creator. The Second Department, on appeal, disagreed.

The Appellate Division investigated whether the Power of Attorney, which, in this case, was executed subsequent to the creation of the Trust, empowered the Agent to amend the trust. The Appellate Division rejected the notion that "estate transactions" pursuant to General Obligations Law §5-1502G and "all other matters" pursuant to General Obligations Law §5-1502N vests the Agent with enough power to amend the trust. The Court held that "the amendment of the Trust by the attorney-in-fact, with the consent of all the beneficiaries, was not an act which 'by [its] nature, by public policy, or by contract,' required the creator's personal performance." Consequently, because the creator was alive and had not revoked the Power of Attorney at the time the amendment was executed, the actions of the Agent were within the bounds of her authority.

From a practitioner's perspective, this case requires that the Power of Attorney with Statutory Gifts Rider be drafted very carefully to ensure that the Agent does not rewrite the Principal's estate plan, and that the Principal and Agent understand the extent of the authority. In situations where the trustees of a trust may be different fiduciaries than the Agent, careful consideration must be given to whether vesting the Agent under a Power of Attorney with this modification authority is advisable.

General Obligations Law §5-1502I is entitled "personal and family maintenance" and is a change from the prior law, where it was "Personal relationships and affairs." Included within this provision is the authority to hire and fire attorneys, accountants, and any other assistants needed by agent to help him carry out his duties, and to continue gifts that the principal customarily made to individuals and to charitable organizations prior to the creation of the agency, provided that no person or charitable organization may be the recipient of gifts in any one calendar year which, in the aggregate, exceed $500.

General Obligations Law §5-1502J used to read "benefits from military service" but now reads "benefits from governmental programs or civil or military benefits." This is a very broad authority, allowing the agent to pursue and act on behalf of principal with regard to any payment or claim against a government agency: Medicaid, Medicare, veteran's benefits, federal pension, etc. Therefore, this provision, if initialed, grants authority to the Agent to submit the Medicaid application and re-certification on behalf of the Principal. It does not, however, grant the Agent authority to engage in planning to secure those benefits if the planning encompasses gifting,

retitling of assets, or transfer of assets, even if the transfers are to a spouse. The Statutory Gifts Rider is the document required to grant that gifting authority.

General Obligations Law §5-1502L governs retirement benefits transactions, but does not give the Agent the power to change beneficiary designations, as that authority would need to be granted in the statutory major gifts rider.

Remember, that even though General Obligations Law §5-1502N covers "all other matters," that still does not include health care decisions and does not include the ability to gift beyond the $500 encompassed by General Obligations Law §5-1502I.

Interestingly, despite the Statutory Short Form Power of Attorney containing a Letter "O" permitting delegation of the Agent's authority, there is no statutory section or subsection authorizing the delegation of authority held by an agent to another agent.

In preparing a Power of Attorney, consider inserting some modifications, as appropriate for each client. Some possible modifications include:

- Changing the document from durable into nondurable;
- Insert provision stating that this new Power of Attorney does revoke all prior powers of attorney, or specify which prior Power of Attorneys are revoked by this document
- Define "reasonable compensation," if the client intends to permit Agent to be compensated
- Any other provisions that are not otherwise restricted to the statutory gifts rider
- Consider a provision stating that authority in modifications section prevails if the authority is in conflict with the authority provided in another section of the power of attorney (only for permissible modifications to the power of attorney)
- Consider a provision acknowledging that the agent may have a conflict of interest when acting, and the principal waives the conflict
- Additional language for agent to conduct insurance transactions
- Ability of agent to act with regard to IRAs, retirement plans, trusts, etc., such as putting it into payout status (remembering that certain actions on the retirement plans, trusts, etc., are considered gifts and therefore authority must also be given in the Statutory Gifts Rider)
- Access to safe deposit boxes
- Ability to make decisions regarding long term care, residency, maintain/change place of abode, etc.
- Additional reimbursement language for expenses advanced by agent on principal's behalf (*i.e.*, mileage, etc.)

The Monitor

Another change in the new Power of Attorney law is the ability to designate a Monitor. This provision allows the principal to appoint a "watchdog" of the Agent. Monitors are permitted to demand an accounting from the Agent and are permitted to have documents/records released to them. They are also a class of persons entitled to commence a lawsuit against the Agent. Interestingly, the statute does not contain a requirement that the Monitor be notified of his or her appointment, nor does the Monitor have to accept such position. See General Obligations Law

§5-1509.

Compensation of the Agent

Compensation of the Agent was not permitted under the prior provisions of the law unless explicitly stated. General Obligations Law §5-1506 contains that restriction, reciting that, absent an express statement affirmatively allowing compensation, the Agent may not be compensated. The Statutory Short Form document now contains, on its face, a provision for allowing for "reasonable compensation." The Principal must initial the box to allow reasonable compensation and while there is no obligation to define it, the Principal may choose to do so in the modifications section of the statutory short form Power of Attorney.

Termination, Revocation, and Resignation

Termination of a Power of Attorney is governed by General Obligations Law §5-1511. A power of attorney terminates when the Principal dies; the Principal becomes incapacitated, if the power of attorney is not durable; the Principal revokes the power of attorney; the Principal revokes the Agent's authority and there is no co-Agent or successor Agent, or no co-Agent or successor Agent who is willing or able to serve; the Agent dies, becomes incapacitated or resigns and there is no co-Agent or successor Agent or no co-Agent or successor Agent who is willing or able to serve; the authority of the Agent terminates and there is no co-Agent or successor Agent or no co-Agent or successor Agent who is willing or able to serve; the purpose of the power of attorney is accomplished; or a court order revokes the power of attorney as provided in section 5-1510 of this title or in section 81.29 of the mental hygiene law.

Pursuant to General Obligations Law §5-1511(2), an Agent's authority terminates when the Principal revokes the Agent's authority; when the Agent dies, becomes incapacitated or resigns; when the Agent's marriage to the Principal is terminated by divorce, annulment or declaration of nullity, unless the power of attorney expressly provides otherwise, but the authority of an Agent is revoked solely by this subdivision, it shall be revived by the Principal's remarriage to the former spouse; or when the power of attorney terminates.

Notice of revocation is accomplished, as it was under the old law, by delivering a written instrument to both the Agent and any third party who may have relied on the document. See General Obligations Law §5-1511(3). A Principal is permitted to revoke a power of attorney in any manner so recited in a Power of Attorney, or by delivering a revocation to the Agent in person or by sending a signed and dated revocation by mail, courier, electronic transmission or facsimile to the agent's law known address. See General Obligations Law §5-1511(3). A recorded Power of Attorney must have its revocation also recorded. See General Obligations Law §5-1511(4).

Resignation is governed by General Obligations Law §5-1505(3), and is an affirmative act on the part of the Agent. While the Power of Attorney itself may call for a different mechanism for resignation (see General Obligations Law §5-1505(3)(b)), the standard method for resignation is for an Agent who has signed a power of attorney to give written notice to the Principal and the Agent's co-Agent, Successor Agent or the Monitor if one has been named, or the Principal's Guardian if one has been appointed. See General Obligations Law §5-1505(3)(a).

Compliance with these provisions is vital. *Matter of Fitzsimmons (Hill)*, NY Slip Op 51693, 32 Misc. 3d 1243(A) (N.Y. Sur. Ct. 2011) addressed, as part of a larger case involving use of a Power of Attorney. In that case, the Court held that "in order to establish an effective resignation, however, there must be evidence that [the Agent] gave notice of her resignation to [the Principal] or, if [the Principal] was incapacitated at that time, to a government agency authorized to protect her welfare. Since there is no evidence submitted that [the Agent] did this, the letter dated March 26, 2004 cannot be deemed a resignation of the power of attorney. In addition, there is no evidence in these papers that the power of attorney was otherwise terminated in a manner proscribed by General Obligations Law § 5-1511 prior to decedent's death."

While under the law in effect from 2009 through September 2010, General Obligations Law §5-1511(6), provided that the execution of a new Power of Attorney revoked all prior Powers of Attorney. However, the amendment effective September 12, 2010 provides that "the execution of a power of attorney does not revoke any power of attorney previously executed by the principal." Consider including provisions within the modifications section addressing intended revocation. Whether specifically mentioning the dates of Powers of Attorney previous executed (if known), or a blanket statement revoking prior Powers of Attorney, give due consideration to the specialized powers of attorneys that are often signed at banks and for agencies. Suggested language includes, "This Power of Attorney revokes all general powers of attorney previously executed by me but does not revoke powers of attorney executed for a specific purpose, for a specific financial institution or agency, or for a specific transaction."

<u>The Statutory Gifts Rider</u>

In addition to the need to have two witnesses and the notary of the Principal's signature, and understanding that a Statutory Gifts Rider must be signed simultaneously with a Power of Attorney and is read in conjunction with the Power of Attorney is supplements, the Statutory Gifts Rider has other requirements that must be carefully evaluated and drafted for each individual client.

Understanding that the purpose of the Statutory Gifts Rider is to permit gift giving authority, the preamble to the document clearly warns of the extent and severity of the authority being given by executing the document. The gift giving is divided into three categories: federal gift tax exclusion gifts to a defined class of beneficiaries (not including the Agent), expanded or specified gifts, and gifts of any amount to Agent.

The first portion of the Statutory Gift Rider is Part A, which allows the Agent to make gifts up to the federal annual gift tax exclusion amount ($14,000 for 2013). <u>See</u> General Obligations Law §5-1514(2). This class of persons includes "the Principal's spouse, children and more remote descendents, and parents."

Part B of the Statutory Gifts Rider is actually blank, but permits modifications and insertion of customized gifting language. General Obligations Law §5-1514(3) permits this section of the Statutory Gifts Rider to be modified to permit the Agent to make any gifts over $500 (and gifts under $500 for which there has not been a pattern of gifting) to any person of any amount and to make unlimited gifts (or gifts of a specific amount) to any person or charity.

At a bare minimum, a practitioner should consider inserting the verbatim language contained in

General Obligations Law §5-1514(3)(c), which is the statutory language that defines what is considered a gift under New York law. This language includes:

> opening, modifying or terminating a deposit account in the name of the principal and other joint tenants;
> opening, modifying or terminating any other joint account in the name of the principal and other joint tenants;
> opening, modifying or terminating a bank account in trust form as described in section 7-5.1 of the estates, powers and trusts law, and designate or change the beneficiary or beneficiaries of such account;
> opening, modifying or terminating a transfer on death account as described in part four of article thirteen of the estates, powers and trusts law, and designate or change the beneficiary or beneficiaries of such account;
> changing the beneficiary or beneficiaries of any contract of insurance on the life of the principal or annuity contract for the benefit of the principal;
> procuring 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;
> designating or changing the beneficiary or beneficiaries of any type of retirement benefit or plan;
> creating, amending, revoking or terminating an inter vivos trust; and
> opening, modifying or terminating other property interests or rights of survivorship, and designate or change the beneficiary or beneficiaries therein.

Many times, simply by inserting this statutory language in the Power of Attorney, Principals who are carefully reviewing their draft documents will ask questions and be concerned that these actions are considered gifts. Additional modifications can lead to further discussion and dialogue, which can, in turn, ensure that the Principal fully understands the scope of the authority being delegated. Consider some additional modifying language:

> Gifts that are to be made by Agent must be made in my best interest, which includes gift, estate, tax or Medicaid or long term care planning purposes;
> The authority given to my Agent to make gifts in my best interest must be made in conformity with my estate plan as known to my Agent; to enable my Agent to understand my estate plan, I hereby authorize any attorney or law firm in possession of my estate planning documents to release to my Agent, upon written request, copies of any known Last Will & Testament and/or testamentary substitutes;
> A gift or other transfer to an authorized individual 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).

In addition, joinder of a Principal to a Pooled Trust by the Agent through the use of a Power of Attorney requires that the Power of Attorney document contain language specifically permitting the creation and funding of irrevocable trusts. Therefore, consider an explicit provision in both the modifications of the Statutory Short Form Power of Attorney and the Statutory Gifts Rider.

While the participation in a Pooled Trust does not, most often, give the right to designate beneficiaries of the remainder as the funds in a pooled trust subaccount remain in the Pooled Trust upon the death of the applicant, there may be circumstances where the use of a pooled trust or other supplemental needs trust would require the designation of beneficiaries or remaindermen. Therefore, inclusion of provisions authorizing the Agent to enroll the Principal to enroll in a pooled trust or to establish a supplemental needs trust should be granted in both the Power of Attorney and the Gifts Rider.

> My Agent shall have the authority to enroll me in any Pooled Trust for my benefit, or to create and fund any supplemental needs trust, including the designation of beneficiaries or ultimate remaindermen of such trusts

It is also very important that the practitioner discuss with the Principal whether the Principal intends for the Agent to have the authority to self-gift. If so, the Agent is only permitted to make gifts to himself or herself ***only*** if Section (c) of the Statutory Gifts Rider is completed and initialed. Notably, it is required that this section be completed and initialed even if the Agent is only permitted to make annual gift tax exclusion gifts.

Gifting through the Statutory Gifts Rider is only valid if the Statutory Gifts Rider is properly executed. The Statutory Gifts Rider must be dated and signed by the Principal, and acknowledged. Two witnesses must see the signature be affixed. The witness must be two people who are not named as possible recipients of gifts under the document. The form itself includes a statement indicating that these witnesses saw the Principal sign it in front of them and in front of the other witness, meaning that all witnesses must be in one place at one time. Further, the Statutory Gifts Rider must contain the requisite statement of who prepared the document on Principal's behalf. This will provide additional clues as to the parties involved in the document if litigation arises as to capacity or fraud or duress issues arise.

Using a Power of Attorney to Engage in Estate and Long Term Care Planning

Once the power of attorney and statutory major gifts rider are properly signed, consider presenting them to all third parties holding assets of the principal so that the principal/agent can ensure that the third party will accept the documents. Waiting until a crisis arises and the Principal needs the Agent to act before having financial institutions and brokerage houses accept the document adds additional stress to an already difficult situation. Because at a time of crisis, access to funds to pay for Principal's long term care is often necessary, this extra step will enable the Agent and the attorney to ensure that the statutory short form document with Statutory Gifts Rider is accepted.

If you are preparing a Power of Attorney with Statutory Gifts Rider, or if you as a practitioner are presented with a Power of Attorney with Statutory Gifts Rider prepared by another practitioner, take a moment and read it thoroughly, asking yourself whether this document would grant the authority to do all the acts that you would now advise the Agent to do. If not, ascertain whether a new document can be signed. If that is not possible, consider whether the actions you would recommend warrant the commencement of a limited guardianship under Article 81 of the Mental Hygiene Law in order to accomplish those objectives.

Remember, that estate planning and long term care planning often involves the creation of trusts,

the transfer of assets outright to another person or into an existing or newly created trust, severance of joint tenancy, acquisition of a life estate interest in real property, sale of real property, investment in annuity or promissory note, modification of life insurance beneficiary designation or other transfer of death account designation. These are all actions that require explicit permission be granted within the Power of Attorney and/or Statutory Gifts Rider, if applicable. The Power of Attorney and Statutory Gifts Rider must be carefully drafted to ensure that the Agent has the authority needed, so that the Agent can act appropriately.

Another important facet of the Power of Attorney law is what happens when two Agents are named and the Principal either elects to require them to act jointly or the Principal fails to initial the option permitting them to act separately, thereby triggering the statute's default provision that when more than one Agent is named to serve at a given time, all Agents must act together. General Obligations Law §5-1508(1) provides an exception. "[I]f prompt action is required to accomplish a purpose of the power of attorney and to avoid irreparable injury to the Principal's interest and a co-agent is unavailable because of absence, illness or other temporary incapacity, the other co-agent or co-agents may act for the Principal." *Id*. Query what "a purpose of the power of attorney" is, as that is not defined in the statute or case law. While best interests include estate, tax, gift and other planning, it could be argued that those are the purposes of the power of attorney. Therefore, if one of those purposes is needed and a co-agent is not available, a sole co-agent may be able to act under this exception. As of this writing, there are no reported cases addressing this issue. However, it may be wise, if counseling an Agent, to avoid the suspicion that will arise if a co-agent seeks to invoke this provision in acting.

Prior to the 2009 law, the General Obligations Law permitted the preparation of a "springing" Power of Attorney. This power of attorney would come into effect at a later time, as specified in the document. The 2009 law and the September 12, 2010 effective law currently in place, provides that all Powers of Attorney are durable (General Obligations Law §5-1501A), and provides that the authority under a Power of attorney comes into effect the moment the Agent signs the document (General Obligations Law §5-1501B(c)). The mere lapse of time between when the Principal affixes his or her signature and when the Agent affixes his or her signature does not affect the validity of the document. *Id*. However, pursuant to the modifications that can be drafted into the statutory short form Power of Attorney, it is still possible for practitioners to create springing powers of attorney for a Principal. See General Obligations Law §5-1501B(3)(b). As *Matter of Moon v Darrow*, 30 Misc. 3d 187 (Sup. Ct. Delaware Cty, 2010) tells us, the language contained in the document that triggers the authority must be carefully drafted and the compliance with such trigger must be strict.

Finally, even with all the possible powers that a Principal may bestow upon an Agent, an Agent under a properly executed Power of Attorney cannot represent the Principal *pro se* in any matter. Such representation would be considered the Unauthorized Practice of Law in New York. See *Parkchester Preserv. Co., LP v Feldeine, L & T*, 31 Misc. 3d 859 (NY Civ. Ct., Bronx Cty, 2011).