

Powers of Attorney

Use, Misuse, Abuse and the Possible Criminal Consequences

Speakers:

Bernard L. Hyman, Jr., Esq.

***Assistant Oneida County District Attorney, Economic Crime Bureau
Professor of Practice-Economic Crime, Utica College***

Janet M. Richmond, Esq.

Getnick Livingston Atkinson & Priore, LLP

Cory A. Zenammo, Esq.

***Assistant Oneida County Public Defender, Criminal Division
Major Crimes Section***

Sponsored by the:

Oneida County Bar Association

In Cooperation with

Oneida County Public Defender, Criminal Division

Oneida County Supplemental Assigned Counsel Program

New York State Defenders Association, Inc.

New York State Office of Indigent Legal Service

Chair: Frank J. Nebush, Jr., Esq.

Oneida County Public Defender, Criminal Division

Saturday, September 10, 2016

9:00 a.m. – 12:00 p.m.

Mohawk Valley Community College

1101 Sherman Avenue

Utica, NY

IT Building, Room 225

MCLE Credits: 3 Professional Practice



PLEASE TO SURE TO TURN OFF YOUR CELLPHONE

AND



YOU MUST SIGN IN FOR THE MORNING SESSION

The Criminal Track Series

The Criminal Track Series is presented each Spring and Fall by the Oneida County Bar Association in cooperation with the Criminal Division of the Oneida County Public Defender's Office, the Oneida County Supplemental Assigned Counsel Program, the New York State Office of Indigent Legal Services and the New York State Defenders Association, Inc. as a regional effort to provide low and reduced cost training programs for public defenders and assigned counsel. A major part of the Series is the annual Criminal Law Academy that is presented in the Fall. The Criminal Law Academy was designed to provide fundamental knowledge of the practice of criminal defense law to newly-admitted attorneys, those attorneys who occasionally practice criminal law and more experienced criminal defense attorneys. The faculty is comprised of some of the most preeminent and experienced criminal law practitioners from across New York State. The two full-day course provides continuing legal education credits in skills, professional practice and ethics.

Again this Spring, under a grant from the New York State Office of Indigent Legal Services, the Oneida County Supplemental Assigned Counsel Program sponsored the Oneida County Assigned Counsel School in conjunction with the Criminal and Civil Divisions of the Oneida County Public Defenders' offices. There were two, full day sessions – one on criminal trial practice and one on family law.

UPCOMING CRIMINAL TRACK PROGRAMS

Saturday, October 1st: “DWI” with John G. Leonard, Esq., *Leonard, Curley & Longoretta PLLC*; Stacey Scotti, Esq, *Assistant Oneida County District Attorney*; along with members of the Oneida County Probation and DMV.

Saturday, October 22nd: “General Immigration Issues” with Joanne Macri, Esq., *Director of Regional Initiatives, NYS Office of Indigent Legal Services* and Sharon Ames, Esq. and Robert Reittinger, Esq., *Directors of the Region 2, Regional Immigration Assistance Center (RIAC) in Rome.*

Saturday, October 29th: “Criminal Law Update” with Gerard Neri, Esq., *Special Counsel to 5th Judicial District Administrative Judge James Tormey.*

These supplemental programs are available free to Oneida County Bar Association members who have purchased a Sempass. A \$25 registration fee is charged to non-members who are public defenders, assigned counsel or government attorneys. This fee is available only for the Criminal Track Series. The Oneida County Public Defender, Criminal Division makes several of the materials from our Criminal Track Series and the Academy available at our website.

2016 Criminal Law Academy **Friday, October 7th & October 8th**

As usual, the Academy will provide two full days of lectures centered on criminal law and criminal procedure including two ethics credits at the Utica campus of Mohawk Valley Community College. As soon as the schedule is confirmed, it will be posted on our website: <http://www.ocgov.net/oneida/pdcriminal/training>. Registration cost for the program is \$65 for one day and \$100 for both days. Continental breakfast and lunch is included.

The New York State Defenders Association, Inc. is also a valuable resource for criminal law practitioners through their website <http://www.nysda.org/>.

Our special thanks to Mohawk Valley Community College who continue to offer their first class facilities for our use. Welcome to today's program. I hope you find the presentation informative and valuable to your practice. As always, we welcome your comments and suggestions for future programs.

Frank J. Nebush, Jr., Esq.
Oneida County Public Defender, Criminal Division

SPEAKERS



BERNARD L. HYMAN, JR. is the Economic Crime Bureau Chief for the Oneida District Attorney's office and Professor of Practice-Economic Crime at Utica College. He received his B.S. degree from Utica College in Criminal Justice in 1994 and his Juris Doctor degree from the Syracuse College of Law in 1997 and joined the Oneida County District Attorney's office in 1999. During the course of his career, he was an Adjunct Instructor at the Utica School of Commerce, Mohawk Valley Community College and SUNY Polytech. Bernie has been a frequent lecturer for the Oneida County Bar Association's CLE programs. Mr. Hyman also has served as a Commissioner for the Lindsey Athletic League.



JANET M. RICHMOND, Getnick Livingston Atkinson & Priore, LLP specializes in Estate Planning and has lectured for the Oneida County Bar Association's CLE programs on the topic. She is a 1977 graduate of SUNY Albany and received her Juris Doctor from Albany Law School of Union University in 1980. She is admitted in New York, the District of Columbia, the Iowa bar and the U.S. District Court of the Northern District of New York. She is a member of the Oneida County and New York State Bar Associations, the District of Columbia bar and is Second Vice-President of the Mid-York Chapter of the Women's Bar Association of the State of New York. Janet is also a member of the board of the Women's Fund of Herkimer and

Oneida Counties, Inc. Prior to moving to Utica in 1988, Ms. Richmond worked extensively in Washington, D.C. with the Department of Energy and the U.S. Securities and Exchange Commission. She joined the firm of Getnick Livingston Atkinson & Priore, LLP in 1992 and became a partner in 1997.



CORY A. ZENAMMO, First Assistant Oneida County Public Defender, Criminal Division, Major Crimes Section. Cory received his Juris Doctor from the Syracuse University College of Law and graduated *magna cum laude* from Utica College where he was inducted into the Sigma Tau Delta International English Honor Society. Over the last five years, Cory has tried more than fifteen jury trials while in the employ of the Oneida County Public Defender's office and litigated numerous other criminal matters in adjoining counties. He has lectured on the fundamentals of pre-trial criminal practice and plea bargaining for the Oneida County Bar Association's CLE programs and the Criminal Law Academy.

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Cory A. Zenammo, Esq.
Assistant Oneida County Public Defender, Criminal Division
Major Crimes Section

8:30 a.m. – 9:00 a.m.

REGISTRATION

9:00 a.m. – 10:00 a.m.

The Power of Attorney: What It Is, What It Does, How It's Used and the Importance of the Gifts Rider, Janet M. Richmond, Esq., Getnick Livingston Atkinson & Priore, LLP

10:00 a.m. – 10:10 a.m.

BREAK

10:10 a.m. – 11:00 a.m.

The Misuse, Abuse and Prosecution of Offenses Involving Powers of Attorney, Bernard L. Hyman, Jr., Oneida County District Attorney, Economic Crime Bureau

11:00 a.m. – 12:00 p.m.

Challenging the Prosecution: Defending An "Agent" of the "Principal," Cory A. Zenammo, Esq., First Assistant Oneida County Public Defender, Criminal Division, Major Crimes Section

The Power of Attorney

*What It Is, What it Does, How It's Used
And the Importance of the Gifts Rider*

Janet M. Richmond, Esq.

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Drafting Powers of Attorney Under the New Law

Timothy E. Casserly, Esq.
JulieAnn Calareso, Esq.
Burke & Casserly, P.C.
255 Washington Avenue Extension
Albany, New York 12205

- I. Basics on Powers of Attorney
 - A. Principal = person giving the authority to someone else to act on his/her behalf
 - B. Agent = person whom the principal names to act on principal's behalf
 - C. New York State enables customization of powers of attorney, although the new law specifies ways in which this can happen

- II. An Agent under a Power of Attorney can:
 - A. Do anything the principal authorizes the agent to do
 - B. Must act in good faith and with the best interests of the principal in mind
 - C. With a properly drafted power of attorney, can assist in preparing for, placing, and paying for long term care

- III. Why a New Power of Attorney Law?
 - A. *Matter of Ferrara*, 7 NY3d 244 (2008); case from Rockland County
 - B. General Obligations Law, Article 5, Title 15 is where the power of attorney law is codified; in effect since 1964
 - C. NYS Law Revision Commission has worked for years to analyze law, make recommendations, and compile new law

- IV. The New Law Became Effective as of September 1, 2009
 - A. Original amendment to the General Obligations Law Article 15 was passed in late January to be effective March 1, 2009
 - B. Strong lobbying efforts were undertaken to delay effective date
 - C. Impossible for practitioners and the public to be educated and put into practice the new form with such short window

- V. Grandfathered
 - A. Powers of attorney validly executed prior to September 1, 2009, remain valid
 - B. Several provisions of the new law apply to all powers of attorney in effect in New York State, regardless of whether they are old or new
 - C. Several concerns with ongoing use of old powers of attorney

- VI. Does it look the same?
 - A. The "old" power of attorney could be as few as 2 pages; had letters running from A - Q (with the opportunity to add additional authority/letters thereafter). The principal was the only person to sign the document (in front of a notary).

- B. The "new" power of attorney is now 6 pages itself, with a separate document, called a statutory major gifts rider that is an additional 3 pages, if the principal wants to give the agent the ability to make gifts.
- C. 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.

VII. New provisions applicable to all Powers of Attorney

- A. Regardless of whether a client executes a new power of attorney or not, the new law contains some provisions that will be applicable to every power of attorney:
 - 1. Acceptance by third parties
 - 2. The agent's fiduciary duties
 - 3. HIPAA language expansion and military benefits expansion
 - 4. Commencement of lawsuits

VIII. Acceptance by Third Parties

- A. Old or new powers of attorneys must be honored
- B. See General Obligations Law §5-1504
- C. 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
 - 1. Reasonable cause is defined in General Obligations Law §5-1504(1)(a)
 - a. "(a) Reasonable cause under this subdivision 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 pursuant to rule twenty-one hundred five of the civil practice law and rules, or by a court or other government entity; (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.”

- D. Still perfectly acceptable for third parties to require agent to sign an acknowledged affidavit pursuant to General Obligations Law §5-1504(5) stating that the power of attorney is still in full force and effect.

IX. An Agent's Fiduciary Duties

- A. General Obligations Law §5-1505 provides the agent's fiduciary duties
- B. The agent must act with the standard of care “of a prudent person dealing with the property of another”
- C. 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 and to avoid conflicts of interest
- D. Must keep assets separate
- E. 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
- F. People who can request these records are: the principal; the monitor; co-agent or successor agents acting under the power of attorney; court-appointed person; executor of estate

X. HIPAA Language

- A. Old power of attorney gave agent authority with respect to “records, reports and statements” and that language is now going to include access to all records pertaining to health care (serve as a general HIPAA release to agent)

XI. Commencement of Lawsuits

- A. General Obligations Law §5-1510 authorizes a special proceeding
- B. A special proceeding may be commenced if agent fails to turn over a power of attorney or records to an authorized person (see General Obligations Law §5-1510(1))
- C. A special proceeding may also be commenced under General Obligations Law §5-1510(2):
 - 1. to determine whether the power of attorney is valid;
 - 2. to determine whether the principal had capacity at the time the power of attorney was executed;
 - 3. to determine whether the power of attorney was procured through duress, fraud or undue influence;
 - 4. to determine whether the agent is entitled to receive compensation or whether the compensation received by the agent is reasonable for the responsibilities performed;
 - 5. to approve the record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal;

6. 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;
 7. to determine how multiple agents must act;
 8. to construe any provision of a power of attorney; and
 9. to compel acceptance of the power of attorney in which event the relief to be granted is limited to an order compelling acceptance.
- D. A special proceeding may also be commenced by an agent who wishes to obtain court approval of his or her resignation.
- E. Parties authorized to commence the lawsuit include:
1. Agent (including co-agents and successor agents);
 2. Spouse of principal;
 3. Child of principal;
 4. Parent of the principal;
 5. Principal's successor in interest;
 6. Any third party who may be required to accept a power of attorney;
 7. Monitor;
 8. Government entity or official or other services investigate report of abuse or neglect;
 9. Court Evaluator; guardian ad litem; guardian; personal representative of estate.
 10. Notably Absent is the principal - oversight?

XII. Why Execute a New Power of Attorney?

- A. Initial resistance (institutions expecting to see the new form may balk at accepting an old form)
- B. Future challenges: if capacity exists now, consider executing a new power of attorney and avoid a potential conflict in 2-3 years when an "old" power of attorney raises a red flag with an institution
- C. Opportunity to review your designations and the authority you have given to your current agent(s)

XIII. Comparison - Old vs. New

- A. Old power of attorney – 2-3 pages
- B. New power of attorney – 6 pages
- C. New statutory major gifts rider – 3 pages
- D. Different execution requirements
- E. "Caution to the Principal" and "Information to the Agent"

XIV. Reviewing the New Power of Attorney

- A. Looks similar in some ways; looks different in others
- B. Execution Requirements
 1. Must be signed by principal **and** agent(s)
 2. If multiple agents acting together (default), both must sign to be effective
- C. Still requires signature in front of a notary; agent(s) must also sign in front of

- notary
- D. Statutory major gifts rider must be signed and notarized in front of 2 witnesses (people not named in the document as agents or alternate agents)
 - E. Effective Date
 - 1. Effective on the date that the named agent(s) sign in front of a notary
 - F. New power of attorney must be typed or printed in 12 point font
 - G. To be a statutory short form power of attorney, only changes are permitted in the modifications section (Part G)

XV. Definitions

- A. Agent - a person granted authority to act as attorney-in-fact for the principal under a power of attorney, and includes the original agent and any co-agent or successor agent. Unless the context indicates otherwise, an "agent" designated in a power of attorney shall mean "attorney-in-fact." An agent acting under a power of attorney has a fiduciary relationship with the principal (see General Obligations Law §5-1501(1)).
- B. Benefits from governmental programs or civil or military service - any benefit, program or assistance provided under a statute or governmental regulation, including social security, medicare and medicaid (see General Obligations Law §5-1501(2)).
- C. Capacity - 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 (see General Obligations Law §5-1501(3)).
- D. Compensation - reasonable compensation authorized to be paid to the agent from assets of the principal for services actually rendered by the agent under a power of attorney (see General Obligations Law §5-1501(4)).
- E. Financial Institution - a financial entity, i.e. bank (national, savings, federal mutual), trust company, savings and loan association, credit union, public pension fund, retirement system, securities broker, dealer or firm, and insurance company (see General Obligations Law §5-1501(5)).
- F. Incapacitated- to be without capacity (see General Obligations Law §5-1501(6)).
- G. Internal Revenue Code - means the United States Internal Revenue Code of 1986, as amended. Such references, however, shall be deemed to constitute references to any corresponding provisions of any subsequent federal tax code (see General Obligations Law §5-1501(7)).
- H. Monitor - means a person appointed in the power of attorney who has the authority to request, receive, and seek to compel the agent to provide a record all receipts, disbursements, and transactions entered into by the agent on behalf of the principal (see General Obligations Law §5-1501(8)).
- I. Person - means an individual, whether acting for himself or herself, or as a fiduciary or as an official of any legal, governmental or commercial entity (including, but not limited to, any such entity identified in this subdivision), corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, government

- agency, government entity, government instrumentality, public corporation, or any other legal or commercial entity (see General Obligations Law §5-1501(9)).
- J. Power of Attorney - means a written document by which a principal with capacity designates an agent to act on his or her behalf (see General Obligations Law §5-1501(10)).
- K. Principal - means an individual who is eighteen years of age or older who executes a power of attorney (see General Obligations Law §5-1501(11)).
- L. Record - means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form (see General Obligations Law §5-1501(12)).
- M. 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 (see General Obligations Law § 5-1501(13)).
- N. Statutory Major Gifts Rider or "SMGR" - document by which the principal may supplement a statutory short form power of attorney to authorize major gift transactions and other transfers, that meets the requirements of subdivision nine of section 5-1514 of this title, and that contains the exact wording of the form set forth in subdivision ten of section 5-1514 of this title. The use of the form set forth in subdivision ten of section 5-1514 of this title is lawful and when used, it shall be construed as a statutory major gifts rider. A statutory major gifts rider may contain modifications or additions as provided in section 5-1503 of this title as such modifications or additions relate to major gift transactions and other transfers. The statutory major gifts rider must be executed in the manner provided in section 5-1514 of this title, simultaneously with the statutory short form power of attorney in which the authority (SMGR) is initialed by the principal. A statutory major gifts rider and the statutory short form power of attorney it supplements must be read together as a single instrument (see General Obligations Law §5-1501(14)).
- O. Statutory Short Form Power of Attorney - means 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. The use of the form set forth in section 5-1513 of this title is lawful and when used, it shall be construed as a statutory short form power of attorney. A statutory short form power of attorney may be used to grant authority provided in sections 5-1502A through 5-1502N of this title. A "statutory short form power of attorney" may contain modifications or additions as provided in section 5-1503 of this title, but in no event may it be modified to grant any authority provided in section 5-1514 of this title. If the authority (SMGR) on the statutory short form is initialed by the principal, the statutory short form power of attorney must be executed in the manner provided in section 5-1501B of this title,

simultaneously with the statutory major gifts rider. A statutory short form power of attorney and a statutory major gifts rider which supplements it must be read together as a single instrument (see General Obligations Law §5-1501(15)).

P. Third Party - means a financial institution or person (see General Obligations Law §5-1501(16)).

XVI. Part A of the Form

- A. The opening warning of the power of attorney has been dramatically expanded
- B. Includes the warning that this document cannot govern health care decisions
- C. Advises that the principal consult with an independent attorney before signing
- D. Powers of attorney do not have to be drafted by an attorney, but even the legislature believes it would be beneficial to have an attorney involved

XVII. Part B of the Form

- A. Designation of agents: the appointment of an agent(s) is the same as in the old form
- B. General Obligations Law §5-1508 allows co-agents or successor agents to be appointed
- C. All agents will act together unless explicitly stated
 - 1. The old power of attorney required an affirmative decision either way by initialing a box
 - 2. The default for multiple agents in the new power of attorney is to act together unless otherwise stated (i.e., initial in the box "my agents may act SEPARATELY")
- D. Exception contained in General Obligations Law §5-1508(1) that allows one co-agent to act alone if "irreparable injury" would occur to the principal absent such single action
- E. If co-agents are named and one dies, resigns or becomes incapacitated, the other acts alone (see General Obligations Law §5-1508(1)).
- F. Successor agents have same authority as originally named agents, unless the principal says otherwise (see General Obligations Law §5-1508(2)).

XVIII. Part C of the Form

- A. Designation of successor agents: the appointment of an agent(s) is the same as in the old form
- B. The law states that all successor agents must act together unless explicitly stated
- C. Issue with successor agents: do the named successor agents need to sign the power of attorney at the time it is executed by the principal/agent or only when he or she takes responsibility?
 - 1. Lack of clarity in the law, but leaders in the field hold that it is only upon needing to act

XIX. Part D of the Form

- A. Document is durable - survives incapacity
- B. See General Obligations Law §5-1501A. Power of attorney not affected by incapacity. 1. A power of attorney is durable unless it expressly provides that it

is terminated by the incapacity of the principal. 2. The subsequent incapacity of a principal shall not revoke or terminate the authority of an agent who acts under a durable power of attorney. All acts done during any period of the principal's incapacity by an agent pursuant to a durable power of attorney shall have the same effect and inure to the benefit of and bind a principal and his or her distributees, devisees, legatees and personal representatives as if such principal had capacity. If a guardian is thereafter appointed for such principal, such agent, during the continuance of the appointment, shall account to the guardian rather than to such principal.

- C. Under the old law, there were three different forms: durable (survived incapacity); nondurable (authority of agent terminates upon incapacity of principal); and springing (authority does not take effect until a specified event at a later date)
- D. The new law uses one form for all three situations; it starts off as durable; it can be amended to be non-durable (modifications section in Part G); it can also insert springing power (modifications section in Part G)

XX. Part E of the Form

- A. Revocation of prior powers of attorney
- B. The old law permitted multiple powers of attorneys to be in force simultaneously
- C. Revocation, under the old law, required affirmative statement of revocation
- D. Presumption is now that all prior powers of attorney are revoked; consider adding language in the modifications section to address this (Part G)
- E. There is a lack of clarity in the law as to how far this will apply: does this apply to bank powers of attorney? IRS powers of attorney? Technical corrections legislation may clarify this issue.

XXI. Part F of the Form

- A. Grant of Authority - see General Obligations Law §5-1502A through General Obligations Law §5-1502O
- B. Removes all references to trusts and forces that authority into the statutory major gifts rider
- C. Carries forward the letters structure, with the option of initialing only the last letter (Letter P) to select all the powers
- D. General Obligations Law §5-1502A - real estate transactions.
- E. General Obligations Law §5-1502B - chattel and goods transactions
- F. General Obligations Law §5-1502C - bond, share and commodity transactions
- G. General Obligations Law §5-1502D - banking transactions
 - 1. Disallows power to add or delete joint account holder designations or change totten trust beneficiaries (authority would need to be granted in the statutory major gifts rider)
- H. General Obligations Law §5-1502E - business operating transactions
- I. General Obligations Law §5-1502F - insurance transactions
 - 1. Disallows power to change beneficiary designations (authority would need to be granted in the statutory major gifts rider)
- J. General Obligations Law §5-1502G - estate transactions
 - 1. Clarification that an agent can act with regard to any estate or trust,

- whether or not created at the time the power of attorney was executed
- K. General Obligations Law §5-1502H - claims and litigation
 - L. General Obligations Law §5-1502I - personal and family maintenance
 - 1. Letter I: used to be "Personal relationships and affairs," now "personal and family maintenance," defined to include 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
 - M. General Obligations Law §5-1502J - benefits from governmental programs or civil or military service
 - 1. Letter J: used to read "benefits from military service," 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.
 - N. General Obligations Law §5-1502K - health care billing and payment matters; records, reports and statements
 - 1. One of the provisions of the new law that is being imposed upon old powers of Attorney
 - O. General Obligations Law §5-1502L - retirement benefit transactions
 - 1. Disallows power to change beneficiary designations (authority would need to be granted in the statutory major gifts rider)
 - P. General Obligations Law §5-1502M - Tax matters
 - 1. Letter M: old Letter M was gifts up to \$10,000 to spouse, children, and remote descendants; new Letter M is "tax matters" which is what was contained in the old Letter N
 - Q. General Obligations Law §5-1502N - all other matters.
 - 1. Letter N: old Letter N was "tax matters" but now that this became Letter M in the new form; the new form has Letter N being "all other matters"
 - a. This does not include health care and does not include major gifts
 - R. NOTE: there is no statutory section or subsection authorizing the delegation of authority held by an agent to another agent, but when you review the statutory short form provided in the statute, that delegation authority is still in there as Letter "O"
 - S. Still can insert some or all of the letters and initial one box instead of all of them in Letter "P" (ease in execution)

XXII. Part G of the Form

- A. Modifications: permits the principal to modify the power of attorney, as needed
- B. Ability to change durable into nondurable
- C. Ability to not revoke all prior powers of attorney
- D. Ability to define "reasonable compensation," if desired
- E. Can insert other provisions as needed, provided that they are not provisions that

- would, by law, belong in the statutory major gifts rider
- F. 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)
 - G. Consider a provision acknowledging that the agent may have a conflict of interest when acting, and the principal waives the conflict.
 - H. Additional language for agent to conduct insurance transactions
 - I. Ability of agent to act with regard to IRAs, retirement plans, trusts, etc.
 - J. Access to safe deposit boxes
 - K. Ability to make decisions regarding long term care, residency, maintain/change place of abode, etc.
 - L. Additional reimbursement language for expenses advanced by agent on principal's behalf (i.e., mileage, etc.)

XXIII. Part H of the Form

- A. Major Gifts Rider indication: if you have the intention of allowing someone to make gifts in excess of \$500 (to people and charities you have customarily given to in the past), you must **BOTH** initial in Part H and complete the statutory major gifts rider

XXIV. Part I of the Form

- A. Designation of Monitor: new section of the law; allows the principal to appoint a "watchdog" of the agent; monitors are permitted to demand accounting of the agent, are permitted to have documents/records released to them, and are permitted to commence a lawsuit
- B. General Obligations Law §5-1509
- C. No notice to or acceptance by monitor

XXV. Part J of the Form

- A. Compensation of the Agent: under the old power of attorney law, compensation was not permitted unless explicitly stated and many people forgot to think about this issue
- B. General Obligations Law §5-1506 states that, absent an express statement affirmatively allowing compensation, it is not allowed
- C. New law has it contained on its face and allows for "reasonable compensation"
- D. The Principal must initial the box to allow reasonable compensation
- E. No obligation to define it, but the Principal may define reasonable compensation in the modifications section (Part G)

XXVI. Part K of the Form

- A. Indemnification to third parties who rely on this
- B. A third party must receive actual notice of revocation or termination of authority in order to be freed from obligation to honor a power of attorney that is presented to such third party

XXVII. Part L of the Form

- A. Termination of Authority (see General Obligations Law §5-1511)
- B. Pursuant to General Obligations Law §5-1511(1), a power of attorney terminates when:
 - 1. the principal dies;
 - 2. the principal becomes incapacitated, if the power of attorney is not durable;
 - 3. the principal revokes the power of attorney;
 - 4. 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;
 - 5. 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;
 - 6. 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;
 - 7. the purpose of the power of attorney is accomplished; or
 - 8. 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.
- C. Pursuant to General Obligations Law §5-1511(2), an agent's authority ends:
 - 1. When the principal revokes the agent's authority;
 - 2. When the agent dies, becomes incapacitated or resigns;
 - 3. 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. If 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
 - 4. When the power of attorney terminates.
- D. Notice of revocation is accomplished as it was under the old law: 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)).
- E. Recorded powers of attorney can only be revoked by recording a revocation (see General Obligations Law § 5-1511(4)).
- F. Pursuant to General Obligations Law §5-1511(6), a principal revokes a power of attorney by executing a subsequent one.

XXVIII. Part M of the Form

- A. Signature and Acknowledgment (signing in front of a notary) has not changed.
- B. However, the power of attorney is not valid at signing as it was under the old law
- C. Must also have agent(s) sign
- D. See General Obligations Law §5-1501B for statutory language indicating when a valid power of attorney is created

XXIX. Part N of the Form

- A. New part of the power of attorney that explicitly warns the agent of the responsibility that he/she is undertaking

- B. Provides language regarding the liability of the agent
- C. Instructs the agent on how to sign documents when exercising authority under the power of attorney

XXX. Part O of the Form

- A. Agent(s) must sign in order to make power of attorney effective
- B. Multiple agents do not need to sign at the same time
- C. Agent(s) do not have to sign at the same time as the principal
- D. Agent's signature must be acknowledged (notarized)

XXXI. New Statutory Major Gifts Rider (SMGR)

- A. General Obligations Law §5-1514
- B. Gifting only authorized provided principal has initialed in the box under Section "H" of the power of attorney
- C. This document must be signed simultaneously with the power of attorney
- D. When both documents are in existence, they are to be read as one document

XXXII. Preamble and Part A of SMGR

- A. "Caution to the Principal" highlights the significance of this document
- B. Part A allows the agent to make gifts to others (not including himself or herself) up to the federal annual gift tax exclusion amount (\$13,000 for 2009). See General Obligations Law §5-1514(2).

XXXIII. Part B of SMGR

- A. Modifications to expand gifting powers may be made in this section. Examples of modifications include, "Principal gives the Agent the right to:
 1. 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;
 2. Make unlimited gifts (or gifts of a specific amount) to any person or charity (consider language stating that gifts and transfers are in principal's best interest, for gift, estate, tax or Medicaid planning, etc.);
 3. Open, modify or terminate a deposit account in the name of the principal and other joint tenants;
 4. Open, modify or terminate any other joint account in the name of the principal and other joint tenants;
 5. Open, modify or terminate 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;
 6. Open, modify or terminate 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;
 7. 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;
 8. 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;

9. Designate or change the beneficiary or beneficiaries of any type of retirement benefit or plan;
 10. Create, amend, revoke, or terminate an inter vivos trust; and
 11. Create, change or terminate other property interests or rights of survivorship, and designate or change the beneficiary or beneficiaries therein.”
- B. Consider an additional modification giving direction to the agent regarding how gifts are to be made, such as:
1. “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)” (see General Obligations Law §5-1514(3)).

XXXIV. Part C of SMGR

- A. Authority for agent to make gifts to himself/herself is done *only* if this provision is initialed and it must be specified what authority the agent is given in this regard

XXXV. Part D of SMGR

- A. Same indemnification of third parties for their acceptance and honoring of the statutory major gifts rider as those third parties had for honoring the power of attorney
- B. Unreasonable refusal:
1. Failure to use third party form
 2. Lapse of time since execution
 3. Lapse of time between principal and agent executing the power of attorney

XXXVI. Part E of SMGR

- A. Signature of Principal: Must be dated, signed and acknowledged (signed in front of a notary public)

XXXVII. Part F of SMGR

- A. Witnesses: Two people who are not named as possible recipients of gifts under the document must sign
- B. Statement indicates that these witnesses saw the principal sign it in front of them and in front of the other witnesses, meaning that all witnesses must be in one place at one time.

XXXVIII. Part G of SMGR

- A. Indication of who prepared the document on principal's behalf
- B. Potentially useful if litigation arises as to capacity or fraud/duress

XXXIX. Planning with the New Power of Attorney Law

- A. Access to funds to pay for principal's long term care
1. The new law greatly broadens who must accept a statutory short form power of attorney.
 - a. Old law only forced "financial institutions" to accept powers of attorney
 - b. New law (see General Obligations Law §5-1504) 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 section 5-1501B of this title, including a statutory short form power of attorney which is supplemented by a statutory major gifts rider, or a statutory short form power of attorney properly executed in accordance with the laws in effect at the time of its execution"
 2. 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 document (as opposed to waiting until the principal needs the agent to act).
- B. Asset protection
1. Asset protection often involves: the creation of a trust(s), 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 TOD account designation.
 2. New statutory short form power of attorney
 - a. Part B of the form - designation of agents
 - i. Absent affirmative initialing of the box in Section B, agents must act together
 - ii. Note statutory exception for irreparable injury (see General Obligations Law §5-1508(1))
 - b. Part H of the form - principal must initial this box and then also properly execute a statutory major gifts rider in order for gifting to be authorized
 - c. Compensation of agent - earned income to the agent (not a gift)
 3. New statutory major gifts rider
 - a. Part A - limited authority to make gifts up to annual gift tax exclusion amount in effect for the year of the gift to spouse, children, more remote descendants and parents
 - b. Part B - modifications
 - c. Part C - specific authority for agent to make major gifts or transfers to himself or herself
- C. Authority to make an application and re-certification
1. General Obligations Law §5-1502J

- a. Letter J in the old form read "benefits from military service"
- b. Letter J now reads "benefits from governmental programs or civil or military benefits"
 - i. This is broad authority allowing the agent to pursue and act on behalf of the principal with regard to any payment or claim against a government agency, such as medicaid, medicare, veteran's benefits, federal pension, etc.

**POWER OF ATTORNEY
NEW YORK STATUTORY SHORT FORM**

(a) **CAUTION TO THE PRINCIPAL:** Your Power of Attorney is an important document. As the "principal," you give the person whom you choose (your "agent") authority to spend your money and sell or dispose of your property during your lifetime without telling you. You do not lose your authority to act even though you have given your agent similar authority.

When your agent exercises this authority, he or she must act according to any instructions you have provided or, where there are no specific instructions, in your best interest. "Important Information for the Agent" at the end of this document describes your agent's responsibilities.

Your agent can act on your behalf only after signing the Power of Attorney before a notary public. You can request information from your agent at any time. If you are revoking a prior Power of Attorney by executing this Power of Attorney, you should provide written notice of the revocation to your prior agent(s) and to the financial institutions where your accounts are located.

You can revoke or terminate your Power of Attorney at any time for any reason as long as you are of sound mind. If you are no longer of sound mind, a court can remove an agent for acting improperly.

Your agent cannot make health care decisions for you. You may execute a "Health Care Proxy" to do this.

The law governing Powers of Attorney is contained in the New York General Obligations Law, Article 5, Title 15. This law is available at a law library, or online through the New York State Senate or Assembly websites, www.senate.state.ny.us or www.assembly.state.ny.us.

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

(b) DESIGNATION OF AGENT(S):

I, _____,
_____, hereby appoint:
name and address of principal

name(s) and address(es) of agent(s)

If you designate more than one agent above, they must act together unless you initial the statement below.

() My agents may act SEPARATELY.

(c) DESIGNATION OF SUCCESSOR AGENT(S): (OPTIONAL)

If every agent designated above is unable or unwilling to serve, I appoint as my successor agent(s):

name(s) and address(es) of successor agent(s)

Successor agents designated above must act together unless you initial the statement below.

() My successor agents may act SEPARATELY.

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

(e) This POWER OF ATTORNEY REVOKES any and all prior Powers of Attorney executed by me unless I have stated otherwise below, under "Modifications."

If you are NOT revoking your prior Powers of Attorney, and if you are granting the same authority in two or more Powers of Attorney, you must also indicate under "Modifications" whether the agents given these powers are to act together or separately.

(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; |
| () | (J) benefits from governmental programs or civil or military service; |
| () | (K) health care billing and payment matters; records, reports, and statements; |
| () | (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: A-O.

You need not initial the other lines if you initial line (P).

(g) MODIFICATIONS: (OPTIONAL) In this section, you may make additional provisions, including language to limit or supplement authority granted to your agent. However, you cannot use this Modifications section to grant your agent authority to make major gifts or changes to interests in your property. If you wish to grant your agent such authority, you must complete the Statutory Major Gifts Rider.

(h) MAJOR GIFTS AND OTHER TRANSFERS: STATUTORY MAJOR GIFTS RIDER (OPTIONAL) In order to authorize your agent to make major gifts and other transfers of your property, you must initial the statement below and execute a Statutory Major Gifts Rider at the same time as this instrument. Initialing the statement below by itself does not authorize your agent to make major gifts and other transfers. The preparation of the Statutory Major Gifts Rider should be supervised by a lawyer.

() I grant my agent authority to make major gifts and other transfers of my property, in accordance with the terms and conditions of the Statutory Major Gifts Rider that supplements this Power of Attorney.

(i) DESIGNATION OF MONITOR(S): (OPTIONAL)

I wish to designate _____, whose address(es)

is (are) _____

_____ as monitor(s).

Upon the request of the monitor(s), my agent(s) must provide the monitor(s) with a copy of the power of attorney and a record of all transactions done or made on my behalf. Third parties holding records of such transactions shall provide the records to the monitor(s) upon request.

(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".

() My agent(s) shall be entitled to reasonable compensation for services rendered.

(k) ACCEPTANCE BY THIRD PARTIES: I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Power of Attorney. I understand that any termination of this Power of Attorney, whether the result of my revocation of the Power of Attorney or otherwise, is not effective as to a third party until the third party has actual notice or knowledge of the termination.

(l) TERMINATION: This Power of Attorney continues until I revoke it or it is terminated by my death or other event described in section 5-1511 of the General Obligations Law.

Section 5-1511 of the General Obligations Law describes the manner in which you may revoke your Power of Attorney, and the events which terminate the Power of Attorney.

(m) SIGNATURE AND ACKNOWLEDGMENT:

IN WITNESS WHEREOF I have hereunto signed my name on _____, 2010.

PRINCIPAL signs here:

b _____
[Print name]

STATE OF NEW YORK
COUNTY OF

)
) SS.:

On the _____ day of _____, 2010, before me, the undersigned a Notary Public in and for said State, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that the individual executed the same in the individual's capacity, and that by the individual's signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Notary Public
My Commission Expires

(n) IMPORTANT INFORMATION FOR THE AGENT:

When you accept the authority granted under this Power of Attorney, a special legal relationship is created between you and the principal. This relationship imposes on you legal responsibilities that continue until you resign or the Power of Attorney is terminated or revoked. You must:

- (1) act according to any instructions from the principal, or, where there are no instructions, in the principal's best interest;
- (2) avoid conflicts that would impair your ability to act in the principal's best interest;
- (3) keep the principal's property separate and distinct from any assets you own or control, unless otherwise permitted by law;
- (4) keep a record of all receipts, payments, and transactions conducted for the principal; and
- (5) disclose your identity as an agent whenever you act for the principal by writing or printing the principal's name and signing your own name as "agent" in either of the following manner: (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 give major gifts to yourself or anyone else unless the principal has specifically granted you that authority in this Power of Attorney or in a Statutory Major Gifts Rider attached to this 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.

(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.

**POWER OF ATTORNEY
NEW YORK STATUTORY MAJOR GIFTS RIDER
AUTHORIZATION TO MAKE MAJOR GIFTS OR OTHER TRANSFERS**

CAUTION TO THE PRINCIPAL: This OPTIONAL rider allows you to authorize your agent to make major gifts or other transfers of your money or other property during your lifetime. Granting any of the following authority to your agent gives your agent the authority to take actions which could significantly reduce your property or change how your property is distributed at your death. "Major Gifts or Other Transfers" are described in section 5-1514 of the General Obligations Law. This Major Gifts Rider does not require your agent to exercise granted authority, but when he or she exercises this authority, he or she must act according to any instructions you provide, or otherwise in your best interest. This Major Gifts Rider and the Power of Attorney it supplements must be read together as a single instrument.

Before signing this document authorizing your agent to make major gifts and other transfers, you should seek legal advice to ensure that your intentions are clearly and properly expressed.

(a) GRANT OF LIMITED AUTHORITY TO MAKE 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 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: Use this section if you wish to authorize gifts in excess of the above amount, gifts to other beneficiaries or other types of transfers. 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 or transfers 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 or transfers pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest:

To enter into a "Personal Service Contract" or Caregiver Agreement" on my behalf with third parties;

To purchase a life estate on my behalf in the home of a third party;

To purchase and/or enter into an annuity contract that is compliant with the DRA, with third parties;

To purchase Series I and Series EE United States Savings Bonds because they are not considered an available resource for Medicaid eligibility during this initial holding period; and

To make the following specified transactions:

- (1) open, modify or terminate a deposit account in my name and other joint tenants;
- (2) open, modify or terminate any other joint account in my name and other joint tenants;
- (3) open, modify or terminate 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;
- (4) open, modify or terminate 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;
- (5) change the beneficiary or beneficiaries of any contract of insurance on my life of the or annuity contract for my benefit;
- (6) procure new, different or additional contracts of insurance on my life principal or annuity contracts for my benefit and designate the beneficiary or beneficiaries of any such contract;
- (7) designate or change the beneficiary or beneficiaries of any type of retirement benefit or plan; and
- (8) create, change or terminate other property interests or rights of survivorship, and designate or change the beneficiary or beneficiaries therein.

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).

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

If you wish to authorize your agent to make gifts or transfers 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 major gifts or other transfers to himself or herself:

(f) SIGNATURES OF WITNESSES:

By signing as a witness, I acknowledge that the principal signed the Major Gifts Rider in my presence and the presence of the other witness, or that the principal acknowledged to me that the principal's signature was affixed by him or her or at his or her direction. I also acknowledge that the principal has stated that this Major Gifts Rider reflects his or her wishes and that he or she has signed it voluntarily. I am not named herein as a permissible recipient of major gifts.

Signature of witness 1

Signature of witness 2

Date

Date

Print name

Print name

Address

Address

City, State, Zip code

City, State, Zip code

(g) This document prepared by: _____.

The Misuse, Abuse and Prosecution of Offenses Involving Powers of Attorney

Bernard L. Hyman, Jr., Esq.
Oneida County District Attorney
Economic Crime Bureau

POWERS OF ATTORNEY: WHERE DID MY MONEY GO?

Bernard L. Hyman, Jr., Esq.

Assistant District Attorney

Economic Crime Bureau

Oneida County District Attorney

DEFINING THE ISSUE....

Local accountant heads to prison after stealing thousands



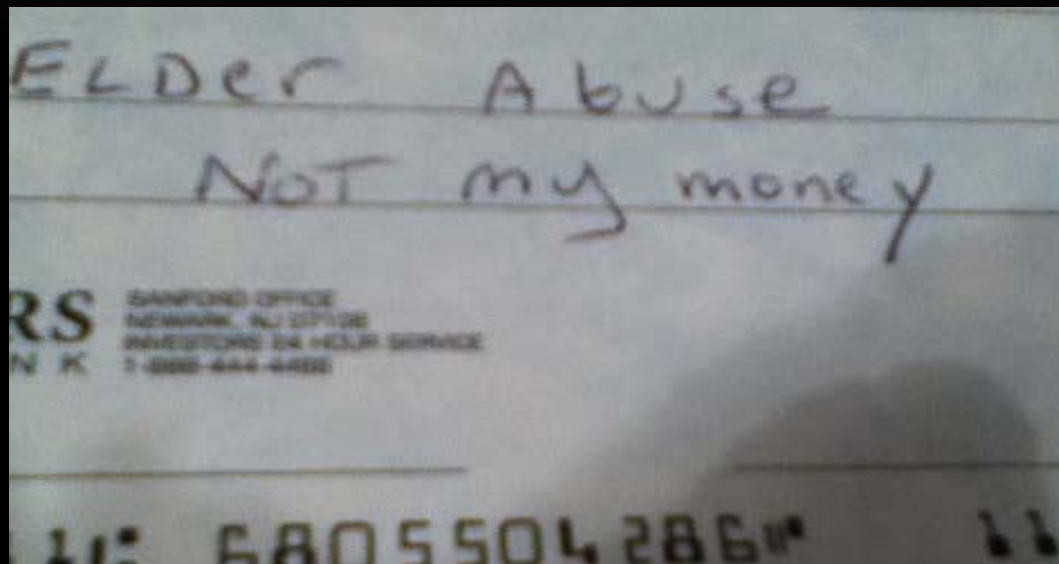
THE GOOD...

- Allows the Principal to prepare for the future
- Incapacity



THE BAD....

- Financial Exploitation



THE LAW.... ON THE HORIZON

- Passed by the Senate in 2015
- Pending in the Assembly in 2016



OUR CURRENT LAW...

- 5-1501 - Applications and definitions.
- 5-1501A - Power of attorney not affected by incapacity.
- 5-1501B - Creation of a valid power of attorney; when effective.
- 5-1501C - Powers of attorney excluded from this title.
- 5-1502A - Construction--real estate transactions.
- 5-1502B - Construction--chattel and goods transactions.
- 5-1502C - Construction--bond, share and commodity transactions.

OUR CURRENT LAW...

- 5-1502D - Construction--banking transactions.
- 5-1502E - Construction--business operating transactions.
- 5-1502F - Construction--insurance transactions.
- 5-1502G - Construction--estate transactions.
- 5-1502H - Construction--claims and litigation.
- 5-1502I - Construction--personal and family maintenance.

OUR CURRENT LAW...

- 5-1502J - Construction--benefits from governmental programs or civil or military service.
- 5-1502K - Construction--health care billing and payment matters; records, reports and statements.
- 5-1502L - Construction--requirement benefit transactions.
- 5-1502M - Construction--Tax matters.
- 5-1502N - Construction--all other matters.
- 5-1503 - Modifications of the statutory short form power of attorney and of the statutory gifts rider.
- 5-1504 - Acceptance of statutory short form power of attorney.

OUR CURRENT LAW...

- 5-1505 - Standard of care; fiduciary duties; compelling disclosure of record.
- 5-1506 - Compensation.
- 5-1507 - Signature of agent.
- 5-1508 - Co-agents and successor agents.
- 5-1509 - Appointment of monitor.

OUR CURRENT LAW...

- 5-1510 - Special proceedings.
- 5-1511 - Termination or revocation of power of attorney; notice.
- 5-1512 - Powers of attorney executed in other jurisdictions.
- 5-1513 - Statutory short form power of attorney.
- 5-1514 - Certain gift transactions; formal requirements; statutory form.

Challenging the Prosecution
Defending an “Agent” of the “Principal”

Cory A. Zenammo, Esq.
First Assistant Oneida County Public Defender
Criminal Division
Major Crimes Section

Consent, the Power of
Attorney and the Like:
Permission is 100/10ths of the
Law



Statutory Short Form

Look It Up and Use It

General Obligations Law Section 5-1513

A. “When in Doubt, Print it Out”

- i. Rework it or don't, but there is no excuse for messing it up when the document is for the taking;
- ii. PRESUMPTIVELY VALID ([GOB § 5-1504](#))
 1. **“No third party located or doing business in this state shall refuse, without reasonable cause, to honor a statutory short form power of attorney properly executed in accordance with [section 5-1501B](#) of this title, including a statutory short form power of attorney which is supplemented by a statutory gifts rider, or a statutory short form power of attorney properly executed in accordance with the laws in effect at the time of its execution.”**
 2. **Reasonable Cause Is:**
 - a) Refusal to Produce Original
 - b) Adult Protective Referral
 - c) Actual Knowledge of Crime, Incapacity (Nondurable), Fraud, Actual Valid Termination Notice;

What Does that Mean for your Client

VALID DEFENSE (Presumptive)

More on that Later

With that in Mind, Let's Discuss

CONSENT

Specific Elemental Requirements

1. Sex Offenses

A. Penal Law § 130.05

- i. EVERY Offense under Article 130 requires CONSENT as an element;

B. Refusal to Extend Elsewhere:

- i. Roe v. Barad, 647 N.Y.S.2d 14 (Second Department, 1996)

- a. Court refused Plaintiff's argument that prior element of consent was previously litigated in prior criminal case under Penal Law § 263.05, since the Penal Law § 130.05 consent requirement ONLY applies to Article 130 offense.

2. Burglary

A. Penal Law § 140.20

- i. “Unlawfully” implies the litigation of consent, but specify it the same as Penal Law § 130.05
- ii. Trees in Boonville, Use permissions, etc.

PEOPLE V. IPPOLITO, 20 N.Y.3D 615 (2013)

Facts and Procedural History:

- D, an accountant, had a short form General PoA with unlimited powers for an 80 year old woman with some tax issues;
- D used authority to divert \$696,000.00 to separate account for personal uses by signing checks in the name of the Principal without designation of PoA;
- D convicted after trial of 40 Counts of Forgery 2nd (DF)(checks) and a class C felony for Grand Larceny;
- DA presented evidence at trial that PoA designation was customary, and that D presented forged documents as a signature purported to be the principal's when it wasn't. Trial Court Agreed.
- Asdf
- FOURTH DEPARTMENT reversed the 40 Counts of Forgery and CoA Upholds:
 - “Here, the POA (until revoked) vested Ippolito with unlimited power to sign Katherine M.L.'s name on written instruments. As a result, the checks cannot have been forgeries (see [People v. Cannarozzo](#), 62 A.D.2d 503, 504, 405 N.Y.S.2d 528 [4th Dept.1978, Simons, J.], *aff'd* 48 N.Y.2d 687, 421 N.Y.S.2d 882, 397 N.E.2d 394 [1979] [“(A) person does not ‘falsely make’ an instrument when he is authorized to execute it”]). Put another way, where the ostensible maker or drawer of a written instrument is a real person, a signature is not forged unless unauthorized (see [Penal Law § 170.00\[4\]](#)). Since Ippolito was empowered to sign Katherine M.L.'s name at the times when he drew or endorsed the 40 checks at issue on this appeal, the People's proof was legally insufficient to convict him of CPFI.”
- NOTE: Court also indicates that Ippolito acted within the broad powers conferred upon him by the PoA

[People v. Vines, 984 N.Y.S.2d 609 \(Second Department, 2015\)](#)

Facts and Procedural History:

- D arrested for hanging around his father's house;
- DA argues that Sister had authority to remove D from house based on a PoA from the Father;
- D convicted after trial.
- Second Department Reverses: “...the People submitted evidence that the defendant's sister had prohibited the defendant from entering the dwelling in reliance upon the powers conferred upon her by a power of attorney she was given by the father. However, the particular power of attorney given to the defendant's sister did not confer upon her authority to make such informal, personal decisions on her father's behalf (*cf.* [Matter of Culbreth, 48 A.D.3d 564, 852 N.Y.S.2d 246](#)), and there was no other evidence that the defendant was not permitted to be in his father's house.”

Take Away:

- Consent is a Requirement for almost every type of offense;
- The existence of a PoA doesn't necessarily convey or restrict permission or consent—its content dependant;
- The DA has to prove intent beyond a reasonable doubt, which, in many cases, means proof beyond a reasonable doubt that there was no PoA or that the PoA lacked the authority (or didn't lack the authority as in [Vines](#)) to establish the unauthorized activity.

People v. Alligood, 115 A.D.3d 1346 (Fourth Department, 2014)

Facts and Procedural History:

- D endorsed checks that had the “forged” signature of D’s father under authority of a PoA (Charged with Grand Larceny 3rd, Criminal Possession of a Forged Instrument 2nd all relating to 6 pension checks);
- A argument by both parties ensued, D presenting evidence of a valid PoA, the People presenting evidence that the same was not.
- D was convicted and conviction upheld. The Fourth Department stated that “Although a defense witness who owned a liquor store testified that defendant's father had walked into his store in 2003 and signed a document that the store owner notarized, the People established that in 2003 the father suffered from a number of debilitating medical conditions that rendered him unable to ambulate on his own, and he had not in any event left MCH since at least 2001.”

PoA and What's Important

- PoA = Consent and Consent = acquittal (or at least created a convenient issue that the DA then has to disprove;
- The Content and Scope of the PoA can make or break your defense;
- The Validity of the PoA is an issue of fact which solidifies or ruins your defense.

People v. Vandermuelen, 42 A.D.3d 667 (Third Department, 2007)

- D, among other things, created a credit card in the name of CW utilizing a PoA;
- Credit Card was used 3 times;
- D convicted of Identity Theft and the Third Department upheld the conviction stating: “The evidence was also legally sufficient to establish defendant's commission of the crime of identity theft in the third degree (see [Penal Law § 190.78](#)[1]). The credit card account was opened in the victim's name and with her identifying information, and three charges were made. Palko testified that she never applied for the credit card and had not made any purchases with it. We find no merit in defendant's claim that the power of attorney authorized her application for the credit card on Palko's behalf, as there was no reference in the application or the bank manager's testimony that defendant made the application on Palko's behalf or pursuant to a power of attorney.”
- CONTRARY TO [IPPOLITO](#)

Presumptive Proof of Consent

- Since the Statutory Long Form MUST be accepted by the DA's office ([GOB § 5-1504](#)) the existence of a PoA is presumptive evidence of consent;
- Force the DA to prove that the PoA is fake, or that your client superseded its grant of authority, etc.