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# Banks Have Much at Risk in Battle Over Powers of Attorney in New York

***Michael J. Heller****

*This article explores potential changes contemplated to New York's law governing powers of attorney, and the implications for banks in New York and nationally.*

A power of attorney is a legally enforceable document that permits a party to make decisions as an agent for another when he or she becomes unable or is unavailable to do so. The scope of the matters that can be covered by a power of attorney is very broad, including financial issues and even the acquisition or disposition of personal and real property.

Banks and other financial institutions frequently encounter powers of attorney in a variety of transactions. Banks are cautious about relying on those documents, however, because as a practical matter the legal impact of power of attorneys can be quite significant and relying on an improperly executed or otherwise unenforceable power of attorney can be costly. As a result, in many instances, some organizations have sought to accept powers of attorney created only on their own forms.

There are, however, significant benefits for a bank or other third party that accepts a statutory short form power of attorney. For example, New York General Obligations Law ("GOL") Section 5-1504(3) provides that, unless the recipient of a statutory short form power of attorney has actual knowledge that the principal lacked capacity to execute the power of attorney or that the power of attorney was procured through fraud, duress, or undue influence, or unless the recipient has actual notice of the revocation or termination of the power of attorney, the recipient—and its officers, agents, attorneys-in-fact and employees—will not incur any liability for acting on the basis of the authority granted by the power of attorney.

About a decade ago, New York revised its rules relating to powers of attorney. Since then, there have been a number of efforts to further alter the law—including by imposing penalties on banks or others that do not accept the statutory short form power of attorney.

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This article focuses on these developments in New York, which may lead the way legislatively for other states, and highlights the potential impact on banks.

## NEW YORK LAW

New York GOL Section 5-1501B explains when a power of attorney is valid and enforceable. The statute provides that, to be valid and enforceable, a power of attorney executed in New York must:

- Be typed or printed using letters that are legible or of clear type no less than 12 point in size, or, if in writing, a reasonable equivalent thereof;
- Be signed and dated by a principal with capacity, with the signature of the principal duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property;
- Be signed and dated by any agent acting on behalf of the principal with the signature of the agent duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property; and
- Contain the exact wording of two specific subsections of the GOL.[1]

New York law contains the following additional requirements for a power of attorney to be valid for the purpose of authorizing the agent to make certain gift transactions:

- A statutory short form power of attorney must contain the authority initialed by the principal and must be accompanied by a valid statutory gifts rider; and
- A non-statutory power of attorney must be executed pursuant to certain other specified requirements.[2]

The GOL further provides that the date on which an agent's signature is acknowledged is the effective date of the power of attorney as to that agent. If two or more agents are designated to act together, however, the power of attorney takes effect when all the agents so designated have signed the power of attorney with their signatures acknowledged.

In addition, if a power of attorney states that it takes effect upon the occurrence of a date or a contingency specified in the document, then the power of attorney takes effect only when the date or contingency identified in the

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[1] The specific subsections are the "Caution to the Principal" provision set forth in GOL Section 5-1513(1)(a) and the "Important Information for the Agent" provision set forth in GOL Section 5-1513(1)(n).

[2] *See*, GOL Section 5-1514(9)(b).

document has occurred, and the signature of the agent acting on behalf of the principal has been acknowledged. Moreover, if the power of attorney requires that a person or persons named or otherwise identified therein declare, in writing, that the identified contingency has occurred, such a declaration satisfies the preceding requirement whether or not the specified contingency actually has occurred.

## WHEN CAN BANKS DISREGARD A POWER OF ATTORNEY?

Can banks properly refuse to honor what appears to be a properly executed statutory short form power of attorney? As provided by GOL Section 5-1504, no bank or other third party located or doing business in New York may refuse, without reasonable cause, to honor a properly executed statutory short form power of attorney, including a statutory short form power of attorney 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.

The statute provides that "reasonable cause" includes the following nine circumstances:

(1) The refusal by the agent to provide an original power of attorney or a copy appropriately certified by an attorney 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 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 gift of real property made pursuant to a statutory gifts rider or non-statutory power of attorney that does not contain the express instructions or purposes of the principal.

The GOL also states that it "shall be deemed unreasonable" for a third party to refuse to honor a properly executed statutory short form power of attorney executed in accordance with the laws in effect at the time of the execution, if the only reason for the refusal is any of the following:

- The power of attorney is not on a form prescribed by the third party to whom the power of attorney is presented;
- There has been a lapse of time since the execution of the power of attorney; or
- On the face of the statutory short form power of attorney, there is a lapse of time between the date of acknowledgment of the signature of the principal and the date of acknowledgment of the signature of any agent.

Indeed, the GOL also provides that it "shall be deemed unlawful" for a third party to unreasonably refuse to honor a properly executed statutory short form power of attorney, including a statutory short form power of attorney that 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.

Moreover, there is an "exclusive remedy" for unreasonably refusing to honor such a power of attorney: The affected party may commence a court proceeding against the third party that has unreasonably refused to honor the power of attorney. The law, however, does not currently provide for any specific liability to be imposed.

## PROPOSED AMENDMENTS

Despite the protections afforded to banks and other parties that accept the statutory short form power of attorney, there are a several reasons that they may be reluctant to do so.

For one thing, the detailed requirements for a properly executed statutory power of attorney under New York law have resulted in quite a few powers of attorney being deemed ineffective. In particular, a statutory power of attorney that does not "strictly" comply with the statute's requirements is invalid.

In addition, third party concerns about litigation, liability, and simply erring by relying on a power of attorney that does not meet all of the numerous

statutory requirements have quite reasonably led them to reject powers of attorney that are not on their own forms, or for any of a host of other reasons.

## AMENDING NEW YORK LAW

A number of bills have been proposed in New York over the years to amend the rules governing powers of attorney. Now, one of those bills—A.5630/S.3923[3]—has been passed by both houses of the New York State legislature. If signed into law by Governor Andrew M. Cuomo, as many currently believe will happen, it would reform the statutory short form power of attorney and other powers of attorney for purposes of financial and estate planning.

In particular, the bill would:

- Simplify the current power of attorney form, which the legislature found "is too complex and prone to improper execution";
- Allow for substantially conforming language rather than "exact wording" language, given that the legislature found that "the "exact wording requirement in current law is unduly burdensome and becomes a trap for the unwary";
- Provide safe-harbor provisions for those who, in good faith, accept an acknowledged power of attorney without actual knowledge that the signature is not genuine;
- Allow damages to be recovered against banks and other financial institutions (and others) who "unreasonably refuse" to accept a valid power of attorney; and
- Make a number of technical amendments to allow a person to sign at the direction of a principal who is unable to sign; expand an agent's power to make gifts in the aggregate in a calendar year from the current $500 limit to $5,000 without requiring a modification to the form; clarify an agent's obligation to keep records or keep receipts; and clarify an agent's authority with regard to financial matters related to health care.

It should be emphasized that this bill would, among other things, change the requirement from strict adherence to the statutory mandates to substantial compliance with them. If this change were to become law, more powers of attorney that do not strictly meet the statutory requirements could be deemed valid and enforceable.

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[3] *See*, https://www.nysenate.gov/legislation/bills/2019/a5630.

It also should be emphasized that if A.5630/S.3923 becomes law, courts could order banks and other third parties that do not accept valid and enforceable statutory short form powers of attorney to pay damages, including attorneys' fees and costs. This would effect a sweeping change in New York law and could impose significant liability on banks that only are seeking to do the right thing.

## CONCLUSION

The New York State legislature has found that the rules governing statutory powers of attorney should be revised, including in particular that the standard for an effective power of attorney be modified to "substantial" compliance with the statutory framework from "strict adherence." Changes to the standard, and other modifications to the applicable rules, may very well be appropriate and may very well become law in New York.

It is far from clear, however, that these kinds of statutory amendments should be accompanied at the same time by new provisions potentially imposing significant costs—including paying the other side's attorneys' fees, which is contrary to the longstanding "American Rule" that generally requires that each party pay its own fees—on third parties who fail to accept statutory powers of attorney that apparently are otherwise enforceable. Such a change would not seem to be warranted now and arguably should be adopted, if at all, only after a detailed study of the effect of any other changes to the statute.

The battle over powers of attorney will continue in New York. How it gets resolved in the Empire State may have implications for other states across the country. Stay tuned.