#L-3031 jd187
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Memorandum 90-64

Subject: Study L-3031 - Acceptance by Agent of Responsibilities Under Power of Attorney

At the November-December 1989 meeting, the Commission wanted to know whether one unilaterally appointed as attorney in fact has any duty to do anything under the power of attorney, and what acts constitute acceptance of fiduciary responsibility. At the March 1990 meeting, the staff responded in Memorandum 90-30 with an analysis drawn from agency rules.

The Commission approved the substance of the following provision which is drawn from agency law:

Civil Code § 2515. Acceptance of duties of attorney in fact

2515. (a) A person named as attorney in fact in a power of attorney, whether or not a durable power of attorney, may accept the duties of attorney in fact by any of the following methods:

(1) Signing the power of attorney or signing a separate written acceptance.

(2) Knowingly exercising powers or performing duties under the power of attorney.

(b) If the person named as attorney in fact receives consideration for agreeing to serve and the agreement is not required by law to be in writing, the person may accept the duties of attorney in fact as provided in subdivision (a) or by orally agreeing or otherwise manifesting acceptance by words or conduct.

Comment. Section 2515 is new. Subdivision (a) makes two changes in what appears to have been prior law. First, a gratuitous attorney in fact is bound by written acceptance, whether or not actually entering upon performance. See 2 B. Witkin, Summary of California Law *Agency and Employment* § 62, at 68 (9th ed. 1987). Second, a gratuitous attorney in fact is no longer bound by oral acceptance, nor is acceptance implied from circumstances and conduct. *Id.* § 36, at 49-50.

Subdivision (b), concerning an attorney in fact who is compensated, is consistent with prior law. See *id.*; *cf.* Civ. Code § 2309 (when written authority required).

A recently enacted Missouri provision dealing with this matter has come to the attention of the staff. Missouri has enacted a comprehensive statute governing durable powers of attorney, and the following provision is found in that statute:

> 4. A person who is appointed an attorney in fact under a durable power of attorney has no duty to exercise the authority conferred in the power of attorney, whether or not the principal has become disabled or incapacitated, is missing or is held in a foreign country, unless the attorney in fact has agreed expressly in writing to act for the principal in such circumstances. An agreement to act on behalf of the principal is enforceable against the attorney in fact as a fiduciary without regard to whether there is any consideration to support a contractual obligation to do so. Acting for the principal in one or more transactions does not obligate an attorney in fact to act for the principal in subsequent transactions.
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> **Comment.** Section 3.4 makes clear that merely appointing a person as attorney in fact in a durable power of attorney imposes no duty on that person to act, even if the attorney in fact knows of the appointment and has received the written power of attorney. A duty to act under this law only arises by reason of an express agreement in writing and reliance is not sufficient to impose a legal duty to act. The subsection thus recognizes that many powers of attorney are given and accepted as a gratuitous accommodation for the principal by the attorney in fact. The principal wants someone to have the ability to act if something needs to be done, but rarely would the principal in a family or friend situation expect that he is imposing a duty to act if the attorney in fact chooses not to do so. Consequently, unless the attorney in fact has agreed to act, accepting a power of attorney appointment imposes no duty to act and he may resign. He may also merely wait until the situation arises and then determine whether to act. The attorney in fact may refuse to act because of the personal inconvenience at the time of becoming involved, or for any other reason and is not required to justify a decision not to act. The attorney in fact may believe that there are others in a better position to act for the principal or that the situation really warrants appointment of a court supervised guardian or conservator. However, once the attorney in fact undertakes the act under the power of attorney, the transaction is governed by the duties imposed in the law to act as a fiduciary.

The Missouri provision is more protective of the attorney in fact than the provision the Commission adopted at the last meeting. The comment to the Missouri provision is somewhat confusing, but it states

the reasons why the Missouri provision gives more protection to the attorney in fact. Would the Commission prefer something along the lines of the Missouri statutory provision in place of the provision approved at the last meeting which was drawn from agency law? If so, the staff can review the Missouri provision and prepare a draft for consideration of the Commission.

Respectfully submitted,

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Executive Secretary