KANSAS BAR ASSOCIATION

TO: **The Honorable John Barker, Chair**
And Members of the House Judiciary Committee

FROM: **Joseph N. Molina**
On behalf of the Kansas Bar Association

RE: **SB 57 – Durable Power of Attorney**

DATE: **March 11, 2015**

Good afternoon Chairman Barker and Members of the House Judiciary Committee. I am Tim O'Sullivan, an estate planning partner in the law firm of Foulston Siefkin in Wichita. On behalf of the Kansas Bar Association, I am providing this testimony in **OPPOSITION** to SB57, concerning durable powers of attorney.

Initially, I might note that no Section of the KBA, including the Real Estate, Probate and Trust Section or the Title Standard Section, was asked for its input on this Bill prior to its filing. Such Sections now having had the opportunity to review it, the KBA is firmly opposed to SB 57 (the Bill) based on several objections to-and concerns about-the Bill:

First, the definition of the standard of "best interest" of the principal upon which the attorney in fact is required to act requires the attorney in fact to take actions "consistent with the principal's intent" as expressed in the power of attorney (POA). This definition fails to approve a verbal direction of a principal who has capacity and requires the attorney in fact to take specific actions which might not otherwise be considered to be in the principal's best interest. For example, an attorney in fact could not legally comply with the direction of the principal to make what would otherwise be an imprudent purchase or investment.

Second, the definition of capacity appears to be quite minimalist, overly narrow and ambiguous as a consequence. The Bill only requires that "*the principal was capable of understanding in a reasonable manner the nature and effect of the act of executing and granting the power of attorney*." By focusing solely on the "nature and effect" of the POA, there appears to be an ambiguity as to whether the principal also needs to be capable of specifically understanding the extent of his or her property over which such power could be exercised. In addition, is the principal also required to know the party in whom or which such power was reposed, or know family members and possible others (such as a bonded corporate fiduciary) in whom or which such authority could be reposed, all of which would appear to be a prerequisite capacity in order to be able to

make an informed and competent decision relating to the execution of a financial POA? If not, such level of capacity would be much less than that required to validly execute a Will or Revocable Trust by a fiduciary, the latter, similarly to POAs, providing for the management of property during lifetime. Both Wills and Revocable Trusts have the same requisite level of capacity under Kansas law as provided under the Uniform Trust Code. As such, this "bare bones" definition might ironically create a requisite "low threshold" level of capacity which would in fact validate attorney in fact a POA which might otherwise have been invalid under current law. The KBA has not been made aware of the sources from which such definition was culled or how it comports with any current Kansas case law on the subject.

Third, Section 2 of the Bill amends KSA 58-652(a), which only relates to what is required to be in a POA for it to be durable, i.e., not terminated by a subsequent disability. Yet, the requisite warning statements to both the principal and attorney in fact, which must be included in financial powers of attorney, are inserted in subsections (4) and (5) of such subsection (a). This appears to be a mistake. Literally read, the absence of such warning statements would appear to have no effect on the efficacy of the POA under the Act, as so amended, while the principal was not under a disability (e.g., a "non-springing" durable POA), but only upon the principal's subsequent disability.

Fourth, in Section 2 subsection (2) on page 4 of the bill amends KSA 58-652(b) by providing that "Any acts done by the attorney in fact not in the best interest of the principal are in violation of the Kansas power of attorney act, *unless such acts are otherwise specifically authorized in the power of attorney.*" [Italicization provided]. This appears to be a non-sequitur. As the definition of "best interest" of the principal already includes "any act consistent with the principal's intent as expressed in the power of attorney," the italicized language should be deleted. In any event, this provision, even with the deletion of such language, merely states the obvious, does not provide for any penalty for a violation and is therefore toothless and superfluous. It is safe to conclude that most malefactors would not read the Kansas statute as a guide to carrying out their duties as an "attorney in fact."

Fifth, there are ambiguities in Subsection (3), with makes "Any acts done by the attorney in fact to intimidate or deceive the principal in procuring the power of attorney" a violation. Does any act "to intimidate" include a well-meaning family member putting significant pressure on the principal to execute a POA in the face of an increasing mental disability of the principal? Is this subsection only meant to apply to undue influence under circumstances already protected and defined by case law? The second disjunctive component of this provision is similarly ambiguous. What type or level of acts would constitute a "deception" under the Bill? In addition to its ambiguities and potential overreaching, it too appears to have no penalty for a violation and thus similarly would appear to have no deterrent effect on a potential malefactor. Would any such act of intimidation or deception under the Bill which resulted in the procurement of the POA render it invalid? If so, this would call into question the validity of every POA and the authority of every attorney in fact and successor attorney in fact into question, thereby raising significant liability questions and concerns.

Sixth, Section 2, subsection (d)(1) places an onerous, extraordinary burden on notary publics to not only acknowledge the signature of the principal but to also acknowledge that the person has read the "Notice to Person accepting the Appointment as Attorney-in-fact" and that such person understands the responsibilities imposed upon them by this Act. Such a requirement goes beyond any acknowledgement any notary public traditionally gives, should be required to give, or even can give. How does a notary acknowledge that an attorney in fact understands his, her or its legal responsibilities? Doesn't this require a notary public go give a legal opinion in that regard? Why would any notary public accept such a legal responsibility and potential liability? Thus, one would expect this requirement to have a quite deleterious effect on the practicality and usage of financial powers of attorney. Most attorneys I have talked to on this issue indicate that they are likely to advise notary publics not to notarize any POA containing this language.

Seventh, Section 2 of the Bill also inserts a new subsection (f) that requires that a person who in good faith contracts with, buys from or sells to an attorney in fact is protected as if the attorney in fact properly exercised such power, regardless of whether the authority of such person as the attorney in fact has been terminated or invalidated. This provision does not extend to third parties who are not contracting but simply accepting the POA (e.g., banks and commercial institutions). Moreover, does the good faith requirement now mean, given the proposed amendments to the Act, that third parties must now check the date of the POA to determine whether the requisite warnings are required to be included, and if so, whether they are in the proper font and have the requisite verbiage and appropriate boldface type? If so, do third parties incur the risk of not being in good faith if they do not so comply and thereby incur possible personal liability for the improper acts of an "attorney in fact" as a result thereof? What deleterious effect is this going to have on title companies and title examiners? Moreover, the proponents of these changes to the Act apparently did not realize that this concept is already embodied in K.S.A. 58-658 of the Act, titled "Exemptions of third persons from liability," which more comprehensively provides third party protection by excusing third parties from any duty of inquiring as to a variety of issues and circumstances, such as the unknown death of the principal, but none of which encompass this possible newly imposed duty to assess the validity of requisite warnings on powers of attorney to be in "good faith." And if there is no such duty, what realistic deterrent effect would it have by requiring such a warning, particularly with respect to the target group of individuals who procure POAs off the Internet?

Finally, what is the legal effect of not having the requisite warnings and certification of the notary public in the POA? Is the POA invalid? If not, what is the purpose in having such requirements? If so, would this invalidate all acts of the attorney in fact which were not accepted by a third party "in good faith" and due to the absence thereof, make the attorney in fact personally liable for all damages resulting from every such act of the attorney in fact? If so, is this an equitable result? As noted above, many of these powers of attorney are procured off the Internet by principals who desire to save legal fees by not seeking the assistance of an attorney.

In sum, besides the Bill's foregoing inconsistencies, ambiguities, and apparent errors in drafting, the Bill appears to impose potential unacceptable burdens and potential liabilities on notary publics and third parties who accept powers of attorney, including title examiners, banks and other financial institutions. As a result, there is little question but that the Bill, if passed in its present form, is going to make POAs much less acceptable to third parties and dutiful potential attorneys in fact, create additional legal costs in advising third parties in its potential import, and result in potential liability claims not only against attorneys in fact acting under POAs, but also third parties who accept them. In my practice, I am particularly fearful that corporate fiduciaries that are otherwise currently willing to serve as attorneys in fact will no longer to agree to so serve, therefore causing clients to have to resort to non-bonded individuals, including family members that increase the risk of family disharmony, to serve as attorneys in fact. A further potential unintended adverse consequence is that in the event such additional requirements are not complied with and the POA should therefore be rendered invalid, following the disability of the principal a significant number of estates are likely to have to undergo a conservatorship proceeding in order to appoint a conservator who or which has the authority to act on behalf of the principal.

All the while, the KBA believes such required provisions are likely to have little deterrent effect on malefactors who do not read Kansas statutes and are likely to ignore all warnings in following illegal pursuits. In short, the Bill is clearly not a cure for the misuse of POAs and even if it has some beneficial deterrent effect on the misuse of POAs, its provisions would appear to have far worse unintended adverse consequences to business and the general public than the disease it is attempting to treat.

It has been suggested by some attorneys that the KBA should acquiesce in the Bill due to it having the least objectionable provisions the Attorney General is willing to accept. However, the KBA believes in doing so it would be abdicating its responsibilities to the public and the clients our attorneys serve. Although there is little question but that the intent of the Attorney General in proposing the Bill is well-meaning, for the foregoing reasons the Kansas Bar Association is nonetheless in opposition to the Bill which it believes is not salvageable in its present form.

On behalf of the Kansas Bar Association, I thank you for your time and would be available to respond to your questions.

About the Kansas Bar Association:

The Kansas Bar Association (KBA) was founded in 1882 as a voluntary association for dedicated legal professionals and has more than 7,200 members, including lawyers, judges, law students, and paralegals. www.ksbar.org