

POWER OF ATTORNEY ALERT!

Drastic changes that have occurred in New York's Power of Attorney law. A Power of Attorney is a document that appoints someone (the "Agent") to make non-medical decisions for someone else (the "Principal"). Recent developments in the law affecting Powers of Attorney may affect you and your family. These changes may impact your estate or long term care planning. You should carefully read this summary and consider how this new law may affect you.

Powers of Attorney are governed by Article 5 of the New York State General Obligations Law. On January 30, 2009, Governor Patterson signed major amendments to this law. The law was set to take effect on March 1, 2009, but through the tireless efforts of advocates, led in part by one of our firm's principals, Timothy E. Casserly, Esq. in his role as the Chair of the New York State Bar Association's Elder Law Section, the Legislature delayed the law to take effect on September 1, 2009. It is advisable to become familiar with the current laws and to take any proactive measures that may be appropriate to ensure that your family's planning continues to operate in conformity with the law.

The new Power of Attorney law contains many changes and both lawyers and the public need to be familiar with them. Briefly, the changes in the law address:

- ▶ the impact of the Health Insurance Portability and Accountability Act's (HIPAA) Privacy Rules on powers of attorney;
- ▶ the Principal's execution of a power of attorney that delegates authority to the Agent to make major gifts and other asset transfers;
- ▶ the circumstances under which the Agent is authorized to make gifts to himself or herself;
- ▶ the Agent's obligations for acting in good faith and in the best interest of the Principal (called the Agent's fiduciary obligations);
- ▶ the Principal's ability to revoke the power of attorney;
- ▶ the Principal's ability to appoint a designee to monitor the Agent's actions;
- ▶ the circumstances under which a third party's refusal to accept the instrument is reasonable; and
- ▶ the procedure for providing compensation to the Agent.

Here are some of the highlights of this new law:

- ▶ **Execution Requirements:** The new power of attorney (“POA”) form must be signed by the Agent as well as the Principal. Under the old law, the Agent was not required to sign the document.
- ▶ **Effective Date:** A POA will not become effective until the date the Agent signs the POA. Under the old law, the POA took effect immediately upon the Principal signing it.
- ▶ **Health Insurance Portability and Accountability Act (HIPAA)’s Privacy Rule:** The law adds the term “health care billing and payment matters” so that an Agent can examine, question, and pay medical bills in the event the Principal grants the Agent power with respect to records, reports and statements without fear that the HIPAA Privacy Rule would prevent his or her access to the records. Under the old law, a POA had to specifically mention HIPAA in order to permit an Agent to have access to the Principal’s medical records.
- ▶ **Major Gifts and Other Property Transfers:** One of the motivating factors behind the significant revision to the law was the concern over an Agent’s ability to make significant gifts of the Principal’s assets. The new law requires that any authority to make asset transfers (referred to as “major gifts” which include outright gifts and transfers into trusts) be granted through an additional rider, to be included as part of the document separate and distinct from the POA. This additional document is called the “Statutory Major Gifts Rider” (SMGR) and it must be signed by the Principal with his/her signature notarized and witnessed by two people not named in the instrument. The creation of a SMGR with its heightened execution requirements is intended to allow the Principal to make an informed decision as to whether the Agent may make gifts or other transfers of the Principal’s property to third parties as well as to the Agent. The execution requirements alert the Principal to the gravity of granting the Agent this type of authority. An Agent acting pursuant to gifting authority must act in accordance with the instructions of the Principal and in the absence of such instructions, in the Principal’s best interests.
 - ▶ Examples of the types of activities an Agent will not be able to do without specific authority in an SMGR:
 - ▶ Change the title to bank accounts by adding or removing joint account holders;
 - ▶ Change beneficiary designations on life insurance policies or retirement plans;
 - ▶ Make gifts in excess of \$500 to any person or charitable organization; or
 - ▶ Transfer any of the Principal’s property to or for the benefit of him/herself.

These are often precisely the types of activities the Principal wants the Agent to be able to do in order to protect assets from long term care costs and taxes.
- ▶ **Agent:** In addition to requiring that the Agent actually sign the new POA, the law now includes an explanation of the Agent’s fiduciary duties. “Fiduciary duties” are the duties of



good faith, trust, confidence and candor, and a fiduciary is one who must exercise a high standard of care in managing another's money or property in carrying out those duties. The new POA contains a description of those responsibilities, and a section entitled "Notice to the Agent" is included which explains the Agent's role, the Agent's fiduciary obligations and the legal limitations on the Agent's authority. The Agent may be subject to liability for conduct which violates their fiduciary duty, including failing to keep accurate records of the transactions engaged in on the Principal's behalf. By signing the POA the Agent acknowledges his or her fiduciary obligations. The law also provides that the Agent may receive reasonable compensation *only if* the Principal includes this language in the instrument. Without this language, the Agent is not entitled to compensation.

- ▶ **Monitor:** The new POA law also permits the Principal to appoint someone (for example, an independent third party) to monitor the Agent's actions. The Monitor is given the authority to request that the Agent provide a copy of the POA and a copy of the receipts and other documents that show the transactions the Agent has carried out on behalf of the Principal. The law also allows the Monitor to bring a court proceeding if there is a concern that the Agent's actions are inappropriate. It is important to note that the Monitor does not have the authority to make decisions on behalf of the Principal.
- ▶ **Acceptance of the POA by Third Parties:** The new POA law provides that third parties can refuse to accept a POA solely for "reasonable cause" and sets forth what activities may be considered "reasonable." When a third party unreasonably refuses to accept a POA, the Agent is allowed to seek a court order forcing the third party to accept the POA. Under the new law, securities brokers, securities dealers, securities firms, and insurance companies ***must*** accept a validly executed power of attorney without requiring that the POA be on the institution's own form.
- ▶ **Old POAs:** Any POA that is currently in place is still valid. However, some of the new laws' provisions are applicable to any POA signed prior to the laws' effective date ("old" POAs for purposes of this notice). Examples include:
 - ▶ The new provisions regarding an Agent's "fiduciary duties" as described above apply to ***ALL*** POAs.
 - ▶ Lawsuits may be commenced:
 - ▶ Against an Agent for violating their fiduciary duties or failing to make records available to the parties that have a right to request them;
 - ▶ To determine the validity of the POA;
 - ▶ To compel acceptance of the POA by a third party; etc.
 - ▶ If an Agent is given authority regarding "benefits from military service" under box J of an "old" POA, this power will also be expanded under the new law to include "governmental programs", including the ability to apply for benefits or programs on the Principal's behalf and will allow the Agent to communicate with any government representatives.



- ▶ If an Agent is given authority regarding “records, reports and statements” under box K of an “old” POA, the power will also be expanded to include health care billing and payment matters as discussed above.
- ▶ The new rules regarding acceptance by third parties, as mentioned above, also apply to POAs executed before the new laws’ effective date.
- ▶ Please keep in mind that while the “old” POA may still be in effect, as the new forms come into use by financial institutions and government offices the general acceptance of the old forms will probably become more problematic. We want to make sure that in the event you or your Agent has to use your POA that it is easily and readily accepted.

These are only some of the new complex changes to the General Obligations Law affecting powers of attorney. Any Estate or Medicaid Planning that you may have done that involves the use of a POA should be revisited in light of the current laws. Please contact our office if you would like assistance in tailoring your individual needs to the new law and regulations, or if your Agent would like a better understanding of what is expected of them.

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