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The Improved Power to Plan: NY Amends Its Power of Attorney Forms and Laws

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As advisors, we are often charged with the implementation of our best-laid plans for our clients. Who hasn't experienced the frustration and confusion when one of our planning documents is submitted to a financial institution and rejected, perhaps with little or no explanation? How much do we wish that we had better solutions and recourse for the acceptance of our planning? Fortunately, in 2021, we have additional power to plan for our powers of attorney in New York.

On December 15, 2020, New York Governor Andrew Cuomo signed a significant and timely change to the New York law governing Powers of Attorney ("POA"), effective June 13, 2021. While this new law does not affect the validity of any existing, valid short-form statutory POA or gift riders before the effective date, attorneys and clients should be aware of these changes and potentially useful estate planning opportunities under the new law.

Some of the most impactful changes under the new law include: permitting POA that "substantially conform" rather than with exact wording; allowing a disinterested person to sign the POA at the principal's direction; and incorporating gifting into the POA rather than by a separate, statutory gift rider, perhaps the most important change. The law also changed the procedures for accepting or rejecting POAs by designating the relevant response period, the available response options, reasonable reliance by third parties, and the principal or agent's potential recourse for the unreasonable rejection of a valid POA by a third party.

These changes help attorneys and clients more easily draft POAs and allow third-parties to rely more effectively upon the POA's validity. These changes create meaningful planning opportunities for individuals and families in 2021, encouraging clients and their attorneys to review this new law and clients' wishes and documents.

Statutory vs. Non-Statutory, What's in a Name?

The new law expands the definition of "power of attorney" to include both statutory short form and non-statutory powers of attorney. This statutory short form permits powers of attorney that substantially conform to the wording of the form, rather than exact wording requirements.

One example of substantially conforming is that any section labeled "Optional" may be omitted and replaced with the words "Intentionally Omitted." The power of attorney may also substantially conform even if it uses words that are similar but not identical to the statutory form. A power of attorney will not fail to conform when it does not include or exclude a particular clause. This expansion of the permissible statutory short form allows attorneys and clients to draft more clearly and more concisely, and, therefore, help third parties more readily accept these POA.

Accepting the Powers

In addition to improving what qualifies as a POA, the procedures for accepting (or rejecting) a POA have also been streamlined. Third parties who act in good faith may rely upon a notarized POA, unless they have actual knowledge that the signature was not genuine or the POA was void, invalid, or terminated. If the third party is uncertain of the POA's validity, the third party may also request an agent's certification or counsel's opinion. The third party has only ten days to respond by accepting the POA, rejecting it in writing, or requesting a certification or opinion. The third party must also respond by accepting or rejecting the POA within seven days after receiving the certification or opinion. These changes ensure that the principal or agent has the causes for rejections in writing, an opportunity to respond, and a limited waiting window for the third party's responses.

Furthermore, following the rejection of a POA, if a principal or agent brings an action to compel the third party to accept the POA and the court finds the rejection unreasonable, then the principal or agent may recover damages, including reasonable attorneys' fees and costs. The prior law outlined some of these reasonable causes for rejection, and the new law expanded this list to include the refusal of a request for certification or opinion of counsel.

These changes in the acceptance procedure ensure the necessary communication; clear options for submitting or reviewing POAs; and the third party's timely acceptance, rejection, or request for more information for the POA.

Execution of the Powers

The new law also modified the signature requirement for executing a POA. Now, principals may either sign or initial, or direct a disinterested third party to sign the POA in the principal's presence. This additional execution option helps principals who may have disabilities that inhibit them from physically signing but who can effectively direct another person to sign on their behalf. The POA's execution is further streamlined by eliminating the statutory gift rider as a separate document and, instead, incorporating an "optional" gift transaction clause. More options for executing POAs, along with a more incorporated document, allow attorneys and clients to ensure that the principal's wishes and directions are followed. Furthermore, additional formalities, such as the need for notary publics and witnesses, are minimized with the incorporation of the gift transaction clause, rather than a separate, statutory gift rider. This streamlined execution allows us to plan more effectively and efficiently for our clients.

Substantive Powers

Finally, the new law makes minor, but consequential changes to powers related to health care and continued gifting in the statutory short form. The principal's designated authority is expanded to include "financial matters related to health care," rather than "health care billing and payment matters." Gifting is also amended to allow the agent to continue the principal's customary gifts to individuals or charities for up to \$5,000 total, rather than the prior \$500. These changes expand the agent's powers to accomplish the principal's direction and wishes, particularly as these directions continue what the principal did or meant to do prior to incapacity.



Planning Opportunities

Planning for potential incapacity remains important in 2021 with increasing hospitalizations and quarantining because of the coronavirus. More businesses and schools are anticipated to re-open, even prior to the full distribution of a vaccine. Therefore, many individuals may continue to be exposed to the virus and its potentially debilitating symptoms. The changes in the New York POA law allow people to communicate their directions more effectively and efficiently, and help third parties rely on these POA with more certainty and clarity. These changes also provide a model for other states considering similar statutes to support its residents and planners.

Given the opportunity to plan, people may want to review the following:

- Have you moved states with an intention to stay? If so, should you consider executing a Power of Attorney under this state's laws?
- Who is your agent? Can he or she still serve? Do you still want them to serve?
- What authorit(ies) does your agent have to act? What other authorities might you want to give your agent?
- Will you consider re-executing a New York Power of Attorney prior to June 13, 2021 under the prior law, or after under the new law?

The new law passed in December 2020 marks the most substantial update to the New York Power of Attorney law in almost a decade. These changes are necessary to ensure all New York residents have access to proper planning and can rely upon third-party's future acceptance of these valid documents. Familiarizing yourself with your current POA, or discussing your options with an attorney, may give you more power and the clarity in a continued, uncertain environment.

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