

Dear Clients, Colleagues & Friends:

On January 27, 2009, Governor Patterson signed into law substantial revisions to the New York laws governing powers of attorney. The new laws become effective as of September 1, 2009.

A power of attorney is one of the most important tools to have in place for both estate planning and Medicaid/asset protection planning purposes. While an important tool, a power of attorney is also a very powerful document. The new law is aimed at ensuring that the principal understands the powers s/he is granting to the appointed agent as well as the consequences of such authority, particularly as it relates to gift-giving and asset transfers.

Important Changes in the New Law

Gift-Giving and Asset Transfers: If the principal wishes to grant their agent (the person being appointed to act) authority to make major gifts and asset transfers, the principal must sign a Statutory Major Gifts Rider (SMGR) to the power of attorney. In this rider, the principal will specify the amount and types of assets the agent may gift and also the parties to whom the agent may make gifts, such as to family members and/or to the agent him/herself. The rider must be executed in the same manner as a Will, that is, witnessed by two (2) people who are not named in the document and a duly notarized signature of the principal. The principal must sign the power of attorney and the gift rider at the same time.

Signature of Agent: A power of attorney must now be signed by the appointed agent(s) as well as the principal. The language of the power of attorney now contains instructions to the agent, setting forth their responsibilities and fiduciary duties, such as to act according to the principal's instructions or in their best interest, to keep property separate from their own, to avoid conflicts and to keep records and receipts. The agent does not need to sign the power of attorney at the same time as the principal, but the document does not become effective until the date it is signed by the agent before a notary public.

Monitor: The new law allows for the principal to appoint a monitor to oversee the actions of the appointed agent. The monitor has the authority to compel the agent to turn over copies of records, receipts, disbursements and transactions entered into by the agent on behalf of the principal.

Compensation: An agent may now be paid for duties performed under the power of attorney and may even be reimbursed for expenses incurred on the principal's behalf. However, the principal must expressly grant compensation to the agent in the power of attorney.



Acceptance of the Power of Attorney: Many clients have encountered difficulty with their financial institution when attempting to use the power of attorney. The new law specifically provides that it is unlawful for a financial institution to refuse to accept a power of attorney simply because it is not on the bank's own form, because it is too old, or because it is not the original (although they can insist that the copy be certified by your attorney). The new law allows for a special proceeding to be brought to compel a financial institution to accept the power of attorney.

Special Proceeding: In the event an agent is suspected of not handling the principal's affairs prudently or in the principal's best interest, the new law allows for an interested party, such as a co-agent, successor agent, monitor, guardian or executor, to bring a special court proceeding. The special proceeding can be used to challenge the validity of a power of attorney, remove an agent, determine an agent's compensation and even compel a bank or financial institution to accept a power of attorney.

A power of attorney executed before the new law takes effect will still be valid. However, we always recommend having the most current legal documents in place where possible. When it comes to gift-giving and asset transfers, a staple of asset protection planning, taking steps now to prevent problems or complications in the future is always advisable. A power of attorney is a very necessary legal document but also a very powerful one. It is always advisable to seek the advice of counsel before executing a power of attorney.

