

## The Estate Planning Advisor

### The New Power of Attorney – A Radical Change

By Richard J. Shapiro, J.D.

On January 27, 2009, Governor Patterson signed into law a bill that radically overhauled the traditional New York “short form” statutory Power of Attorney (“POA”). The law, which went into effect on September 1, 2009, requires greater formality for signing the new POA than was required under the prior statute.

Some of the changes incorporated in the new statute include:

- A requirement that the designated agent or agents execute an acknowledgement of appointment that is contained within the POA in the presence of a Notary Public. The agent’s need not sign the POA at the same time that the principal signs, but the POA will not be deemed valid, and therefore cannot be used, until the agent has duly executed the acknowledgement.
- A requirement that the POA include a written notice to the agent explaining the scope of the agent’s fiduciary responsibilities. The POA also includes a warning to the agent that the agent may be liable for a breach of his or her fiduciary responsibilities.
- To limit perceived abuses by agents in making gifts of the principal’s assets to themselves or third persons under the prior statutory form, the new law requires that in any circumstance where the principal wishes to authorize an agent to make gifts of the principal’s assets, in addition to signing the new POA form, the principal must execute an optional document called the “Statutory Major Gifts Rider” (“SMGR”). The principal will need to carefully review the SMGR to determine which types of gifting authority, if any, that the principal wishes give the agent. In order for the agent to have each type of gifting authority, the principal must initial the corresponding section. For example, the principal must specifically initial a provision authorizing an agent to change beneficiary designations for life insurance policies and retirement plans if the principal desires that the agent have such authority. In addition, the principal must sign the SMGR, and his or her signature must be notarized and witnessed by two people not appointed as an agent.
- An optional provision for designation of a “monitor” to oversee the agent’s actions.
- Authorization to provide “reasonable compensation” to the agent for his or her services.
- Specific directions for revoking the POA.
- Expansion of the class of “financial institutions” that are required to accept the POA absent “reasonable cause.” Previously, the term “financial institutions”

was limited to banks, but it now includes securities brokers, securities dealers, securities firms and insurance companies.

Many concerns remain among attorneys regarding how the new form will work in practice, and whether the new POAs will be readily accepted by financial institutions. As events unfold, we will keep readers informed regarding the effectiveness of the new POA.

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