

TYPES NOT MAPPED YET August 02, 2021 | TTR not mapped yet | Ninette S. Bordoff

What you need to know about recent changes to New York's power of attorney law

It is important for every adult to include a power of attorney ("POA") as part of one's financial and estate planning documents. In the absence of a power of attorney, unless an individual's assets are jointly held or held by a trust, no one would be authorized or able to handle that individual's financial affairs if he/she were to be incapacitated. An expensive and protracted court proceeding to appoint a guardian would then become necessary.

POAs are not tools to be used only later in our lives. With the start of the school year, every parent of a student off to college should consider having that young adult execute a POA to enable a parent or other adult to handle any financial matters, or even be given access to their child's residential quarters, should it become necessary.

Late last year, the New York State Legislature made significant changes to the New York power of attorney law, which went into effect on June 13, 2021. Given those changes, it is important for New Yorkers and others who have executed New York POAs to review them at this time, and to consider updating them.

Background on the changes

In New York, Title 15 of Article 5 of New York's General Obligations Law establishes a "statutory short form power of attorney" by which an individual, the Principal, can designate an Agent to act on the Principal's behalf in personal and financial matters. The POA form may consist of several pages, especially when permitted modifications are added, yet is still referred to as Statutory Short Form, as the language conferring authority with respect to each power listed on the "short form" is construed to incorporate the full description and extent of the agent's authorized transactions set forth in the statute under that power. Many other states have statutes with similar suggested forms.

Financial institutions and other third parties often refuse to honor valid, properly executed powers of attorney. The changes to the New York power of attorney law that went into effect in June are intended to simplify the POA form and to reduce the frequency of refusal by financial institutions to honor validly executed POAs.

Under the prior law that took effect in 2009, the slightest deviation in the POA form from the statutory language would cause the form to be deemed invalid. The statutory form also limited the agent's ability to make gifts, allowing only an aggregate annual amount of \$500 in gifts to be made, unless the principal had executed a separate Statutory Gift Rider ("SGR"). Moreover, the old law provided no sanctions or punitive remedy against any third parties refusing to honor a valid POA.

The new law provides the following significant changes:

- 1. Substantial compliance with statutory language.** The new law requires a POA form to "substantially conform" to the language provided in the General Obligations Law §5-1513 and states that the language of the POA is not required to be identical to the POA form in NY GOL §5-1513. It allows a POA form to be valid even if the form has insignificant mistakes in spelling, punctuation, formatting, or type slightly deviating from the statutory POA form language. However, the following two warnings included in NY GOL §5-1513 cannot be omitted from the POA: the "Important Information for the Agent" clause and the "Caution to the Principal" clause.
- 2. Elimination of the Statutory Gift Rider.** To authorize the agent to make gifts in excess of \$500 annually, the principal previously had to execute the separate SGR which required two witnesses to the principal's signature and a notary's acknowledgment. The change in the law allows a principal to authorize the agent to make gifts annually in an aggregate amount of \$5,000, and additionally enables the principal to modify the standard POA form to authorize the agent to make gifts over \$5,000 in any one year, to allow the agent to make gifts to himself or herself, or to make other gift transactions and changes to interests in the principal's property without a separate SGR.

3. **Penalties for unreasonable refusal to accept a valid POA.** As noted above, financial institutions have often refused to accept a valid, properly executed POA or recognized only their own form POA. The prior law did not provide punitive remedies for unreasonable refusal to honor POA. The new statute permits courts to award damages, including reasonable attorneys' fees and costs, if a third party is found to have acted unreasonably in refusing to accept a POA. The statute does set forth a list of circumstances when rejection of a POA may be deemed reasonable, and sets forth a timeline. The recipient of a POA has 10 days after receipt of the POA to either accept, reject it, or ask for an affidavit from the agent or an opinion of counsel from the principal, and must either accept or reject the POA in writing within seven days from receiving the affidavit or opinion of counsel.
4. **Safe Harbor for third parties acting in good faith.** The new law creates a safe harbor for recipients of a POA if the recipient acts in good faith when accepting the POA, even if it is later deemed invalid. Such a recipient is shielded from liability if the following conditions are met: (a) the POA must have a principal's acknowledged signature verified by a notary public or person authorized to take acknowledgments and (b) the recipient must not have "actual knowledge" that the principal's signature is forged, that the POA is invalid, or that the agent is abusing his/her/its authority.
5. **Execution requirement.** A statutory short form power of attorney, or a non-statutory power of attorney, executed in New York by a principal, must: (a) be typed or printed using letters which are legible or of clear type no less than twelve point in size and (b) be signed, initialed and dated by a principal with capacity, or in the name of such principal by another person, other than a person designated as the principal's agent or successor agent, in the principal's presence and at the principal's direction. In either case, the signature of the person signing must be duly notarized and acknowledged, and must be witnessed by two persons who are not named in the instrument as agents or as permissible recipients of gifts, principal. The person who takes the acknowledgment may also serve as one of the witnesses.

While third parties may more easily accept the new POA form, powers of attorney and statutory gifts riders properly executed previously under the law in effect at the time of the execution will remain effective.

[Ninette Bordoff](#) works closely with clients and their families to create comprehensive multi-generational estate plans and provide for effective business succession planning.

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