



Alert

Trusts and Estates

Revisions to Power of Attorney Statute Offer Protections

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On September 1, 2009, the Durable Power of Attorney form changed in New York. The new law governs the form of the power of attorney and the rules that govern the use of a power of attorney. The changes are significant and offer critical protections to you as the grantor of the power. These protections, however, introduce increased complexity in the form and the decisions that you are required to make in executing a New York power of attorney.

It is NOT necessary to execute a new power of attorney if you have a validly executed power of attorney currently in place.

The power of attorney is an important and effective tool in managing your financial and contractual affairs, especially if you become temporarily or permanently disabled or incapacitated. The power of attorney that you execute grants to another individual ("agent") the authority to act on your behalf without consulting you. Because this document is a significant grant of authority, you should carefully consider its terms.

The new law is primarily an attempt to remedy the potential for financial exploitation and abuse that existed under the old law.

Chapter 644 of the laws of 2008 amends the provisions of the General Obligations Law relating to the use of powers of attorney in New York and creates a new statutory form which incorporates the changes listed below.

- All powers of attorney must be executed by both the principal and the agent. Although the principal and the agent do not have to sign at the same time, the power of attorney is not effective until signed by the principal and the agent.
- If the principal wishes to grant the agent the authority to make transfers and gifts, the principal may do so only by executing a "major gifts rider" which must be executed in the presence of two witnesses. This rider is necessary if the agent is to be authorized to make annual exclusion gifts or other transfers in connection with financial and estate planning.

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- Under the new law you may grant your agent authority to access to your medical records, which allows your agent to question and pay medical bills without concern that the HIPAA privacy rules will prevent the agent's access. The new law continues to prohibit an agent from making health care decisions for you (which authority you may grant only under a health care proxy).
- The new statutory form includes an explanation of the agent's role, the legal limits on the agent's authority, and the fiduciary obligations of the agent, including recordkeeping. An agent had these fiduciary obligations under the old law, but the new law attempts to ensure that agents are aware of their responsibilities.
- The new form allows the principal to appoint a "monitor" to request and receive records of the agent's transactions.
- An attorney may certify a copy of the power of attorney instead of having to record it to obtain certified copies.
- The new law requires all financial institutions to accept a validly executed power of attorney form. The former law only required banks to accept the statutory power of attorney form. Now brokerage firms and all financial institutions must accept the form, if validly executed. This provision eliminates the need for multiple brokerage powers of attorney.

This may be good time to review your estate planning documents, including whom you appoint as agent under your durable power of attorney and what powers you wish to grant to your agent.

Please contact us to ask any questions regarding your durable power of attorney or any other aspects of your estate plan.



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