

## **Power of Attorney (POA) Reform Legislation – *Summary of the Changes***

**Chap 644, Laws of 2008 (A6421-B / S4996-B) – signed Jan 27, 2009**

**Chap 4, Laws of 2009 (A4392 / S1728 – signed Feb 25, 2009 – changed effective date**

**Chap 340, Laws of 2010 (A8392-C / S7288-A) – signed Aug 13, 2010 – amended 2009 law**

### **General Background Information**

- Financial exploitation of vulnerable older adults is the fastest growing form of elder abuse.
- Social workers, bankers, law enforcement, legal community (including prosecutors), and others consistently identified NY's law regulating POA as a major obstacle to preventing financial exploitation of the elderly and had advocated for changes in the law for over ten years.
- Legislation was first introduced in 2004 – amended several times based on input from Adult Protective Services, Aging Service Providers, Bankers, Judiciary, Law Enforcement, Lawyers specializing in elder law and trust and estates practice, Prosecutors, and others.
- Pre-2009 statute lacked direction and guidance regarding rights and responsibilities of Agent, Principal, and Third Parties – this contributed to confusion and interfered with APS, law enforcement and prosecution.
- New statute provides more clarity and direction – this will help (1) prevent financial exploitation, (2) uncover possible abuse, and (3) assist in stopping abuse, while still maintaining the flexibility of this popular instrument.
- POA reform was identified as a top priority during the 2004 NYS Elder Abuse Summit, and has been a priority for professionals who work diligently to protect vulnerable older adults.
- Goal is to reduce the incidence of financial exploitation by educating the Principal and Agent, and holding the Agent accountable if abuse occurs.
- No criminal sanctions – however, prosecutors say that the changes will help lay the groundwork for criminal prosecution of POA abuse cases.
- HIPAA issue – “health care billing and payment matters” added to the POA form so the Agent can examine, question and pay the Principal's medical bills.

**To access legislation and NY statutes:** <http://public.leginfo.state.ny.us>

**For the entire law governing powers of attorney:** Laws drop down, click on Laws of New York; GOB (General Obligations), Title 15 (5-1501 – 5-1514) – you will then be able to click on each section.

**For individual bills:** Select year; type bill number; check any or all boxes – Status, Text, Summary, Sponsor's Memo.

- **Changes affecting Agent** (person granted authority to act as attorney-in-fact for the Principal) (§§ 5-1501B, 5-1504, 5-1510, 5-1511)
  - Fiduciary obligations and accountability are clear (previous law was silent on these issues) – notice explaining role, fiduciary obligations and legal limitations on Agent’s authority – clear process for Agent to resign. (§§ 5-1505, 5-1513)
  - Agent required to sign the POA, acknowledging fiduciary obligations. (§ 5-1507)
  - When transacting business, Agent is attesting that he/she is acting under a valid POA and within scope of authority conveyed by the instrument. (§ 5-1507)
  - Reasonable compensation if Principal agrees – without this designation, Agent is not entitled to compensation. (§ 5-1506)
  
- **Changes affecting Principal** (individual, 18 or older, acting for himself or herself, who executes a POA) (§§ 5-1501B, 5-1505)
  - Expands instructions to Principal – better information to Principal regarding the extent of the Agent’s authority and the fiduciary duty owed to the Principal. (§ 5-1513)
  - Clear explanation regarding manner in which the Principal can revoke POA. (§ 5-1511)
  - Allows Principal to appoint a monitor. (§ 5-1509)
  
- **Changes affecting Third Parties** (§ 5-1510)
  - Expands definition of financial institution to include retirement systems, securities brokers, securities dealers, securities firms and insurance companies. (§ 5-1501)
  - Provides for Third Party refusal to accept a POA based on reasonable cause, which includes: (§ 5-1504)
    - Agent’s refusal to provide original or certified copy of POA.
    - Third Party’s good faith referral of Principal and Agent to local APS or actual knowledge of report to local APS by another person.
    - Actual knowledge of Principal’s death or actual knowledge of incapacity of Principal if POA is nondurable.

- Third Party must accept validly executed statutory form POA and cannot require use of institution's own form, or refuse based on lapse of time since execution or lapse of time between date signed by Principal and date signed by Agent. (§ 5-1504)
  - Third Party does not incur any liability in acting on a POA unless Third Party has actual notice that POA is revoked, as specified in the statute. (§ 5-1511)
- **Statutory Gifts Rider Provisions** (§§ 5-1501, 5-1501B, 5-1502I, 5-1514)
    - Granting of authority to make certain gift transactions.
    - Must be witnessed in same manner as a will – this alerts the Principal to the seriousness of granting the Agent this type of authority.
    - Certain gift transactions to the Agent must be specified in the Gifts Rider.
    - No Gifts Rider without a POA; and POA must include a separate Statutory Gifts Rider for a variety of gift transactions.
- **Abuse Prevention & Intervention** (§§ 5-1501, 5-1503, 5-1504, 5-1505, 5-1506, 5-1507, 5-1508, 5-1509, 5-1510, 5-1511, 5-1513, 5-1514)
    - Government investigation of abuse complaint can request accounting from Agent.
    - Special Proceeding may be commenced for a variety of reasons, including:
      - Determine validity of POA, if POA was wrongfully procured, or to determine if Principal had capacity at time of execution, or whether procured through duress, fraud or undue influence.
      - Compel accounting - limited category of persons who have standing to bring action to compel accounting.
      - Determine whether Agent is entitled to compensation and if it is reasonable; or to remove agent for violation of fiduciary duty.
      - Compel acceptance of the POA.

**Reform measures that also apply to powers of attorney executed prior to September 1, 2009:**

- (1) Benefits from governmental programs or civil or military service. (§ 5-1502J)
- (2) Health care billing and payment matters. (§ 5-1502K)
- (3) Acceptance of validly executed statutory form POA. (§ 5-1504)
- (4) Agent fiduciary responsibility and process for resignation. (§ 5-1505)
- (5) Special proceedings. (§ 5-1510)

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*Prepared by Lifespan of Greater Rochester Inc., updated on May 31, 2011. Adapted from various sources including the bill memo and NYS Law Revision Commission documents.*

**If you have comments or questions about this Summary document, please contact:**

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