The 2021 New York Statutory Power of Attorney

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What is the Effective Date?

Beginning on June 13, 2021, Power of Attorney forms should follow the new statutory form and are subject to the new rules regarding execution and formatting. Powers of Attorney signed before June 13, 2021, using the old form, are still valid. They are not required to follow the new execution and formatting standards.

What is a New York Power of Attorney?

Generally, a Power of Attorney (POA) allows one person (a principal) to appoint someone else (an agent) to handle his or her personal and financial affairs. Powers of Attorney in New York can be statutory or non-statutory.

A statutory POA follows the form outlined in the New York General Obligations Law Section 5-1513 (the statutory form). A non-statutory POA does not meet the requirements of Section 5-1513 and will not receive all the enforcement protections discussed under "Recognition and Enforcement of the Agent's Authority" below. The law has been amended to state that a POA may follow the statutory form, but does not have to follow the statutory form, to be considered a valid and effective POA.

Recommendation: If possible, follow the statutory form. Deviations from the statutory form will only create headaches for third parties asked to accept an agent's authority and as a result, may not be accepted.

Validity of the Power of Attorney vs. Proper Exercise of the Agent's Authority

The validity of the POA is a separate concept from the authority granted by the POA. Validity determines whether a third party is required to accept the document. It gets the agent in the door and grants them the ability to work with the principal's assets. Proper witnessing and notarization, as well as following the new substantial compliance standard discussed below, makes a statutory POA valid.

Proper exercise of the agent's authority determines whether the agent's actions are authorized under a valid POA. If an agent is able to use the principal's assets in a way that was not allowed by the POA, the action may not be legally recognized, and the agent may be liable to the principal for misuse of his or her authority as agent.

Example: Jim signs a POA before a Notary and two witnesses naming his daughter Sally as the agent. The POA meets the written requirements of Section 5-1513. It is a valid POA. Sally takes the POA to a local bank where Jim has a checking account and presents it to a bank officer. The bank officer creates new signature cards for the account and marks that Sally is an agent under the

POA. Sally now has authority over the account with the ability to sign checks.

Two months later, Sally writes a check from Jim's account in the amount of $16,000.00 to George, who is a longtime friend of Jim, to buy a boat. The POA does not contain language giving an agent the right to make gifts from Jim's assets.

Although the POA gave Sally the power to write the check and transfer the funds, she misused her authority because the POA did not give her the power to make gifts. Sally will be liable to Jim for the amount of the gift.

The Demise of the Exact Language Requirement (NY GOL §5-1501(n) & §5-1501B(2))

Under the previous law, POA's had to follow the statutory form down to a specific font and font size to be considered a valid statutory POA. This was known as the exact language requirement. Following the exact language requirement was important because a statutory POA granted extensive powers to agents as provided in state law, without specification of those powers required in the actual document signed by the principal. In addition, a statutory POA was enforceable by the agent if a third party refused to accept the agent's authority.

Previously, companies refused to recognize an agent's authority when the POA did not mirror the statutory form, causing huge inconvenience and expense if the principal was unable to sign a new POA, and possibly creating the need for a guardianship proceeding.

Under the new law, statutory POA's must substantially conform to the format provided in section 5-1513 (the statutory form) to be valid. A document will substantially conform (and be a valid statutory POA) despite the following differences from the statutory form:

1. Deleting portions of the statutory form that are optional and replacing them with the words "Intentionally Omitted."
    - Optional sections include (1) designating successor agents, (2) modifications, (3) designation of monitors, and (4) certain gift transactions.
2. Insignificant mistakes in wording, spelling, punctuation, or formatting.
3. Using bold or italicized fonts.
4. Differences in phrasing or language from the statutory form.
5. Deleting clauses present in the statutory form.
6. Insubstantial variation in the "Caution to the Principal" and "Important Information for the Agent" sections.

Recommendation: Although highly modified POAs going forward will still be valid, drafters should continue using the statutory form and make all changes under "modifications". Instead of deleting the optional sections, writing "Not Applicable" under each section serves the same purpose and will not cause third parties to wonder why the section is missing from the document and question the agent's authority.

Updates to the Statutory Form

The new law changed the wording of the statutory POA, the authority granted by the document, and even changed the execution requirements for a valid POA.

Agent's Ability to Act (NY GOL §5-1502D & NY GOL §5-1513)

Under the old statutory POA, when a principal appointed more than one agent, the default rule was that they had to act together. This meant the agent's both had to agree to any action taken on behalf of the principal. To allow agents to act separately, the principal initialed a line that stated, "My successor agents may act SEPARATELY."

The default rule has not changed. If the principal appoints more than one agent and does not initial the line that allows them to act separately, the agents must both agree to any action taken on behalf of the principal. However, a new line has been added to the statutory POA where the principal may initial a line that states that his or her agents must act together, which is redundant.

The same lines are present for successor agents. If the principal wishes to designate successor agents, he or she should also decide whether these agents must act together or may act separately.

Even if the principal requires agents to act together (or does not initial either option), the agents may agree among themselves to have just one person take care of banking transactions if the power to delegate is initialed on the statutory POA under section (o) on the list of powers. The previous law included section (o) on the statutory form, but there was no corresponding grant of authority in the law. This has been updated and subsection (o) is now present in the law.

Recommendation: Make sure the principal decides whether to have the agents act together or separately and initials the appropriate line. Although the default rule requires agents to act together, the less interpretation required of third parties, the more likely a POA will be accepted without delay.

Health Care Finances (NY GOL §5-1502K)

The statutory form and the authority granted to agents regarding health care finances have been updated. Under the old law, an agent had the authority to access records and decide whether to pay the principal's medical bills.

The new law grants more expansive authority over matters relating to the principal's health care, including the authority to:

1. Receive protected health information from health care providers and health plans, and to use this information to verify the legitimacy and accuracy of
    a. The principal's payment obligations
    b. The principal's entitlement to benefits
2. Pay the principal's medical and other health care bills
3. Act as the principal's personal representative in health care matters (the authority to make health care decisions is excluded)

Removal of the Statutory Gifts Rider (NY GOL §5-1514) - Repealed

The Statutory Gifts Rider (SGR) has been repealed. All gifting authority must now be included under the modifications section of the new POA. The modifications required to the Statutory POA for estate planning or government benefit planning goals is covered in 'Modifying the Statutory Power of Attorney" below.

The effects of this change are far reaching. The SGR was a separate document that had to be executed under stricter formalities than the statutory POA (two witnesses were required). While it was more complicated to complete than the statutory POA, the SGR required the principal to confront the fact that he or she was granting the agent gifting powers that could decrease or deplete the principal's estate. It is possible including gifting powers only under the modification's section will make it easier for an unscrupulous agent to obtain gifting powers without the principal's knowledge.

Personal and Family Maintenance (NY GOL §5-1502I)

The gifting authority granted under "personal and family maintenance" has been increased to $5,000 from $500. As with the old law, the ability to make gifts under this section only applies if the principal was making these gifts before the agent stepped in.

Execution of the Power of Attorney (NY GOL §5-1501B(1)(b))

With the many other changes to the statutory POA, the formalities for execution of a POA have changed:

1. Previously the principal's signature on a POA only had to be notarized. On the new statutory POA, the principal's signature will also require two disinterested witnesses. A disinterested witness must be someone who (1) is not named as an agent in the POA, and (2) is not eligible to receive gifts under the POA.

2. A third party is now allowed to sign the principal's name on his or her behalf. The third party cannot be named as an agent on the POA, and the person signing must have his or her signature acknowledged before a notary. The principal's name must be printed or written, with the person signing adding his or her name afterward.

The principal must be physically present when the person signs the POA on behalf of the principal. There is no provision for e-signing or other remote procedures.

Recommendation: A third party signature for the principal should be a last resort. If the principal can sign, even if the signature is shaky and illegible, he or she should do so. A third party can help steady the principal's hand or provide other support to make sure the principal signs the document. Like following the statutory form whenever possible, having the principal sign the POA makes it more likely that a third party will accept the POA without court involvement.

Recognition and Enforcement of an Agent's Authority

The new laws have strengthened the procedures for enforcement of a valid statutory POA. There are also new provisions that encourage third parties to accept a statutory POA without court intervention. To encourage acceptance of a valid statutory POA, the new law provides that a third party may rely upon:

1. A good faith belief that the POA was properly signed and is valid;
2. An Agent's Certification under penalty of perjury of any factual matter concerning the principal, agent, or power of attorney;
3. An opinion of counsel (licensed attorney) as to any matter of law concerning the power of attorney if the person making the request provides in a writing or other record the reason for the request.

The Good Faith Acceptance Standard (NY GOL §§5-1504(1)(b),(c))

Third parties have been given liability protection if they accept in good faith a statutory POA that is later found to be deficient in any of the following ways:

1. An invalid signature by the principal
2. The POA is void, invalid, or has been terminated
3. The agent is using his or her authority in manners not authorized by the POA

To accept a POA in good faith, the third party must have no actual knowledge of the above deficiencies.

Agent's Certification and Opinion of Counsel (NY GOL §5-1504(1)(d))

If a third party has concerns about accepting a POA, they may request a certification from the agent regarding the facts about the principal, agent, or the POA.

They may also request an opinion of counsel (a licensed attorney) regarding any matter of law concerning the power of attorney. The request for an opinion of counsel must set forth the reason for the request. If the agent refuses to provide the certification, or the opinion of counsel, the third party may refuse to accept the POA without penalty.

It is unclear based on the legislation what facts the third party would need to verify. The certification might be related to the agent's knowledge of the principal's capacity or incapacity, and the agent's assertion that the POA is in full force and effect. However, the law already provides a separate acknowledgement procedure to deal with whether the agent certifies that he or she is able to act as agent.

The opinion of counsel is not designed to verify facts, only matters of law. This means an opinion of counsel will likely be required where the third party is unsure of whether the document was validly executed, or if certain actions may be taken by the agent, like the ability to make gifts using the principal's assets.

The New York State Bar Association provided a model form for the previous POA, along with

suggested modifications. It is likely that when a model form for the new law comes out, sample or suggested agent certifications and opinions of counsel will be provided in addition to the new statutory form.

The Procedure for Accepting or Rejecting a Power of Attorney (NY GOL §5-1504(3))

The new law provides a structure for third parties to accept or reject a POA. Here are the steps:

1. The agent presents the statutory POA to the third party - Either the original POA, or an attorney certified copy, or a County Clerk Certified copy, must be presented. Failure to present the original or an attorney certified POA is a valid reason to refuse to accept the agent's authority.

2. Within ten business days, the third party must either accept, reject, or request a full force and effect affidavit from the agent. A rejection must include the reason(s) for the rejection. At this stage, the third party may also request an opinion of counsel or the agent's certification of factual matters.

3. If the third party rejects the POA, the agent may submit a response, and within seven business days of receipt of the response, the third party must make a final decision to accept or reject the POA.

4. If the third party requests a full force and effect affidavit from the agent, once the agent provides the affidavit, the agent's authority must be recognized within seven business days, or refused again in writing, listing the reason(s) for refusal.

Enforcing the Power of Attorney after a Refusal (NY GOL §5-1510(2)(i))

When a third party refuses to recognize an agent's authority, the remedy is to begin a Special Proceeding in Supreme Court. The proceeding allows the agent (and other groups of people if needed) to obtain Court review of the third party's refusal to accept the statutory POA. The Court may order the third party to accept the agent's authority if the statutory POA is valid. Additionally, under the new law, attorney's fees and other expenses of the special proceeding may be awarded to the agent and his or her counsel if the third party's refusal to accept the POA is unreasonable. NY GOL §5-1504(2)(a) provides a list of "reasonable cause[s]" to refuse the agent's authority.

By including the ability of the court to award attorney's fees, it may encourage attorneys to litigate these matters when refusal to accept the agent's authority is clearly unreasonable. As there was no monetary reward for gaining acceptance of the POA under the old law, an attorney would require a retainer to bring the special proceeding, and agents short on funds may have simply given up instead of pursuing the issue.

Many agents wait to present the POA to a third party until after the principal is incapacitated. Refusal to accept the agent's authority means the principal's bills cannot be paid, the agent may not be able to apply for government benefits, and other financial issues lie dormant. Giving the special proceeding "teeth" is a positive step.

Recommendation: If an agent has a current POA, it is a good idea to present the bank or other financial institution with the document while the principal still has capacity.

Suggestions for Lawyers

When drafting a statutory POA under the new law, drafters need to include any modifications that would be helpful for the client's goals. Here are a few of the most common modifications:

1. Immediate Authority or Authority in the Future? - One of the most common modifications to a POA is to require some event to happen before the agent's authority begins. This could be a certain date, a certain event, or most commonly, the incapacity of the principal. The trigger mechanism can be any procedure the client and drafter want to use.

2. Durability - The default rule is that a POA continues to be valid after the incapacity of the Principal. If the principal wants the agent's authority to end if the principal becomes incapacitated, this should be included in the modification's sections.

3. Compensation - A statutory POA with no modification no longer provides compensation for agents. This means "reasonable compensation" must be defined in the modifications section, and the POA must also state that the principal wishes the agent to be compensated for his or her actions as agent. Compensation could be defined through reference to New York executor's commissions, New York Trustee Commissions, an hourly or flat rate, or any other system the principal wants to use.

4. Revocation of previous POAs - When executing a new POA, most principals want to revoke previous POA's they signed. This must be included in the modifications section. See the below section regarding revocation which goes into detail on the mechanics of revoking an agent's authority.

Using the Power of Attorney for Estate and Incapacity Planning

Under the new law, a statutory POA with no modifications will not be useful for estate and incapacity planning. Previously, the Statutory Gifts Rider provided some limited gifting options without modification of the document. Now, all gifting abilities must be granted within the modification section of the document. The following is a list of some of the modifications that should be added if the POA is to be used as a general estate planning and incapacity planning tool:

1. Addition or removal of a joint account owner from the principal's bank accounts

2. Addition or removal of Totten Trust beneficiary designations, also known as payable on death accounts

3. Modification of beneficiary designations on brokerage accounts and other financial accounts

4. Gifting - To provide flexibility, the gifting provisions should be broadly worded. They might include:
    a. Transfer of Property, real, tangible, and intangible, for income and transfer tax planning, Medicaid planning, or other planning that qualifies the principal for any other government benefit
    b. Creation and funding of trusts
    c. Gifts in any amount from the agent to him or herself individually
    d. Gifts in any amount to family members

e. Whether all transfers must be in the best interest of the principal - Is it in the best interests of the principal to qualify for Medicaid if his or her assets could be used for placement in a private pay facility instead? Make sure to define the goals of any gifting program if the principal does not want the agent to be unrestricted when making gifts.

5. Anything else the drafter can think of that would be relevant. The more specific the wording, the more likely it is that an action will be allowed without further investigation

Revocation of the Power of Attorney (NY GOL § 5-1511)

What if somebody comes to you and wants to revoke a POA they signed previously?

A principal may revoke his or her POA by delivering written notice of the revocation to the agent. This notice must be signed and dated to be effective if (1) delivered by a third person, (2) mailed, (3) emailed, or (4) faxed. Absent Article 81 Guardianship, a properly executed revocation is effective even if the principal is incompetent.

If the Power of Attorney has been recorded with the county clerk, the revocation must also be recorded.

Third parties may continue to accept a revoked power of attorney without liability until the principal notifies that third party. This means that if the agent has been working with financial institutions, the principal must make sure to notify each institution in writing that the former agent's authority is now revoked. Further, the principal must make sure to get back the original POA from the agent to stop further use without the principal's consent.

Revoking the Power of Attorney	YES	NO
Did the principal deliver the revocation to the agent?		
If delivered by any manner other than the principal handing it to the agent, is the revocation signed and dated? (Third Party hand delivered, mailed, faxed, or emailed)		
Has the principal notified third parties he or she knows were dealing with the agent under the power of attorney of the revocation?		
Has the principal taken back the signed original power of attorney document?		
If the original Power of Attorney was recorded, was the revocation also recorded with the same County Clerk?		

Dealing with Agents

What if you are given a Power of Attorney and asked to accept the agent's authority?

Even if the POA does not follow the statutory form, you can still agree to the agent's authority. Non-statutory POA agency relationships are created all the time for specific purposes (real estate agent contracts come to mind). The POA law is designed to prevent the third party from denying the agent's authority, not to stop the third party from accepting the agent's authority unless the forms are completed perfectly.

However, what if you do not want to accept the agent's authority? Use the following chart to determine whether denying the agent's authority will end with you paying the agent's attorney's fees. If the answer to any of these questions is no, you do not have to accept the POA, and should follow the procedure for rejecting a POA outlined on page 6.

Is the Power of Attorney Valid?	YES	NO
Has the agent presented the original or an attorney certified power of attorney?		
Is the power of attorney legible and the writing at least as large as the font used for this checklist?		
Is it signed by the principal in front of a Notary Public with the proper acknowledgement language and Notary signature?		
Have two witnesses attested that the document was signed in front of them? It is ok if one of the witnesses is also the notary.		
Is it signed by the Agent asserting authority in front of a Notary Public with the proper acknowledgement language and Notary signature?		
Does the Power of Attorney include the "Caution to the Principal Warning" somewhere in the document?		
Does the Power of Attorney include the "Important Information for the Agent" language somewhere in the document?		
Check the Modifications Section: Is this Power of Attorney currently in force? (It may not be in effect until a future event occurs, or if not durable, is no longer effective if the Principal is incompetent)		
Has the principal initialed the specific grant of authority the agent is attempting to use? Or, has the principal initialed the final line authorizing all powers?		
Has the Power of Attorney been altered using white out, cross outs, or additions?		

If the answer to all the above questions, other than the final question, which should be no, is yes, it is likely that the agent has a valid statutory POA. If there is a question about the agent's authority to take a particular action, you can request and rely on an opinion of counsel regarding the extent of the agent's authority. You will not be held liable for improper actions by the agent if this procedure is followed.

When is it reasonable to reject a valid Power of Attorney? (NY GOL §5-1504(2))

The following list provides some reasons you can reject a valid POA and will not be responsible for the agent's attorney's fees:

1. The agent did not show you the original power of attorney or an attorney certified copy of the power of attorney.
2. You make a report to adult protective services about the principal and agent, or you know there has been a report to adult protective services about abuse, neglect, exploitation, or abandonment of the principal by the agent or people working with the agent.
3. You know or have a reasonable basis to suspect that the principal died. A POA is only valid while the principal is alive.
4. You know or have a reasonable basis to suspect that the principal is currently incapacitated and the POA is non-durable.
5. You know or have a reasonable basis to suspect that the principal was incapacitated when he or she executed the power of attorney.
6. You know or have a reasonable basis to suspect that the principal executed the POA due to fraud, duress, or undue influence.
7. You received notice of the termination or revocation of the agent's authority from the principal in one of the manners outlined on page 8.
8. The agent refused to provide an agent's certification or an opinion of counsel.

If you choose to reject an agent's authority for one of these reasons, you must still follow the procedure outlined on page 6 for rejection. Include the reason you rejected the agent's authority in the written response and provide your evidence. If the agent begins a special proceeding, you want the written record to show that your rejection was reasonable.

When is it unreasonable to reject a valid Power of Attorney? (NY GOL §5-1504(2)(b))

Finally, there are some reasons for rejection of a valid POA that are considered unreasonable. They include:

1. Requiring your own custom POA form to be signed by the principal.
2. Requiring the POA to have been signed recently or within some previous time frame.
3. The principal and agent signed the POA on different dates.
4. Requiring the new statutory POA if the POA was in the valid statutory form at the time it was executed.

If your only reason for rejecting the POA is on this list, you will be paying the agent's attorney fee in court. However, if your reason for rejecting the POA is not on either of the above lists, it will be up to the Judge's discretion to determine if you acted reasonably or unreasonably, and if you must pay the agent's attorney's fees.