The New York Statutory Power of Attorney

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What is the "Statutory" Power of Attorney?

A Power of Attorney ["POA"] is a document that allows an Agent to conduct the financial affairs for the Principal's benefit with the Principals property. Such financial affairs include signing and depositing checks, monitoring and changing investment accounts, transferring real estate, potentially gifting the Principal's funds to family members, and more. The Agent is held to the standard of a fiduciary, and may face criminal charges if he absconds with the Principal's property.

The POA is "Statutory" because it is outlined in the General Obligations Law, Section 5-1051 to 5-1510. A financial institution may also have its own in-house POA, but must accept a valid Statutory POA if the institution wishes to conduct business in New York. As such, the POA has sections that hold these financial institutions harmless if they agree to the Agent's financial instructions in reliance of a valid POA.

The New York Statutory POA is one of the longest and most comprehensive POAs in the country. The current format was implemented in September of 2009 and was amended in 2010. Any prior POAs are still considered valid, and may be either kept in effect or terminated within the new POA

A "Limited" POA is only valid for a certain period to time, such as the six months someone may be outside of the country. A "Durable" POA is valid even after the Principal becomes incapacitated, thereby "locking in" the Principal to their choice of Agent until they pass away or are no longer incapacitated.

Who Needs a POA?

- Persons who may become physically or mental incapacitated, such as an individual recently diagnosed with dementia.
- Persons who will be having extreme surgeries that may threaten their lives.
- Elderly individuals, as their mobility and mental capacities have often begun to decline.
- Married individuals, particularly where one spouse lacks financial acumen.
- Incarcerated individuals, as they typically can no longer adequately manage their finances from prison but may need access to these finances for family obligations and legal fees.
- Persons who will be out of the country and will not have access to phones or the internet.

Why Would Someone Need a POA?

POAs may allow the Agent to serve whether or not the Principal is mentally incapacitated. However, the POA is typically used when the Principal can no longer handle his own finances. Under these circumstances the Agent will almost always have to pay bills and manage the

Principal's assets, but may also transfer the Principal's funds for Medicaid planning or gifting funds to minimize estate taxes that would otherwise be assessed upon the Principal's death. If this does happen to be the case, it is imperative that the Agent continues to consult with the attorney in order to minimize the pretense of making suspicious transfers of assets to the detriment of the Principal

Who Should the Principal Choose to Serve as Agent?

This question is more complex than many people give it credence. The Principal needs to balance (1) the proximity of the prospective Agent, (2) their financial acumen, and (3) their trustworthiness (the last being of preeminent importance). An Agent living in California may not be able to adequately perform his duties if the Principal is severely incapacitated. A twenty one year old child with no experience in finances may prove more suited to act as a Monitor of the Principal. A spendthrift with creditors hounding him may have good intentions, but may not have the requisite level of trustworthiness to serve.

Where two spouses have joint finances and adequate financial acumen and estate planning goals it makes sense to name each spouse as the other's Agent. Thought should often be given as to a Successor Agent, since the surviving spouse should also have an Agent available to serve upon the death of the first spouse.

When the Principal's children are all trustworthy and have an adequate level of financial acumen the Principal may name them either individually (I.e. in a particular order) or jointly as Agents. However, when one of the children is a "bad seed" or the children have had an acrimonious relationship for years it makes sense to insist that they act only jointly (meaning they must both approve any decision) to avoid one child absconding with all of the Principal's funds to the other sibling's detriment. Remote family members make less ideal candidates, as they may be more likely to view the Principal as extra money in their pockets.

An attorney may serve as Agent for his client, though this should often be limited in duration and based solely on individual transactions. For example, an attorney may want to serve for his client during the sale of real estate, but should probably avoid representing a purchaser where a mortgage is being signed. The same is true with business transactions: Representing a seller of a business often solely involves transferring ownership and collecting funds, whereas a purchaser of a business may require signing financing documents. Even where a client does not really have anyone he trusts, the attorney may want to choose to act as a Monitor instead of as an Agent.

Sections of the NY POA:

The New York POA can be broken-down into three distinct and separate aspects.

- ASPECT 1: The Principal is granting authority to an Agent to conduct financial affairs with the Principal's property for the benefit of the Principal.

- ASPECT 2: The Agent accepts this authority as a fiduciary. However, an Agent cannot be forced to serve.

- ASPECT 3: The Principal allows the Agent to make gifts of the Principal's property to parties named by the Principal. This section must be witnessed by disinterested parties in order to be affective. This aspect does not have to be executed.

A Comment as to Gifting

The seminal case regarding gifting with a POA is *Matter of Ferrara*, 7 N.Y.3d 244 (2006). The New York Court of Appeals stated that transferring the Principal's funds to other parties for the same of minimizing gift, estate, inheritance and income tax can be considered as acting for the best interests of the Principal. However, transferring the Principal's property that is inconsistent with his Will, and thus his overall estate plan, is a breach of the Agent's fiduciary duties. Though the Court of Appeals was not directly addressing transfers as to Medicaid planning, gifting most of the Principal's assets so that he can receive Medicaid should likewise follow the desired distributive pattern of the Principal.

As the following materials are geared towards New York Skills Requirement CLE Credits, what follows is a sample Power of Attorney on the left-hand side of the page, and commentary as to both content and execution suggestions on the right.

Keep in mind that the "Modifications" sections provided are quite expansive, and some or all of these Modifications may not be suitable for all clients. Make sure to review each with your client prior to execution.

POWER OF ATTORNEY
NEW YORK STATUTORY SHORT FORM

(a) CAUTION TO THE PRINCIPAL: Your Power of Attorney is an important document. As the "principal," you give the person whom you choose (your "agent") authority to spend your money and sell or dispose of your property during your lifetime without telling you. You do not lose your authority to act even though you have given your agent similar authority.

When your agent exercises this authority, he or she must act according to any instructions you have provided or, where there are no specific instructions, in your best interest. "Important Information for the Agent" at the end of this document describes your agent's responsibilities.

Your agent can act on your behalf only after signing the Power of Attorney before a notary public.

You can request information from your agent at any time. If you are revoking a prior Power of Attorney, you should provide written notice of the revocation to your prior agent(s) and to any third parties who may have acted upon it, including the financial institutions where your accounts are located.

You can revoke or terminate your Power of Attorney at any time for any reason as long as you are of sound mind. If you are no longer of sound mind, a court can remove an agent for acting improperly.

Your agent cannot make health care decisions for you. You may execute a "Health Care Proxy" to do this.

The law governing Powers of Attorney is contained in the New York General Obligations Law, Article 5, Title 15. This law is available at a law library, or online through the New York State Senate or Assembly websites, www.senate.state.ny.us or www.assembly.state.ny.us.

If there is anything about this document that you do not understand, you should ask a lawyer of your own choosing to explain it to you.

(b) DESIGNATION OF AGENT:

I, **PRINCIPAL**, residing at _____(Principal's Address)_____, hereby appoint my wife, **AGENT**, who resides at _____(Agent's Address)_____, as my agent.

( )My agents may act SEPARATELY

This portion of the Statutory Form is required by law. It must be in 12 point type so that the Principal is aware that he or she is delegating financial powers to an Agent to work on the Principal's behalf and for the Principal's benefit. It also informs him of requirements to make the POA valid (such as requiring an Agent to execute his portion of the document) to reminding the Principal of limitations (such as the POA not granting the Agent health care decision making authority).

Any deviation from this standard language will, as you can imagine, invalidate the power of attorney's statutory status, thus financial institutions would not be obligated to abide by it. Indeed, most financial institutions will refuse a non-conforming POA, and may require the Principal to execute that particular institution's POA. This may not be possible if the Principal is now incapacitated. Therefore, as a rule, use the Statutory Form, and leave individualized limitations and modifications for later in the document.

SECTION (b): The "Designation of Agent" section names the Principal's initial Agent. Though an address, relationship to the Principal or birthdate is not required, it is a good practice to provide at least two of these aspects for identification purposes. Two or more initial agents may also be chosen. If you name more than one initial Agent you may choose to have them act jointly or independently from one another.

(c) DESIGNATION OF SUCCESSOR AGENT(S): (OPTIONAL)

If any agent designated above is unable or unwilling to serve, I appoint my son, **SUCCESSOR AGENT 1**, who resides at _____(Successor's Address)_____ and **SUCCESSOR AGENT 2**, who resides at _____(Successor's Address)_____ as my successor agent(s).

Successor agents designated above must act together unless you initial the statement below.

( )My successor agents may act SEPARATELY

You may provide for specific succession rules in this section. Insert specific succession provisions here:

_____

(d) This POWER OF ATTORNEY shall not be affected by my subsequent incapacity unless I have stated otherwise below, under "Modifications".

(e) This POWER OF ATTORNEY DOES NOT REVOKE any Powers of Attorney previously executed by me unless I have stated otherwise below, under "Modifications".

If you do NOT intend to revoke your prior Powers of Attorney, and if you have granted the same authority in this Powers of Attorney as you granted to another agent in a prior Power of Attorney, each agent can act separately unless you indicate under "Modifications" that the agents with the same authority are to act together.

(f) GRANT OF AUTHORITY:

To grant your agent some or all of the authority below, either (1) Initial the bracket at each authority you grant, or (2) Write or type the letters for each authority you grant on the blank line at (P), and initial the bracket at (P). If you initial (P), you do not need to initial the other lines.

( ) (A) real estate transactions;

( ) (B) chattel and goods transactions;

( ) (C) bond, share and commodity transactions;

SECTION (c); The Successor Agent portion is optional, but should be utilized where there is an additional trustworthy individual to act as agent, as the principal and initial Agent may be elderly and the document is meant to last for as long a period of time as the Principal desires – perhaps for the remainder of their life. The Principal must also decide whether the Agents should work together (such as two children who may have poor relations and there is a fear of one agent absconding with funds) or separately (such as when both Agents are trustworthy, but perhaps one is geographically much closer). The Principal may also determine his or her own succession plans. Perhaps the Principal eventually wants his children to eventually serve, but does not yet have the financial acumen and life experience to handle this position until a later date and the Principal wishes to have his own sibling serve until the children reach a later age.

SECTION (d): The Principal must also decide whether the document should or should not be affected when the Principal becomes incapacitated. The reasoning for this provision is that once the Principal is incapacitated he cannot revoke the document and must live with his past decisions in the document until his death.

SECTION (e): The Statutory Form itself states that this Power of Attorney does not revoke any Power of Attorney document executed in the past. This statement must remain in the POA. However, the Principal may choose to invalidate some or all past-executed Powers of Attorney. As stated in the Statutory Form itself, this is done in the "Modifications" Section.

SECTION (f): In this Section the Principal chooses which types of property the Agent may manage on his behalf. For example, if the Principal does not want to give the Agent the ability to sell his personal property he would initial all items except (B). This is usually done by the Principal due to his or her trust in the Agent not to abscond with the principal's property.

When a Principal does not initial a certain item problems may arise. For example, disallowing banking transactions could have disastrous consequences, as the Agent will not be able to write checks for the Principal's benefit, or move funds to a bank location that is more convenient for the Agent. As a practice, it is advisable to have the Principal sign all sections and, where trust is the issue, limit or eliminate the Statutory Gift Rider.

If the Principal does have trustworthy Agents he may simply initial line (P) and ignore lines (A) through (O). When there are possible ill-spirited future claims that the Principal was incapacitated or did not understand what he was signing the attorney may want the Principal to sign (A) through (O) individually.

( ) (D) banking transactions;

( ) (E) business operating transactions;

( ) (F) insurance transactions;

( ) (G) estate transactions;

( ) (H) claims and litigation;

( ) (I) personal and family maintenance. If you grant your agent this authority, it will allow the agent to make gifts that you customarily have made to individuals, including the agent, and charitable organizations. The total amount of all such gifts in any one calendar year cannot exceed five hundred dollars;

( ) (J) benefits from governmental programs or civil or military services;

( ) (K) health care billing and payment matters; records, reports and statements;

( ) (L) retirement benefit transactions;

( ) (M) tax matters;

( ) (N) all other matters;

( ) (O) full and unqualified authority to my agent(s) to delegate any or all of the foregoing powers to any person or persons whom my agent(s) shall select;

( ) (P) EACH of the matters identified by the following letters: (A) (B) (C) (D) (E) (F) (G) (H) (I) (J) (K) (L) (M) (N) (O)

You need not initial the other lines if you initial line (P).

Subsection "(E) business transactions" will probably require greater details in the "Modifications" section: Some professionals, such as Doctors or Attorneys, have duties to maintain patient / client files. It may be desirable for a business partner to have a separate POA with the Principal.

Subsection "(G) estate transactions" does not include the Agent acting on behalf of the Principal regarding fiduciary duties delegated to the Principal (Ex: Principal is named the Executor to an individual's Will; the Agent cannot act as Executor for the Principal), as a fiduciary duty cannot be delegated.

Subsection "(I) personal and family maintenance" allows for simple gift giving, but only up to $500 total per year. This is not an adequate substitute where more substantial and sophisticated gifting is required for Medicaid or Estate Tax.

Subsection "(N) all other matters" is extremely vague, and should be expanded upon in the "Modifications" Section.

Subsection "(P)" allows the Principal to initial just here instead of (A) through (O) to give the Agent Power over all of these powers and not have to initial each of the former items of listed property individually. This is acceptable in most circumstances (a married couple, a person in a hospital who is physically compromised). Where a legal dispute is looming or anticipated having the Principal initial (A) through and including (P) is advisable.

(g) MODIFICATIONS: (OPTIONAL)

In this section, you may make additional provisions, including language to limit or supplement authority granted to your agent.

However, you cannot use this Modifications section to grant your agent authority to make gifts or changes to interests in your property. If you wish to grant your agent such authority, you MUST complete the Statutory Gifts Rider.

( ) **SPRINGING POWER**: Aside from my spouse acting as my Agent, my Attorney-in-Fact shall have no power under this legal instrument unless (1) I acknowledge such power is in effect by the execution of a signed document this document is effective, or (2) written confirmation of two Board Certified Physicians, Psychiatrists, or any combination thereof, who are intimately familiar with my physical or mental health, stating that I am no longer competent to handle my own financial affairs.

( ) (P-1) The powers granted under (A) and (B) above are enlarged so that all fixtures and articles of personal property which at the time of such transaction are or which may thereafter be attached to or used in connection with the real property may be included in the deeds, mortgages, agreements, and any other instruments to be executed and delivered in connection with real estate transactions and which may be described in said instruments with more particularity;

( ) (P-2) My attorney-in-fact has the unrestricted power to act (including gratuitous acts) with respect to Trusts, including but not limited to the creating and funding a Trust, revoking or modifying a Trust, and adding property to an existing or subsequently created Trust and also to transfer any of my assets into any trust and to withdraw and/or receive on my behalf income and/or principal of a trust to which I may be entitled to, to expend such distributions for my behalf and/or to give such distributions to any person or charity if allowed under the provisions of such trust; and to disclaim any interest I may have in any Trust and to use such withdrawals to purchase an annuity for my benefit. My attorney-in-fact shall also have the authority to request all financial information and request any form of Accounting from any Trusts created by me or to which I am a beneficiary; My attorney-in-fact is hereby granted the authority to create, fund, amend or add to revocable or irrevocable inter vivos trusts; terminate revocable inter vivos trusts; accept transfers or distributions from any trustee of any trust, provided that any creation of new or changes to existing trusts are to be done primarily for the health and financial benefit of the principal or the principal's estate. This provision shall include the power of the Attorney-in-fact to create, fund, amend or make investments to an Income Only Trust, Special Needs or Supplemental Needs Trust, or a NYSARC or similar "Pooled" Trust.

( ) (P-3) My attorney-in-fact may disclaim all or part of any transfers to me if it is probable that no gift taxes will be imposed on me on account of such disclaimer or renunciation;

SECTION (g): MODIFICATIONS

The "Modifications" section in the POA allows the Agent the ability to exercise expanded powers not explicitly covered under the Standard From. This may include the ability to Disclaim / Renounce property that the Principal would otherwise inherit, change beneficiaries for testamentary substitutes, plan for Medicaid, and other more sophisticated legal issues. While it is important for many POAs to have modifications, using every one of them may ruin the Principal's desired estate plan. The following modifications are provided solely for informational purposes, and may not be appropriate for your individual clients.

A "Springing Power" may be appropriate where the Principal does not want to give financial authority to an Agent until he is incapacitated. Upon incapacity the POA "springs" into effect. Until that time the document is ineffective. Determining the terms of the springing power as well as who it applies to are equally important: Does a trusted spouse have to wait for the Principal's incapacity? Should a springing power not be used for a trusted child? It is these questions that the attorney must address with the client. Unlike initially (P) in the property designation section (I.e. initialing one catch-all for multiple designations), it is recommended that a springing power be initialed individually.

P-1 allows the Agent greater authority to contract under enlarged terms for real estate transactions, such as contracting for furniture and other items during a real estate sale.

P-2 is a very expansive modification regarding Trusts, and should be thoroughly discussed with the Principal. Granting an Agent the ability to fund an existing Trust or create a Pooled Trust for Medicaid planning is probably acceptable to most clients, but allowing an Agent the right to modify an existing Trust or change its terms may turn the Principal's estate plan upside-down. It may cause conflict between the Agent and Trustee and confusion as to their respective fiduciary duties.

NYSARC may disallow the Agent to create a Pooled Trust with them if they are not specifically named in the POA. As such, it is a good practice to include the language in the last sentence of this sub-section.

P-3 allows for measured gifting / renunciation powers, but here is tempered to minimize the amount of funds that may be renounced.

( ) (P-4) My attorney-in-fact shall have the power to establish one or more "individual retirement accounts" or other retirement plans or arrangements in my name, transfer existing retirement accounts to new retirement accounts, and make conversions of these pre-tax retirement funds to Roth IRA accounts;

In connection with any pension, profit sharing or stock bonus plan, individual retirement arrangement, Roth IRA § 403(b) annuity or account, § 457 plan, or any other retirement plan, arrangement or annuity in which I am a participant or of which I am a beneficiary (whether established by my Attorney-in-fact or otherwise) (each of which is hereafter referred to as "such Plan"), my Attorney-in-fact shall have the following powers in addition to all other applicable powers granted by this instrument;

1. To make contributions (including "rollover" contributions) or cause contributions to be made to such Plan with my funds or otherwise on my behalf.
2. To receive and endorse checks or other distributions to me from such Plan, or to arrange for the direct deposit of the same in any account in my name or in the name of any revocable living trust established by me.
3. To elect a form of payment of benefits from such Plan, to withdraw benefits from such Plan, to make contributions to such Plan and to make, exercise, waive or consent to any and all elections and/or options that I may have regarding the contributions to, investments or administration, of, or distribution or form of benefits under, such Plan.
4. To designate one or more beneficiaries or contingent beneficiaries for any benefits payable under such Plan on account of my death, and to change any such prior designation of beneficiary made by me or by my Attorney-in-fact ; provided, however, that my Attorney-in-fact shall have no power to designate my Attorney-in-fact directly or indirectly as a beneficiary or contingent beneficiary to receive a greater share or portion of any such benefits than my Attorney-in-fact would have otherwise received unless such change is consented to by all other beneficiaries who would have received the benefits but for the proposed change. This limitation shall not apply to any designation of my Attorney-in-fact as beneficiary in a fiduciary capacity, with no beneficial interest.

( ) (P-5) If any third party (including but not limited to stock transfer agents, title insurance companies, banks, credit unions, and savings and loan associations) with whom my Attorney-in-fact seeks to transact business refuses to recognize my Attorney-in-fact's authority to act on my behalf pursuant to this Power of Attorney, I authorize my Attorney-in-fact to sue and recover from such third party all resulting damages, costs, expense, and attorney's fees that are incurred because of such failure to act. Refusal to recognize my Attorney-in-fact s' authority to act on my behalf shall include, but shall not be limited to, requirements of a particular form of Power of Attorney, requirements that the Power of Attorney be dated within a certain time period, and requirements that particular language be included in the Power of Attorney to the extent that such requirements are not part of New York's General Obligations Law. The costs, expenses and attorney's fees incurred in bringing such action shall be charged against my general assets, to the extent they are not recovered from said third party. I expressly direct my Attorney-in-fact to move my assets from any brokerage, transfer attorney-in-fact or other entity that refuses to recognize the full extent of powers that I intend to convey by this Power of Attorney;

P-4 is an example of giving the Agent expansive powers over retirement plans. Here the Agent can create new retirement plan accounts, transfer among different accounts, covert funds to Roth IRAs, contribute to existing plans, and the like.

In this example perhaps the greatest power is the final aspect of this sub-section: The ability to change the plan's beneficiary (though the Agent may not name himself unless other parties consent). This section also implies that the Agent must know the other beneficiaries of the estate; this may require an explicit reference to allowing the Agent to have access to the Principal's legal documents.

P-5 includes expanded rights for the Agent to pursue legal action against any financial institutions that fails to accept the POA. This is implied (F) of the standard form, but here states that associated legal fees may be paid for by the Principal's funds.

( ) (P-6) I intend for my attorney-in-fact to be treated as I would be with respect to my rights regarding the use and disclosure of any individually identifiable health information governed by the Health Insurance Portability and Accountability Act of 1996 (a/k/a HIPAA), 42 USC 1320d and 45 CFR 160-164. I authorize any person or entity that has provided treatment or services to me or that has paid for or is seeking payment from me for such services to give, disclose and release to my attorney-in-fact, without restriction, all of my individually identifiable health information and medical records regarding any past, present, or future medical or mental health condition, to include all information relating to the diagnosis and treatment of HIV/AIDS, sexually transmitted diseases, mental illness and drug or alcohol abuse. The authority given to my attorney-in-fact shall supersede any prior agreement that I may have made with my health care providers to restrict access to or disclosure of my individually identifiable health information. The authority given my attorney-in-fact has no expiration date and shall expire only in the event that I revoke the authority in writing and deliver it to my health care provider;

( ) (P-7) My attorney-in-fact is hereby granted the authority to: create trusts, promissory notes, life estates on real property and other legal devices, instruments and strategies on my behalf and funding such instruments particularly for, but not limited to, Medicaid and other government program planning; my attorney-in-fact is hereby granted the authority to act on my behalf with regards to the social security administration, veterans administration, social services, Medicare, Medicaid, SSI, and all other government benefits or entitlements, which may include but is not limited to: claims, planning for eligibility, submission of applications and appeals;

( ) (P-8) My attorney-in-fact is hereby granted the authority to retain, discharge and pay for the services of attorneys, accountants, financial planners, care managers, social workers and other professionals who will work on my behalf;

( ) (P-9) My attorney-in-fact is hereby granted the authority to enter into any safe deposit box or other place of safekeeping standing in my name alone or jointly with another to remove the contents and to make additions, subtractions or replacements;

( ) (P-10) My attorney-in-fact is hereby granted the authority to name my preferred Guardian of the Person and Guardian of the Property, including himself / herself.

( ) (P-11) My attorney-in-fact is hereby granted the authority to sign an intent to return home for any Governmental Benefits application or otherwise.

( ) (P-12) EACH of the matters identified by the following letters: (P-1), (P-2), (P-3), (P-4), (P-5), (P-6), (P-7), (P-8), (P-9), (P-10) and (P-11),

I direct that all previously executed powers of attorney shall be revoked by the execution of this new power of attorney.

1. P-6 allows the Agent to receive health care records, payments and expenses and the like, but does not allow the Agent to make actual health care decisions. Since New York's Health Care Proxy is itself a statutory form it must be executed separately.

P-7 allows for more explicit planning regarding government programs, specifically Medicaid, Social Security and the Veteran's Administration. The explicit reference to promissory notes should be included (reference to Supplemental Needs Trusts and Income Only Trusts is covered in P-2).

P-8 further clarifies the types of professionals and professional services the Agent may retain for the benefit of the Principal..

P-9 allows the Agent to enter safe deposit boxes owned by the Principal. This can be extremely important if the Principal is on his deathbed, as the box is closed upon the Principal's death. Whether the bank will allow this section is another issue…

P-10 should help to save costs on Article 81 Guardianships, as the Agent is given authority to name the Principal's preferred Guardian.

P-11 allows the Agent to let the Principal return home where Medicaid planning is contemplated, but the Principal may have his residence attached to a Medicaid Lien.

P-12, like (P) in the Statutory Form, is a catch-all for these modifications, and may be initialed in lieu of initialing P-1 through P-11.

This is the preferred area to state that all (or certain) past-POAs are revoked. Placing this in bold type is suggested, as it makes the decision stand out to financial firm's legal departments.

(h) CERTAIN GIFT TRANSACTIONS: STATUTORY GIFTS RIDER (OPTIONAL)

In order to authorize your agent to make gifts in excess of an annual total of $500 for all gifts described in (I) of the grant of authority section of this document (under personal and family maintenance), you must initial the statement below and execute a Statutory Gifts Rider at the same time as this instrument. Initialing the statement below by itself does not authorize your agent to make gifts. The preparation of the Statutory Gifts Rider should be supervised by a lawyer.

( ) (SGR) I grant my agent authority to make gifts in accordance with the terms and conditions of the Statutory Gifts Rider that supplements this Statutory Power of Attorney.

(i) DESIGNATION OF MONITOR(S): (OPTIONAL)

( ) I wish to designate my attorney, **Daniel Timins,** whose business address is currently 399 Knollwood Road, Suite 300, White Plains, New York 10603 as monitor. Upon request of the monitor(s), my agent must provide the monitor(s) with a copy of the power of attorney and a record of all transactions done or made on my behalf. Third parties holding records of such transactions shall provide the records to the monitor(s) upon request.

(j) COMPENSATION OF AGENT(S): (OPTIONAL)

Your agent is entitled to be reimbursed from your assets for reasonable expenses incurred on your behalf. If you ALSO wish your agent to be compensated from your assets for services rendered on your behalf, initial the statement below. If you wish to define "reasonable compensation", you may do so above under "Modifications".

( ) My agent(s) shall be entitled to reasonable compensation for services rendered. My Agent shall be permitted to receive compensation that a person in his or her professional capacity would receive on a hourly basis, and paid for reasonable travel expenses but not travel time.

(k) ACCEPTANCE BY THIRD PARTIES: I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Power of Attorney. I understand that any termination of this Power of attorney, whether the result of my revocation of the Power of Attorney or otherwise, is not effective as to a third party until the third party has actual notice or knowledge of the termination.

SECTION (h): Absent initialing this section AND executing the Statutory Gifts Rider at the back of the instrument, the Agent may not gift more than $500 total every year from the Principal's property. The term "gifting" would include everything from a holiday gift to gifting for college education and healthcare expenses for family members.

This particular section seems somewhat redundant: The Principal still has to execute three to four pages of the Statutory Gifts Rider at the end of the POA. Nevertheless, failing to initial (h) may confound the Principals desires to help family members in their times of need.

SECTION (i): A "Monitor" is permitted the power to review all property being administered to by the Agent, but is not given authority to exercise any decision-making authority. It is most practical where the Agent has far greater financial acumen than his sibling, but there is concern the Agent may abscond with assets that may partially pass to the sibling (thus naming the sibling as a Monitor). Another instance to name a Monitor is when the client does not entirely trust the Agent, but nonetheless needs one. In these instances an attorney may wish to act in this capacity.

Many attorneys avoid naming Monitors. The level of their fiduciary duty is limited, but not yet definitively defined by case law or statute. In addition, while it is implied that an Agent is required to inform a Monitor of his status, the very nature of the Monitor position may tempt to Agent to not inform him of his position immediately.

SECTION (j): A Principal is entitled to decide whether an Agent is entitled to compensation, and define how this compensation should be measured. Allowing for compensation makes sense in the context of Medicaid planning, as it may be considered a reasonable way to transfer the Principal's wealth.

The difficult issue is how to define the amount of compensation. The standard is "reasonable," but this too can lead to litigation at the hands of future beneficiaries, the Department of Social Services, and the like. Rather than relying on what is reasonable, it may be preferable to highlight the Agent's professional abilities, financial knowledge or responsiveness, and base compensation based on people with similar qualities.

SECTION (k): Because financial institutions operating in New York are required to accept the Statutory Form the state requires a hold-harmless provision in the POA, thereby indemnifying them for accepting an executed POA.

(l) TERMINATION: This Power of Attorney continues until I revoke it or it is terminated by my death or other event described in section 5-1511 of the General Obligations Law.

Section 5-1511 of the General Obligations Law describes the manner in which you may revoke your Power of Attorney, and the events which terminate the Power of Attorney.

(m) SIGNATURE AND ACKNOWLEDGMENT:

In Witness Whereof I have hereunto signed my name on September 21, 2011.

PRINCIPAL signs here:==> _____

Acknowledgment

STATE OF NEW YORK)
) SS:
COUNTY OF WESTCHESTER)

On September 21, 2011 before me, the undersigned, a Notary Public in and for said State, personally appeared **PRINCIPAL**, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____

Notary Public

SECTION (l): The Principal may choose to make the POA perpetual in nature (until death, of course) or limit its duration.

SECTION (m): Obviously, the POA must be signed by the Principal or by a person who signs on behalf of the Principal and notarized. This is similar to the execution of a Will, where the Testator may or may not be the actual person signing the document.

Due to differing Modifications and the number of Successor Agents named, the length of each POA may differ. It is not required to put the Principal's signature and notarization on the same page, but adds a sense of consistency to the document. It is also be preferable to end the page with the notary's signature and begin the next portion of the POA (the Agent's Portion) on a new page to avoid confusion to the Agent.

(n) IMPORTANT INFORMATION FOR THE AGENT:

When you accept the authority granted under this Power of Attorney, a special legal relationship is created between you and the principal. This relationship imposes on you legal responsibilities that continue until you resign or the Power of Attorney is terminated or revoked. You must:

(1) act according to any instructions from the principal, or, where there are no instructions, in the principal's best interest;

(2) avoid conflicts that would impair your ability to act in the principal's best interest;

(3) keep the principal's property separate and distinct from any assets you own or control, unless otherwise permitted by law;

(4) keep a record of all receipts, payments, and transactions conducted for the principal; and

(5) disclose your identity as an agent whenever you act for the principal by writing or printing the principal's name and signing your own name as "agent" in either of the following manner: (Principal's Name) by (Your Signature) as Agent, or (your signature) as Agent for (Principal's Name).

You may not use the principal's assets to benefit yourself or anyone else or make gifts to yourself or anyone else unless the principal has specifically granted you that authority in this document, which is either a Statutory Gifts Rider attached to a Statutory Short Form Power of Attorney or a Non-Statutory Power of Attorney. If you have that authority, you must act according to any instructions of the principal or, where there are no such instructions, in the principal's best interest. You may resign by giving written notice to the principal and to any co-agent, successor agent, monitor if one has been named in this document, or the principal's guardian if one has been appointed. If there is anything about this document or your responsibilities that you do not understand, you should seek legal advice.

Liability of agent:

The meaning of the authority given to you is defined in New York's General Obligations Law, Article 5, Title 15. If it is found that you have violated the law or acted outside the authority granted to you in the Power of Attorney, you may be liable under the law for your violation.

SECTION (N) is a completely separate aspect of the New York Statutory Power of Attorney. Here, it is the Agent who is signing the document. In sum, it conveys to the Agent that the Agent must (1) act in the Principal's best interests, (2) avoid getting into conflict with the Principal's best interests, (3) avoid self-dealing, and (4) maintain records (presumably to protect Principal and Agent alike).

(5) illustrates to the Agent how the Agent is required to sign checks and other legal documents on behalf of the Principal.

Example: Where John in the Principal and Mary is his Agent, Mary signs:

John Smith by Mary Smith as Agent
or
Mary Smith as Agent for John Smith

The POA also informs the Agent not to gift money to himself or others unless instructed by the Principal or within the Statutory Gift Rider. An issue often arises where elder law or Medicaid planning is involved: The Principal may not want to be moved to a Nursing Home but constant care is the only viable solution. Situations like this are typically a problem where the Agent's greed (or the greed of other family members) lead the Agent to transfer funds so that Medicaid will be granted prior to most of the Principals assets have been expended on care. An argument could be made that saving family money is in the best interest of the Principal, but the Agent should be prepared to back up this claim.

Lastly, the Agent is informed that if he absconds with funds or transfers assets in a way not permitted under the POA he may be criminally liable for breaching his fiduciary duty.

(o) AGENT'S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT:

It is not required that the principal and the agent(s) sign at the same time, nor that multiple agents sign at the same time.

I, **AGENT**, have read the foregoing Power of Attorney. I am the person identified therein as agent for the principal named therein.

I acknowledge my legal responsibilities.

Agent signs here:==> _____

Acknowledgments

STATE OF NEW YORK)
) SS:
COUNTY OF WESTCHESTER)

On September 21, 2011 before me, the undersigned, a Notary Public in and for said State, personally appeared **AGENT**, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by hher signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
Notary Public

Occasionally the question arises whether or not an Agent should execute the POA immediately. Remember that the document is not affective until both the Principal and Agent have executed in front of a Notary. Occasionally the Principal wishes to wait until they feel as though they can no longer handle their own finances (essentially creating a "Springing" power without the language). Other times the Principal feels their Agent is not yet responsible enough to act on his behalf, such as a child who is in their late teens or early twenties.

The best answer to this issue lies in whether there is trust between the parties, pending need to use the POA, and who is serving. If spouses are executing mirrored durable POAs then it is best to have the spouses execute the entire POA at the same time. If the Principal is already nearing incapacity then the Agent should also execute as soon as possible. If a child is not yet ready to serve then it may make sense to delay execution. Where the Principal's friend is acting as Agent delaying the Agent's execution may also be reasonable.

If the POA has a "Springing" power the mechanism for ensuring the effectiveness has been established, thus it is probably acceptable to have the Agent sign sooner than later.

(p) SUCCESSOR AGENT'S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT:

It is not required that the principal and the SUCCESSOR agent(s), if any, sign at the same time, nor that multiple SUCCESSOR agents sign at the same time. Furthermore, successor agents can not use this power of attorney unless the agent(s) designated above is/are unable or unwilling to serve.

I/we, SUCCESSOR AGENT 1 and SUCCESSOR AGENT 2have read the foregoing Power of Attorney. I am/we are the person(s) identified therein as agent(s) for the principal named therein.

Successor Agent(s) sign(s) here:==> _____

Acknowledgments

STATE OF _____)
) SS:
COUNTY OF _____)

On _____ before me, the undersigned, a Notary Public in and for said State, personally appeared SUCCESSOR AGENT 1 and SUCCESSOR AGENT 2, personally known to me or proved to me on the basis of satisfactory evidence to be the individuals whose names are subscribed to the within instrument and acknowledged to me that he executed the same in their capacity, and that by their signatures on the instrument, the individuals, or the persons upon behalf of which the individual acted, executed the instrument.

_____
Notary Public

Successor Agents are also required to sign the POA prior to them becoming an Agent. When the initial Agent has executed there is less of a need to have the Successor sign.

A Successor often has a lesser chance of serving than an initial Agent. The time prior to the Successor may be several years or longer. In addition, the Agent's state and county of residence at the time of signing may not be known. As such, it is acceptable to leave blank lines where the notary signs, though it is not required.

**The page for the second Successor to sign has intentionally been omitted.

POWER OF ATTORNEY NEW YORK STATUTORY GIFTS RIDER

AUTHORIZATION FOR CERTAIN GIFT TRANSACTIONS

CAUTION TO THE PRINCIPAL: This OPTIONAL rider allows you to authorize your agent to make gifts in excess of an annual total of $500 for all gifts described in (I) of the Grant of Authority section of the statutory short form Power of Attorney (under personal and family maintenance), or certain other gift transactions during your lifetime. You do not have to execute this rider if you only want your agent to make gifts described in (I) of Grant of Authority section of the statutory short form Power of Attorney and you initialed "(I)" on that section of that form. Granting any of the following authority to your agent gives your agent the authority to take actions which could significantly reduce your property or change how your property is distributed at your death. "Certain gift transactions" are described in section 5-1514 of the General Obligations Law. This Gifts Rider does not require your agent to exercise granted authority, but when he or she exercises this authority, he or she must act according to any instructions you provide, or otherwise in your best interest.

This Gifts Rider and the Power of Attorney it supplements must be read together as a single instrument.

Before signing this document authorizing your agent to make gifts, you should seek legal advice to ensure that your intentions are clearly and properly expressed.

(a) GRANT OF LIMITED AUTHORITY TO MAKE GIFTS:

Granting gifting authority to your agent gives your agent the authority to take actions which could significantly reduce your property.

If you wish to allow your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.

To grant your agent the gifting authority provided below, initial the bracket to the left of the authority.

( ) I grant authority to my agent to make gifts to my spouse, children and more remote descendants, and parents, not to exceed, for each donee, the annual federal gift tax exclusion amount pursuant to the Internal Revenue Code. For gifts to my children and more remote descendants, and parents, the maximum amount of the gift to each donee shall not exceed twice the gift tax exclusion amount, if my spouse agrees to split gift treatment pursuant to the Internal Revenue Code.

The "Statutory Gifts Rider" ["SGR"] is the third and final aspect of the Statutory Power of Attorney. Recall that unless this section is executed the Agent may only gift a total of $500 per year to other parties. This limitation would prove to be disastrous in the context of Medicaid and Gift / Estate Tax planning, and could financially compromise a spouse who has substantially less funds than the Principal.

That being said, the SGR is not mandatory. There are numerous reasons why a Principal may choose not to sign the SGR, ranging from wanting to avoid children from impoverishing the Principal when he becomes incapacitated, to spouses having separate finances. The Principal should be made to understand that though his Agent does have a fiduciary duty, the Agent will have the ability to transfer funds from the Principal, perhaps in near-totality.

As the preamble of this section states, the Principal may instruct the Agent as to his desires. This could specifically lay out that the Principal wishes to gift for his children's heath care and education, but keep his finances separate from his spouse. This can be done verbally, but may best be done in writing so as to better ensure the Agent complies with the provisions.

As the powers outlined in the SGR may call into question whether the Agent truly is working for the benefit of the Principal, it states that it should be viewed as a separate legal document.

SECTION (a) allows the Agent the ability to make gifts to the Principal's immediate and more remote family up to the then-current Annual Exclusions (currently $13,000) for each individual. It also states that gift splitting with the spouse can be utilized, thereby doubling the amount that can be gifted to each individual. While this is a sizable amount of money, it does not necessarily cover the cost of college education or a major medical issue that a family member may suffer.

This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(b) MODIFICATIONS:

Use this section if you wish to authorize gifts in amounts smaller than the gift tax exclusion amount, in amounts in excess of the gift tax exclusion amount, gifts to other beneficiaries or other gift transactions. Granting such authority to your agent gives your agent the authority to take actions which could significantly reduce your property and/or change how your property is distributed at your death. If you wish to authorize your agent to make gifts or transfers to himself or herself, you must separately grant that authority in subdivision (c) below.

( ) I grant the following authority to my agent to make gifts pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

I hereby grant my agent or agents (other than any descendant of mine acting as such) acting under this power of attorney (referred to herein as "agent") from time to time the power and authority to make any transfers, with or without consideration, that my agent concludes, in the exercise of sole and absolute discretion, will aid in estate planning for my property, including but not limited to gifts of any type (whether outright, in trust, to a Uniform Transfers to Minors Act account or by the creation of a tuition savings account or prepaid tuition plan as defined in section 529 of the Internal Revenue Code), to create charitable remainder trusts, charitable lead trusts, grantor retained income and annuity trusts, personal residence trusts, any other type of irrevocable trusts or similar transfers including but not limited to split or joint purchases or to make loans at no or low interest, in any manner that my agents reasonably conclude will increase the net after tax property available to my children and more remote descendants; provided, however, that during my spouse's lifetime any transfer in excess of the then gift tax annual exclusion (or twice that amount if I am married and my spouse will gift split) must be in trust and my spouse has to be at least a discretionary beneficiary of any such transfers. I also hereby grant my agent (other than any descendant of mine acting as such) the power and authority, whether constituting a gift by me or not:

1. to open, modify or terminate a deposit account in my name and other joint tenants consisting of one or more of those individuals to whom I have authorized the agent to make gifts in the immediately preceding sentence,

SECTION (b) "MODIFICATIONS" is, like in the initial segment of the POA, an area where the Principal may (1) increase both the amount that can be gifted, (2) increase the group of recipients, and (3) change beneficiaries on certain accounts (perhaps to the point of modifying the Principal's estate plan).

Remember that *Matter of Ferrara*, _____, allows for minimizing income, estate, inheritance, generation skipping transfer or gift taxes, but does not allow for the Agent to completely deviate from the Principal's post-mortem desires. As such, much like the earlier Modifications section, great thought and review must go into the Modifications section of the SGR.

This modification allows for increased gifting as well as estate planning techniques that could decrease the Principal's taxable estate upon death. However, we do use language which allows for protection of the Principal's spouse.

This modification allows the Agent to create or dispose of joint accounts (thereby ensuring more proper Medicaid planning may be conducted, and avoid inclusion of those accounts in the Principal's gross estate.

2. to open, modify or terminate a Totten trust or similar "in trust for" account for one or more of those individuals to whom I have authorized the agent to make gifts in the immediately preceding sentence,

3. to open, modify or terminate a transfer-on-death account described in EPTL 13-4.1 to 13-4.12 for one or more of those individuals to whom I have authorized the agent to make gifts in the immediately preceding sentence,

4. to change the beneficiary of any insurance policy on my life or any annuity for my benefit which beneficiary is one or more of those individuals to whom I have authorized the agent to make gifts in the immediately preceding sentence,

5. to procure new, different or additional contracts of insurance on my life or annuity contracts and designate the beneficiaries thereof which beneficiary or beneficiaries is one or more of those individuals to whom I have authorized the agent to make gifts in the immediately preceding sentence,

6. to designate or change the beneficiaries of any type of retirement benefit or plan provided such beneficiary or beneficiaries is one or more of those individuals to whom I have authorized the agent to make gifts in the immediately preceding sentence, and

7. to create, change or terminate other property interests or rights of survivorship provided such change or termination benefits me or one or more of those individuals to whom I have authorized the agent to make gifts in the immediately preceding sentence.

(c) GRANT OF SPECIFIC AUTHORITY FOR AN AGENT TO MAKE GIFTS TO HIMSELF OR HERSELF: (OPTIONAL)

If you wish to authorize your agent to make gifts to himself or herself, you must grant that authority in this section, indicating to which agent(s) the authorization is granted, and any limitations and guidelines.

( ) I grant specific authority for the following agent(s) to make the following gifts to himself or herself:

AGENT may make unlimited major gifts to herself while acting as Agent.

SUCCESSOR AGENT 1 may make major gifts to himself/herself provided he/she make equal gifts to any and all of my other children or, in their absence, that sibling's descendants, at the time my Agent receives such gifts.

The next two modifications allows does the same for Totten trust and In Trust For accounts, as these accounts are also included in full in the Principal's Gross Estate.

These next two allow for procuring new insurance policies and changing beneficiaries to insurance policies to the parties defined above. However, remember to be mindful of *Ferrara* when including this power.

The same here regarding retirement plans.

SECTION (c) allows the Principal to name (1) whether any Agents are entitled to gifts from the Principal's property, and (2) the terms of those gifts. Typically the Principal will allow a spouse to gift to herself in unlimited portions. Children serving as Agent and being entitled to gifting should have some limitation that ensures other non-serving siblings are entitled to equal gifts (unless, of course, the Principal desires otherwise).

This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(d) ACCEPTANCE BY THIRD PARTIES: I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Statutory Gifts Rider.

(e) SIGNATURE OF PRINCIPAL AND ACKNOWLEDGMENT:

In Witness Whereof I have hereunto signed my name on September 21, 2011.

PRINCIPAL signs here:==> _____

ACKNOWLEDGMENT

STATE OF NEW YORK)
) ss: New Rochelle
COUNTY OF WESTCHESTER)

On September 21, 2011 before me, the undersigned, a Notary Public in and for said State, personally appeared **PRINCIPAL**, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument and that such individual made such appearance before the undersigned in the County of Westchester of New York.

_____
Notary Public

The principal executes the SGR in front of a Notary. Again, while the SGR is in some ways considered a separate document, it is typically included at the end of the POA.

(f) SIGNATURES OF WITNESSES:

By signing as a witness, I acknowledge that the principal signed the Statutory Gifts Rider in my presence and the presence of the other witness, or that the principal acknowledged to me that the principal's signature was affixed by him or her or at his or her direction. I also acknowledge that the principal has stated that this Statutory Gifts Rider reflects his or her wishes and that he or she has signed it voluntarily. I am not named herein as a permissible recipient of gifts.

_____	_____
Signature of witness 1	Signature of witness 2
_____	_____
Date	Date
_____	_____
Print name	Print name
_____	_____
Address	Address
_____	_____
City, State, Zip code	City, State, Zip code

(g) This document prepared by: Daniel Timins

Witnesses are only required for the SGR and, as such, it comes after the SGR. The executing attorney may serve as a Aitness to the SGR.

As it takes about ten to fifteen minutes to execute the POA, it may be wise to have the Principal and Agent sign and initial prior to the Witnesses acknowledging the SGR for the convenience of the Witnesses. Much like a Will, address information for the Witnesses is included in case a future dispute arises and the Witnesses must be found. Therefore, from a practicality viewpoint, home addresses may be preferable (though often Witnesses may sometimes be hesitant to share this information).

Lastly, the POA's preparer is required to place his or her name in the document. Actual signature by the preparer is not necessary.

25 minutes (.5 E) Ethical Issue relating to Trusts and Estates

II. TESTAMENTARY CAPACITY

III. WHO IS THE CLIENT?

A. Drafting Stage

B. Incapacity Stage

C. Post Mortem

IV. WHEN AND WHEN NOT TO REPRESENT A COUPLE

V. SHARING INFORMATION WITH OTHERS

A. Accountants, Financial Planners, Banks, Health Care Workers

B. Informing Family Members

VI. ARE YOU COMPETENT TO PRACTICE ESTATE PLANNING?

A. What is estate planning?

1. Legal documents
   - Testamentary Substitutes and financial institution forms
   - Taxation issues
   - Disability & Incapacity issues