



# The Polner Abrahams REPORT

Insights for Intelligent Estate, Special Needs & Elder Law Planning

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Courtesy of The Law Office of Beth Polner Abrahams

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## Power of Attorney Update Issue

### *Do I Need a New Power of Attorney?*

In the prior issue of this newsletter, I outlined the expected changes in New York State's **power of attorney law**, effective September 1, 2009. Many clients have contacted me to ask about the power of attorney documents signed with my law office:

- Must I update my power of attorney?
- Will my power of attorney still be valid?
- If my loved one no longer has the mental

capacity to sign a new document, how can I protect these rights under the power of attorney signed with your law office?

I advise these clients that the new law specifically states that a validly executed power of attorney remains effective, lawful and in effect when the new law becomes effective. Following are more details.

#### **Q: What is a "validly executed" power of attorney?**

**A:** At the time the legal document was signed, the principal (the consumer) was competent to sign the document and understood what was being signed. In my office, a power of attorney document is reviewed fully before its signing and each power the agent may exercise is explained.

Additionally, the principal's signature must be notarized before a notary public (with a current registration in New York State).

#### **Q: What if my power of attorney was executed several years earlier?**

**A:** Each power of attorney prepared by my law office has an Affidavit of Full Force and Effect. In the event a financial institution requires proof that the document has not been revoked (cancelled), they may ask that this form be completed. The Affidavit is usually completed by the 'agent' (person selected as the power of attorney, the agent in fact).

The Affidavit certifies that the principal has not died (death means the document is no longer in effect).

#### **Q: When should my agent sign this Affidavit?**

**A:** If the power of attorney needs to be used at this time, the agent should make copies of the document and sign several of the Affidavits in blue ink, in front of a notary public. The original should be brought to the financial institution to compare with the copy and then returned to you. The institution will keep the copy with the original, notarized Affidavit.

#### **Q: The new law requires the Major Gift Rider to permit gifts by the agent. Will my agent be able to make gifts or do lawful Medicaid planning with the power of attorney prepared by your law office?**

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## Power of Attorney Update...Continued

**A**: In most instances, my clients wanted their selected power of attorney to have the authority to make gifts, including transfers for lawful Medicaid planning, the creation of trusts and supplemental needs trusts for themselves or others.

If this 'gifting' power is in your document, it will stay valid as part of the lawfully executed document when the new law becomes effective.

**Q: *Who should execute a new power of attorney when the new law takes effect?***

**A**: This is more difficult to answer because it will incur legal fees for the new power of attorney document, which expands from its current 4 pages to more than 8 pages.

Here are some guidelines for your decision:

- If you have designated only one agent without successor or co-agent, you should consider executing a new power of attorney.

- If you are single or widowed, without children or any dependable family member to rely upon, you should consider executing a new power of attorney. However, many clients in this situation placed their assets into a revocable living trust for management in the event of incompetence. If you have done this type of legal plan with my law office, you would not need to update your power of attorney document.

- If your designated agent is no longer trustworthy or is in ill health or has died, you should consider executing a new power of attorney.

- If you executed a power of attorney without legal representation or without having my office review your document, it is time for that review.

The new law is designed to protect seniors and others from being easy targets for fraud and financial abuse. The new law document will address the complexities of financial management as a person's health and capacity diminish.

## COMMUNICATIONS UPDATE: EBLAST ALERT AND INTERNET RADIO SHOW

**T**hank you to everyone who signed up for my e-blast alert for my newsletter and blog. I also invite you to listen to my on-demand, Internet-based radio program, *Focus on Law*, where I present experts on a variety of elder law and special needs topics and discuss basics and current issues. At [www.bpaelderlaw.com](http://www.bpaelderlaw.com) or [www.bpasntlw.com](http://www.bpasntlw.com), look for the radio player section, and click on a show to listen directly from my website.

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