



Ethical Issues with Powers of Attorney

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Disclaimer

- This is an overview – not a complete statement of the law and is not to be considered legal advice
- If you have any questions, contact Moira S. Laidlaw, Esq. at (914) 767-0646



NY Durable Power of Attorney

- Grants a person with authority to handle all decisions for a person not related to medical care and treatment.
 - “Principal” = Person giving the power of attorney.
 - “Agent” = Person given the authority to act.
- “Durable” = effective even if you become unable to handle your own affairs. Terminates at death.
- Can be revoked.

NY Power of Attorney – Types and Effectiveness

Effective Immediately
Upon Signing

Effective Upon Disability
or Loss of Competence

Death

Durable POA

Non-Durable POA

Springing POA

Health Care Proxy



Springing Power of Attorney

- Effective only upon occurrence of specified event.
- Who decides the event has occurred?
- Problems re decisions of incapacity
 - Particular issues re acceptance by financial institutions



Power of Attorney

- New forms as of September 1, 2009.
- More complicated and more decisions.
- Pre-September 1, 2009 POA's grandfathered in, but good idea to update, especially with elder law gifting language



Power of Attorney

– (a): Caution to Principal

- Cautionary language re powers which explains
 - Dual Authority of Principal and Agent
 - Significant power granted to Agent

- **Practice Tip:** Consider reading this caution out loud to client



Power of Attorney

– (b): Designation of Agent

- One or more Agents.
- If more than one Agent, how will they work together?
 - Jointly
 - Independently
 - Can add other requirements as a modification
 - **PRACTICE TIP:** Potential red flag if client overly concerned about allowing agent to act independently

Power of Attorney

– (b): Designation of Agent

- “Who should I appoint as my Agent?”
 - Trusted family member, close friend or professional.
 - Like signing a blank check
 - Although subject to fiduciary obligation to act in Principal’s best interests.
 - Make sure person is willing.
 - Agent must sign the POA and formally accept responsibilities.
 - Required to act in your best interests.



Power of Attorney

– (c): Designation of Successor Agent

- Optional
- Acts if primary Agent unable or unwilling to serve
- **Practice Tip:** Escrow Letter Alternative



Power of Attorney – (d): Advisory

- POA durable unless otherwise indicated.
- Indicate non-durable in Modification section.



Power of Attorney

– (e): Prior Revocation

- POA does not revoke prior POA unless otherwise indicated.
- Indicate revocation of prior POA in Modification section.

Power of Attorney

– (f): Grant of Authority

□ Lists 15 powers – can be granted or limited:

1. Real estate transactions
2. Chattel and goods transactions
3. Bond, share and commodity transactions
4. Banking transactions
5. Business operating transactions
6. Insurance transactions
7. Estate transactions
8. Claims and litigation
9. Personal and family maintenance
10. Benefits from government programs
11. Health care billing, payment and related matters
12. Retirement benefit transactions
13. Tax matters
14. All other matters
15. Power of delegation



Power of Attorney

– (g): Modifications

- Include all modifications to POA
- Sample modifications included in materials
 - Expand on each category to dispel any doubt as to complete powers being granted

Power of Attorney – (h): Gifts

- Optional.
- Authority of Agent to make gifts.
- **NO** authority unless:
 - Section (h) is initialed
 - Statutory gift rider executed **SIMULTANEOUSLY**



Power of Attorney – (i): Monitors

- Optional
- Monitor reviews actions of Agent



Power of Attorney – (j): Compensation

- Optional
- May authorize reasonable compensation
- Agent does not need to accept compensation if authorized



Power of Attorney – (1): Termination

- POA continues unless revoked

- Specific procedures required
 - Written Notification to Agent
 - Possible Recording of Revocation

Statutory Major Gifts Rider

- Must be signed, notarized and witnessed AT THE SAME TIME as the POA
 - Witnessing also helps with validity of POA in Florida
- Section (a) gives Agent the authority to make “annual exclusion gifts” to the Principal’s spouse, children, more remote descendants and parents
 - Current annual exclusion amount is \$14,000
 - Inadequate gifting authority for elder law planning

Statutory Major Gifts Rider Section (b)

- Allows gifts to persons not named in Section (a)
- Allows gifts in excess of annual exclusion amount
- Sample provisions included in the materials
 - Most important is expression of best interest (see Matter of Ferrara)
 - For asset and income protection, also need power to create and fund a trust

Statutory Major Gifts Rider Section (c)

- Allows gifts by Agent to himself or herself.
- If there is more than one agent, you need to name each agent who has authority to make gifts of your property to themselves.
- Gifting authority must be specified in detail.
 - Consider requiring equality of gifting if child is serving as Agent

Statutory Major Gifts Rider Execution Requirements

- Must be signed and notarized in Section (e).
- Also requires the signature of two witnesses – who are not named as agents.
 - This means that anytime you are signing a POA that grants gift giving authority, there must be two persons who are not agents or successor agents present.
- Requires the name, address and telephone number of the person who prepared the document.



FAQs about POAs

- How many originals?
 - As many as you want. Don't need more than one, but may want an original for both agent and principal
- Do I have to record the POA?
 - No you do not have to record it **UNLESS** you are using a POA for a document than ordinarily needs to be recorded – such as a Deed
 - If you do record a POA, remember to record any later revocation of same.

Ethical Issues in POAs

Who is the Client?

- Candidates:
 - Elderly Person directly
 - Agent on behalf of elderly person
 - Agent on behalf of himself or herself
- Potential for Conflict of Interest
- When does the client relationship begin?
 - Initial consultation issues

Ethical Issues in POAs

Who is Paying for Legal Services?

- Rule 1.8(f): Third party payment of legal fees NOT allowed unless:
 - Client gives informed consent;
 - No interference with lawyer's independent professional judgment or with client-lawyer relationship; and
 - Confidential information protected.
- Practice Point: In elder law cases, you want the client to pay for legal services, because considered a compensated transfer and does not result in a Medicaid penalty

Ethical Issues in POAs

Does my client have capacity?

- RPC Rule 1.14 (Client with Diminished Capacity)
Comment 6, Balancing of Factors:
 - Client's ability to articulate reasoning leading to a decision
 - Variability of state of mind and ability to appreciate consequences of decision
 - Substantive fairness of decision
 - Consistency of a decision with known long-term commitments
 - Values of the client

Ethical Issues in POAs

Compare Against Capacity to Execute a Will

- Legal Standard for Capacity to Execute a Will
 - Lucid in the Moment
 - Knows natural objects of bounty
 - Can generally identify the nature of their property



Ethical Issues in POAs

Disclosure Issues

- RPC Rules 1.14 and 1.6: Disclosure of client information if protective action warranted
- Disclosure of agent's actions to principal

Ethical Issues in POAs

Personal Liability for Agents

- ❑ Common question is whether agents personally responsible
- ❑ Nursing homes not allowed to required child to guarantee payment
- ❑ Some nursing homes are requiring agents to agree not to transfer resident's funds and such provisions are being held enforceable (see Troy Nursing & Rehab. Ctr., LLC vs. Naylor and Gaetano)



Conclusion

- ❑ Ethical issues in Elder Law are complicated.
- ❑ The Elder Law Section of the New York State Bar Association offers a mentor program and hosts a vibrant ListServ. These resources should be fully utilized if you practice in this area.
- ❑ Thank you for your time.