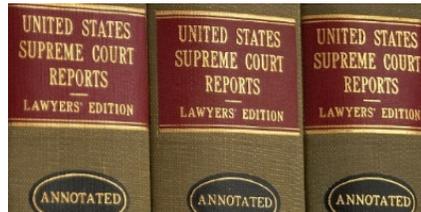




**SUFFOLK ACADEMY OF LAW**  
*The Educational Arm of the Suffolk County Bar Association*  
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## **ZOOM PROGRAM**

# **NEW YORK'S NEW POWER OF ATTORNEY What Lawyers Need to Know**

## **FACULTY**

**Richard A. Weinblatt, Esq.**  
**Jay P. Sheryll, Esq.**

**Program Coordinators: Jay P. Sheryll, Esq. and Ashley M. Valla, Esq.**

**May 12, 2021**  
**Suffolk County Bar Association, New York**

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**Richard A. Weinblatt, Esq.** is a partner in the law firm of Haley Weinblatt & Calcagni, LLP located in Islandia, New York. He practices primarily in the areas of Elder Law and Trusts and Estates. Richard graduated *magna cum laude* from St. John's University School of Law in 1988. He is a member of the New York State Bar Association, National Academy of Elder Law Attorneys and a former Director of the Suffolk County Bar Association. He is a Past Chair of the New York State Bar Association's Elder Law and Special Needs Section. Richard is a past Associate Dean of the Suffolk County Bar Association's Academy of Law, past President of the Estate Planning Council of Long Island, Suffolk Chapter and is a former Co-Chair of the Suffolk County Bar Association's Elder Law Committee, Surrogate's Court Committee and Tax Committee. Richard is also an adjunct professor at Touro College Jacob D. Fuchsberg Law Center.



**Jay P. Sheryll** is the founding and managing attorney of Sheryll Law, P.C., focusing his practice on Elder Law, Estate Planning, Trusts and Estates, Medicaid Planning, Estate Tax Planning, Asset Protection, Special Needs Planning and Guardianship Practice. Jay is a graduate of Touro College, Jacob D. Fuchsberg Law Center where he was a member of the Law Review. Jay has been admitted to practice law in the States of New York and New Jersey. Jay is a trained Article 81 Guardian and frequently serves the Guardianship part as a court- appointed Guardian and Court Evaluator.

Jay is active in the local community serving as a member of the Rotary Club of Riverhead and as a Vice President of the Riverhead Chamber of Commerce. Jay also volunteers his time on the board of the Long Island Science Center, a museum dedicated to providing STEAM educational programs and content to Long Island students.

Jay is a frequent speaker, where he lectures on Elder Law, Medicaid, and Estate Planning. Jay is married to his loving wife and has two adorable children. When not in the office, Jay enjoys playing the guitar and spending time on the Peconic Bay.

**SUFFOLK COUNTY ACADEMY OF LAW**  
**May 12, 2021**

**NEW YORK'S NEW POWER OF ATTORNEY**

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## NEW YORK'S NEW POWER OF ATTORNEY

### I. Current Law

#### A. The Need for Change

1. The Statutory Short Form Power of Attorney (“ power of attorney”) is an essential part of the estate plan. It can help to avoid a costly guardianship proceeding, facilitate the receipt of government benefits such as Medicaid and minimize or eliminate gift and estate taxes.

2. Despite all of its benefits, however, a power of attorney may also facilitate elder abuse.

##### a. Matter of Ferrara, 7 N.Y.3d 244

(1) Matter of Ferrara, illustrates how a power to make gifts granted in a power of attorney may be misused by an agent. This case involved a power of attorney executed on January 25, 2000. It is the egregious facts of this case that led to the September 1, 2009 amendment to the power of attorney statute requiring that a separate gift rider be attached to the power of attorney form and that such gift rider be acknowledged and witnessed by two persons other than a person who may benefit under the power of attorney.

(2) A summary of the facts of this case are worthy of review in this outline.

- (3) On June 10, 1999, George Ferrara, a retired stockbroker residing in Florida, executed a will leaving his entire estate to the Salvation Army. On August 16, 1999, George executed a codicil appointing the attorney draftsman of his will as executor.
- (4) In December 1999, George was hospitalized.
- (5) On January 15, 2000, Dominick Ferrara, George's nephew, accompanied George from Florida to New York.
- (6) On January 25, 2000, George signed a power of attorney appointing Dominick and Dominick's father (George's brother) as agents and initialed the form to allow them to act separately. The January 25, 2000 power of attorney authorized the agents to make gifts in unlimited amounts to themselves. The power of attorney was notarized by a friend of Dominick's.
- (7) Dominick use the power of attorney to transfer \$820,000 of George's assets to himself.
- (8) George died on February 12, 2000.
- (9) The Salvation Army found out about George's death after a doctor in Florida, learning of George's death, contacted the attorney draftsman of George's will to inquire about an unpaid medical bill.

- (10) The Court of Appeals held that Dominick was only authorized to make gifts to himself insofar as these gifts were in George's best interest.
- (11) The Court stated that "[T]he term 'best interest' does not include such unqualified generosity to the holder of a power of attorney, especially where the gift virtually impoverishes a donor whose estate plan, shown by a recent will, contradicts any desire to benefit the recipient of the gift".
3. In an effort to prevent elder abuse, changes to the power of attorney law were made in 2009 and again in 2010. These changes included the addition of a gift rider requiring two witnesses, the requirement of exact wording of the "Caution to the Principal" and the "Important Information for the Agent" and the requirement of an acknowledged signature of the agent.
4. The current power of attorney form, with its separate gift rider, however, is too complex, and simple errors may result in an invalid power of attorney.
- a. An error in the exact wording requirements in the "Caution to the Principal" or the "Important Information for the Agent" sections makes the form invalid.
5. Since there are no financial penalties if a bank unreasonably refuses to accept the form, acceptance of the current form has been a problem.

## II. The New Law Effective June 13, 2021

### A. Major Changes

1. Elimination of the gift rider.
2. Penalties for unreasonably refusing to accept the power of attorney.
3. Replacing the “exact wording” requirement with “substantially conforms”.
4. Change to the signing requirements.

### B. Elimination of the Gift Rider

1. GOL § 5-1514, the statutory gift rider form, is repealed. No more gift rider.
  - a. GOL § 5-1514 set forth specific gifts that an agent is authorized to make. Since this section has been eliminated, those statutory provisions should be incorporated as modifications to the new form.
2. Provisions for granting the power to make gifts can be made in paragraph (h) of the form, which is the modification section.
  - a. In addition, the principal must also initial paragraph (g) of the form to confirm that the power of attorney is being modified to permit gifting.
3. No longer need to worry if a gift modification should be in the gift rider or in the form itself.
4. GOL § 5-1502I has been amended to increase to \$5,000 the amount that can be gifted each year without the necessity of a modification of the power of attorney.

### C. New Penalties for Unreasonably Refusing to Accept the Form GOL § 5-1504

1. Damages and attorney's fees may be awarded against third parties who unreasonably refuse to accept the power of attorney.
2. Third parties who reasonably accept the power of attorney are held harmless from liability.
3. New procedure and time limits for acceptance.
  - a. A third party being asked to accept the power of attorney may request, and rely upon, without further investigation (i) an agent's certification under penalty of perjury of any factual matter concerning the principal, agent or power of attorney; and (ii) an opinion of counsel 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 reasons for the request.
  - b. Third party has 10 business days after presentation to (i) honor the power of attorney, (ii) reject the power of attorney, or (iii) request the agent to submit an affidavit that the power of attorney is in full force and effect.
    - (1) Rejection must be in a writing that sets forth the reasons for the rejection.
    - (2) Notice of rejection must be sent to the principal and the agent. However, if the reason for rejection is the referral by the third party to adult protective services, no notice to the agent is required.

(3) This 10 business day time limit does not apply to certain government agencies, including DSS.

c. If the third party receives a written response to the rejection, the third party has 7 business days after receipt to either honor the power of attorney or finally reject it.

(1) No time limit for responding to the rejection.

D. Replacing the “Exact Wording” Requirement with “Substantially Conforms”

GOL § 5-1501

1. The requirement that the power of attorney contain the “exact wording” of the statutory form has been replaced with the requirement that the form “substantially conform” to the wording of the statutory form.

2. The statute contains a definition of “substantially conforms”.

a. The form substantially conforms notwithstanding that the form contains (i) an insignificant mistake in wording, spelling, punctuation or formatting, or the use of bold or italic type; or (ii) uses language that is essentially the same as, but not identical to, the statutory form, including utilizing language from a previous statute.

b. The determination of whether there is substantial conformity with the form shall not depend on the presence or absence of a particular clause.

c. Failing to include clauses that are not relevant to a given power of attorney shall not in itself cause such power of attorney to be found

to not substantially conform with the requirements of the statutory form.

3. Sections designated as “Optional” on the form can be replaced by the words “Intentionally Omitted”.

E. Change to the Signing Requirements

1. Permits the signing of the power of attorney in the name of the principal by another person, other than the principal’s agent or successor agent, in the principal’s presence and at the principal’s direction.
  - a. The person signs by writing or printing the principal’s name and printing and signing his or her own name.
2. The signature of the person signing must be acknowledged in the manner prescribed for the conveyance of real property in the presence of the principal.
3. The power of attorney form must be witnessed by two persons who are not named in the instrument as agents or as permissible recipients of gifts, in the manner described in subparagraph 2 of paragraph (a) of section 3-2.1 of the estate, powers and trusts law in the presence of the principal.
  - a. The person who takes the acknowledgment may also serve as one of the witnesses.
  - b. This is from the Chapter Amendment S 888. The Assembly same as Bill is A 2353.

F. Other Changes

1. GOL § 5-1502D has been changed to provide that if the power of attorney requires that two or more agents act together as co-agents, one or more agents may delegate to the co-agents the authority to conduct banking transactions if the principal initialed subject (O) in the grant of authority provisions of paragraph (f) of the power of attorney form. This is the paragraph that permits the agent to delegate powers.
  - a. Some financial institutions refuse to open accounts that require two signatures. This has created problems where agents are required to act jointly.
2. The “IMPORTANT INFORMATION FOR THE AGENT” section has been changed to make clear that the agent must keep either records or receipts of all transactions.
3. The power of attorney form has been modified to include a place for the date that the agent signs.
4. GOL § 5-1502L, Retirement Benefit Transactions, does not include the power to change beneficiary designations, unless expressly stated otherwise in the modification section of the power of attorney form.

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# NEW YORK'S NEW POWER OF ATTORNEY

SUFFOLK COUNTY ACADEMY OF LAW

May 12, 2021

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# CURRENT LAW & THE NEED FOR CHANGE

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- The Statutory Short Form Power of Attorney (“power of attorney”) is an essential part of the estate plan. It can help to avoid a costly guardianship proceeding, facilitate the receipt of government benefits such as Medicaid and minimize or eliminate gift and estate taxes.
- Despite all of its benefits, however, a power of attorney may also facilitate elder abuse.
- In an effort to prevent elder abuse, changes to the power of attorney law were made in 2009 and again in 2010. These changes included the addition of a gift rider requiring two witnesses, the requirement of exact wording of the “Caution to the Principal” and the “Important Information for the Agent” and the requirement of an acknowledged signature of the agent.
- The current power of attorney form, with its separate gift rider, however, is too complex, and simple errors may result in an invalid power of attorney.
- Since there are no financial penalties if a bank unreasonably refuses to accept the form, acceptance of the current form has been a problem.

# Powers of Attorney May be a Source of Elder Abuse

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## Matter of Ferrara, 7 N.Y.3d 244

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# Powers of Attorney May be a Source of Elder Abuse (Cont.)

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## Matter of Ferrara, 7 N.Y.3d 244 (Cont.)

- A summary of the facts of this case is worthy of review.
- On June 10, 1999, George Ferrara, a retired stockbroker residing in Florida, executed a will leaving his entire estate to the Salvation Army. On August 16, 1999, George executed a codicil appointing the attorney draftsman of his will as executor.
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- The Court stated that "[T]he term 'best interest' does not include such unqualified generosity to the holder of a power of attorney, especially where the gift virtually impoverishes a donor whose estate plan, shown by a recent will, contradicts any desire to benefit the recipient of the gift"

# THE NEW LAW EFFECTIVE JUNE 13, 2021

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- Major Changes
  - Elimination of the gift rider.
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  - Replacing the “exact wording” requirement with “substantially conforms”.
  - Change to the signing requirements.

- Elimination of the Gift Rider
  - GOL § 5-1514, the statutory gift rider form, is repealed. No more gift rider.
    - GOL § 5-1514 set forth specific gifts that an agent is authorized to make. Since this section has been eliminated, those statutory provisions should be incorporated as modifications to the new form.
  - Provisions for granting the power to make gifts can be made in paragraph (h) of the form, which is the modification section.
    - In addition, the principal must also initial paragraph (g) of the form to confirm that the power of attorney is being modified to permit gifting.
  - No longer need to worry if a gift modification should be in the gift rider or in the form itself.
  - GOL § 5-1502I has been amended to increase to \$5,000 the amount that can be gifted each year without the necessity of a modification of the power of attorney.

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  - Damages and attorney's fees may be awarded against third parties who unreasonably refuse to accept the power of attorney.
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- New procedure and time limits for acceptance.
- A third party being asked to accept the power of attorney may request, and rely upon, without further investigation (i) an agent's certification under penalty of perjury of any factual matter concerning the principal, agent or power of attorney; and (ii) an opinion of counsel 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 reasons for the request.

- New procedure and time limits for acceptance.
- Third party has 10 business days after presentation to (i) honor the power of attorney, (ii) reject the power of attorney, or (iii) request the agent to submit an affidavit that the power of attorney is in full force and effect.
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- New procedure and time limits for acceptance.
- If the third party receives a written response to the rejection, the third party has 7 business days after receipt to either honor the power of attorney or finally reject it.
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- Replacing the “Exact Wording” Requirement with “Substantially Conforms” GOL§ 5-1501
  - The requirement that the power of attorney contain the “exact wording” of the statutory form has been replaced with the requirement that the form “substantially conform” to the wording of the statutory form.

- The statute contains a definition of “substantially conforms”.
- The form substantially conforms notwithstanding that the form contains (i) an insignificant mistake in wording, spelling, punctuation or formatting, or the use of bold or italic type; or (ii) uses language that is essentially the same as, but not identical to, the statutory form, including utilizing language from a previous statute.
- The determination of whether there is substantial conformity with the form shall not depend on the presence or absence of a particular clause.
- Failing to include clauses that are not relevant to a given power of attorney shall not in itself cause such power of attorney to be found to not substantially conform with the requirements of the statutory form.
- Sections designated as “Optional” on the form can be replaced by the words “Intentionally Omitted”.

- Change to the Signing Requirements
  - Permits the signing of the power of attorney in the name of the principal by another person, other than the principal's agent or successor agent, in the principal's presence and at the principal's direction.
  - The person signs by writing or printing the principal's name and printing and signing his or her own name.

- Change to the Signing Requirements
  - The signature of the person signing must be acknowledged in the manner prescribed for the conveyance of real property in the presence of the principal.
  - The power of attorney form must be witnessed by two persons who are not named in the instrument as agents or as permissible recipients of gifts, in the manner described in subparagraph 2 of paragraph (a) of section 3-2.1 of the estate, powers and trusts law in the presence of the principal.
    - The person who takes the acknowledgment may also serve as one of the witnesses.
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  - Some financial institutions refuse to open accounts that require two signatures. This has created problems where agents are required to act jointly.
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- Other Changes

- The power of attorney form has been modified to include a place for the date that the agent signs.
- GOL § 5-1502L, Retirement Benefit Transactions, does not include the power to change beneficiary designations, unless expressly stated otherwise in the modification section of the power of attorney form.

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## **SAMPLE MODIFICATIONS TO THE POWER OF ATTORNEY**

### **Guardian Provision:**

If it becomes necessary to appoint a guardian of my person or property, I hereby nominate pursuant to New York Mental Hygiene Law § 81.17 [INSERT NAME] to serve as guardian. If [INSERT NAME] is for any reason unable or unwilling to serve as guardian, I nominate [INSERT NAME] to serve as guardian.

### **Gift Provisions:**

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:

- (a) make gifts unlimited in amount;
- (b) make gifts to any person or persons except [INSERT NAMES]
- (c) I grant specific authority for the following agents to make the following gifts to themselves: [INSERT NAMES]

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

### **Make gifts in any of the following ways:**

- Opening, modifying or terminating a deposit account in the name of the principal and other joint tenants;
- Opening, modifying or terminating any other joint account in the name of the principal and other joint tenants;
- With respect to joint accounts existing at the creation of the agency, the authority granted hereby *shall* include the power to change the title of the account by the addition of a new joint tenant or the deletion of an existing joint tenant;
- Opening, modifying or terminating a bank account in trust form as described in § 7-5.1 of the estates, powers and trusts law, and designate or change the beneficiary or beneficiaries of such account;
- With respect to totten trust accounts existing at the creation of the agency, the authority granted hereby *shall* include the power to add, delete, or otherwise change the designation of beneficiaries in effect for any such accounts;

- Opening, modifying or terminating a transfer on death account as described in part four of article thirteen of the estates, powers and trusts law, and designate or change the beneficiary or beneficiaries of such account;
- Changing the beneficiary or beneficiaries of any contract of insurance on the life of the principal or annuity contract for the benefit of the principal;
- With respect to life insurance contracts existing at the creation of the agency, the authority granted hereby *shall* include the power to add, delete or otherwise change the designation of beneficiaries in effect for any such contract;
- Procuring new, different or additional contracts of insurance on the life of the principal or annuity contracts for the benefit of the principal and designate the beneficiary or beneficiaries of any such contract;
- To apply for and to receive any available loan on the security of the contract of insurance, whether for the payment of a premium or for the procuring of cash, to surrender and thereupon to receive the cash surrender value, to exercise an election as to beneficiary or mode of payment, to change the manner of paying premiums, and to change or to convert the type of insurance contract, with respect to any contract of life, accident, health, disability or liability insurance as to which the principal has, or claims to have, any one or more of the powers described in this section; the authority granted hereby with respect to the contract of insurance *shall* include the power to add, delete or otherwise change the designation of beneficiaries in effect for any such contract;
- Designate or change the beneficiary or beneficiaries of any type of retirement benefit or plan;
- The authority granted hereby with respect to retirement benefits or plans *shall* include the authority to add, delete, or otherwise change the designation of beneficiaries in effect for any such retirement benefit or plan;
- Creating, amending, revoking or terminating an inter vivos trust;
- Opening, modifying or terminating other property interests or rights of survivorship, and designate or change the beneficiary or beneficiaries therein;
- Create trusts, whether revocable or irrevocable, on my behalf;
- Fund such trusts on my behalf or make transfers and additions to any trusts already in existence;
- Withdraw income or principal on my behalf from any trust;
- Exercise whatever trust powers or elections which I may exercise;
- This grant of authority shall include the ability of my agent(s) to create trusts or accounts naming himself, herself, or themselves, as the case may be, as the beneficiary(ies) of such trusts;
- Convey all of my right, title and interest in the real property known as **[INSERT PROPERTY ADDRESS]** paying off any liens of the said premises, paying all expenses related to the sale of the said premises, including but not limited to filing fees, maintenance adjustments and legal fees, receiving all moneys resulting from the sale of the premises executing all documents necessary to accomplish the foregoing and doing all things necessary to effect the conveyance; and
- Make loans and executing promissory notes.

**A gift to an individual authorized by this subdivision may be made:**

Outright, by exercise or release of a presently exercisable general or special power of appointment held by the principal; to a trust established or created for such individual; to a Uniform Transfers to Minors Act account for such individual (regardless of who is the custodian); or to a tuition savings account or prepaid tuition plan as defined under section 529 of the Internal Revenue Code for the benefit of such individual (without regard to who is the account owner or responsible individual for such account).

**Digital Assets:**

The agent shall have (a) the power to access, use, and control my digital devices, including but not limited to, desktops, laptops, tablets, storage devices, mobile telephones, smartphones, and any similar digital device that currently exists or may exist as technology develops for the purpose of accessing, modifying, deleting, controlling, or transferring my digital assets, including any content contained in an electronic communication therein, (b) the power to access, modify, delete, control, and transfer my digital assets, including the content contained in any electronic communication therein, wherever located and including but not limited to, my emails received, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, banking accounts, domain registrations, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts, and similar digital items which currently exist or may exist as technology develops, and (c) the power to obtain, access, modify, delete, and control my passwords and other electronic credentials associated with my digital devices and digital assets described above. This authority is intended to constitute “lawful consent” to a service provider to divulge the contents of any communication under The Stored Communications Act (currently codified as 18 U.S.C. §§ 2701 et seq.), to the extent such lawful consent is required, and as agent acting hereunder shall be an authorized user for purposes of applicable computer-fraud and unauthorized-computer-access laws.