



# The New Power of Attorney: Form and Substance

NASSAU/SUFFOLK LAW SERVICES COMMITTEE, INC.

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ATTORNEY-IN-CHARGE, ADULT CARE FACILITY PROJECT



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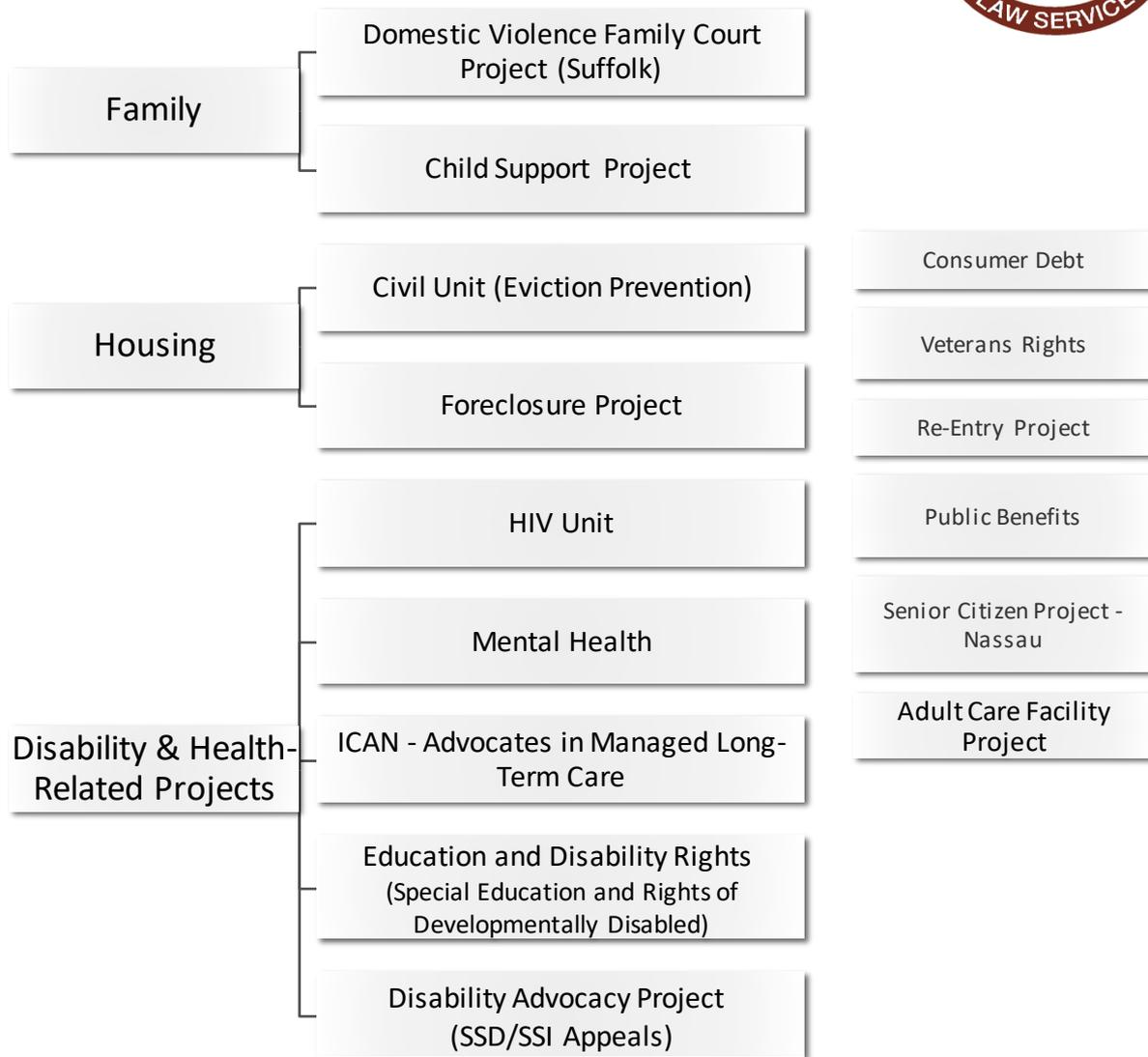
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- **Bi-County Unit created to assist any Adult Care Facility Resident with legal issues. We are a multi-issue Unit.**
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- **Presentations to Residents/ Professional support groups on Resident Rights**
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# IN A NUTSHELL

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## What is a Power of Attorney?

- What a POA *is*.
- What a POA *is not*.

## Considerations before assisting with a POA

- Capacity of the Principal
- Reasons for the Power of Attorney
- Who is the Agent?
- Potential Abuse

## The New Power of Attorney:

- What changed
- What remains the same



## What is a Power of Attorney?

**NY GOL 5-1501 2 (J)"Power of attorney means a written document, other than a document referred to in section 5-1501(C) of this title, by which a principal with capacity designates an agent to act on his or her behalf and includes both a statutory short form power of attorney and a non-statutory power of attorney".**

Statutory short form versus Other Powers of Attorney:

The main advantage of a statutory short form POA is that a third party can be compelled to accept it. This is particularly important when dealing with a principal with diminishing capacity.

A statutory form is a "short form" because in the initialing provisions in section (f) of the form is referencing the provisions as defined in NY GOL 5-1502A through 5-1502N, and therefore all those powers do not need to be spelled out individually in the Power of Attorney form.



All Powers of Attorney, whether Statutory or not, must meet four criteria: (NY GOL 5-1511 B(1))

- a. Be legible and of type no less than twelve point in size, or, if in writing, a reasonable equivalent thereof;
- b. Be signed and dated by the principal and notarized and witnessed;
- c. be signed, dated notarized by any agent(s) acting on behalf of the principal; and
- d. Substantially conform to the wording of the “Caution to the Principal” and “Important Information for the Agent.”

NY GOL 5-1512 provides that a power of attorney executed in another State or Jurisdiction that is in compliance with that State or Jurisdiction, or the laws of New York, is deemed valid in New York.

*Question: Can a Principal reside outside of New York State, and have their signature notarized in their home State?*

*Answer: Yes, they can.*



## Durable Power of Attorney

Although there are many reasons for executing a power of attorney, unless the power of attorney is for a specific transaction, it is usually the custom for a power of attorney to be a *Durable Power of Attorney*.

A power of attorney in New York State is considered durable unless otherwise specified.

The primary advantage of a durable power of attorney is the ability of the Agent to act for the Principal in the event that the Principal is unable to transact their own business or express their wishes, such as in the event of illness or dementia.



## What a Power of Attorney is *Not*

A power of attorney is *not* a guardianship. Before executing a power of attorney, both the Principal and their Agent(s) should understand:

- The Principal is *not* relinquishing ANY of their personal freedoms or legal rights simply by executing a power of attorney. They are not “signing away” any legal rights.
- The Agent may *not* act on the Principal’s behalf in any way that is counter to their wishes. If the Principal is no longer capable of making decisions themselves, the Agent must act in a way that they believe is consistent with the wishes of the Principal.
- *An example: The Principal wants to move money to a different bank or give a gift of money to an individual. The Agent may NOT in any way block the Principal, unless capacity is an issue, and even then the Agent must proceed with caution.*



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A power of attorney is *not* a health care proxy, and in fact a different individual altogether may be given that responsibility, or no one at all.

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*A Warning: Many institutionalized settings such as Hospitals, Adult Care Facilities and Skilled Nursing Facilities prefer dealing with the Agent, to the exclusion of the wishes of the Principal. This is not acceptable, unless that is what the Principal has requested, or unless the Principal is no longer able to express their own wishes.*



# Considerations Before Assisting with a Power of Attorney

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**CAPACITY:** An individual must have the capacity to request your legal assistance. This does *not* mean they must have 100% capacity.

**REASON(S) FOR THE POWER OF ATTORNEY:**  
What are the reasons for requesting a Power of Attorney?

**THE AGENT:** Who does the Principal wish to appoint as an agent? Is it a family member? A friend? A romantic partner?

# Capacity

What are the elements to consider?

Just because someone may have diminished capacity does not mean they are necessarily incapable of retaining your services.

Capacity is not a straightforward assessment.

The American Bar Association and the American Psychological Association have published a handbook on the Assessment of older adults with diminished capacities. Even if you are dealing with younger adults with diminished capacity, many of the issues to consider remain the same.

<https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>



*Dammit Jim, I'm  
a lawyer, not a  
doctor!*



# Reasons for the Power of Attorney

Usually, it is not appropriate to second guess the reason someone wants to execute a power of attorney. However, rationality must enter into it. Not only is this a subset of capacity, but it also goes towards possible exploitation.

## COMMON REASONS FOR POA

1. Degenerative capacity diagnosis
2. Serious medical diagnosis
3. Institutionalization (nursing facility, Adult Home, etc.)
4. Estate planning

## RED FLAG REASONS FOR POA

1. Pressure from the Agent
2. To conceal/hide assets
3. To “give” the agent money.

# The Agent

Who is the proposed Agent? Is it a family member? A friend? A romantic partner? An individual can have anyone designated as their Agent (with very limited exceptions).

**Family members** are, generally, the “safest” bet for an Agent. They have a long-term relationship with the Principal, and theoretically are more likely to act on their best interests. But beware of interfamily politics!

**Friends** How long have the Principal and Agent been friends? What is the likelihood of exploitation?

**Romantic Partners** The worst. For obvious reasons.



# The Agent (continued)

What are qualities to look for in an Agent? The Principal should consider:

1. Geographic proximity
2. Age of the Agent
3. Ability to deal with paperwork/reliability
4. Look for an Agent who is good with money
5. The Agent should be someone who will take the Principal's wishes seriously and execute them accordingly.





# Major Changes to Power of Attorney Effective as of June 13, 2021

- Substantially Conforming Language
- Under the new law, “**substantially conforming**” language is acceptable, notwithstanding if it contains insignificant wording or spelling mistakes; uses language that is essentially the same, but not identical to, the statutory form, or failing to include clauses not relevant to a given power of attorney. (NY GOL 5-1501(2)(n).
- *Question: Can I draft my own Power of Attorney Form?*
- *Answer: Yes, you can, providing it fulfills the provisions of GOL 5-1500 et seq., but it is not recommended that you draft your own form unless you are an attorney. There are blank POA Forms that can be purchased. A widely used form is published by the New York State Bar Association, and can be found here:*
- <https://nysba.org/products/power-of-attorney-2021-word/>



## **Acceptance of properly executed power of attorney**

A person that is presented with a Power of Attorney may ask for the following:

1. An Agent's certification under the penalties of perjury of any factual matter concerning the agent, principal, or power of attorney,
2. An opinion of counsel as to any matter of law concerning the power of attorney, so long as they put the request in writing or other written record and give the reason for the request. NY GOL 5-1505(1)(d).



## Acceptance (continued)

A third party has ten (10) days to honor or reject a statutory short order form power of attorney. Rejection must be done in writing and sent to the principal and agent.

After the response, the third party has seven (7) days to honor or finally reject the POA.

If a special proceeding under GOL 5-1510 is brought to compel a third party to accept the statutory form and the Principal and Agent are successful and it is determined that the third party acted unreasonably in refusing to accept the POA, the Court may award damages, including reasonable attorneys' fees and costs.

The special proceeding remains the exclusive remedy for the refusal to honor the statutory short form POA. GOL 5-1504(4)(b).

*Question: Can a bank or other institution refuse the POA and insist on their own form?*

*Answer: Not unless they have "Good cause" for the rejection.*



**Statutory gifts rider eliminated**, and gifting provisions are included in the “Modification” section, although you still must initial (g) “certain gift transactions,” if you want to include gifting provisions in the modifications section (h).

If gift granting is going to be added in the modification Section, it is recommended that the gifting mirror language previously found in NY GOL 5-1514 (gift rider). These “Gifts” can include items parallel to those found in Grant of Authority (f), which would include

- banking transactions
- insurance transactions
- retirement benefits transactions.

If opening, modifying or terminating accounts, whether held singularly or jointly, they should be specifically listed in the Modification Section.

*Question: Can an Agent make a gift to themselves?*

*Answer: Yes. Any or all power to make gifts can be limited in the Power of Attorney, and as a rule, limiting the ability to make gifts should be encouraged in order to discourage any malfeasance .*

# Statutory Gift Rider Eliminated



## Signing Requirements

**Signing requirements** have been modified, so that a physically incapacitated person may direct someone else sign on their behalf. However, it must be done in the Principal's presence, at their direction, and the person signing is duly acknowledged. The proxy signor cannot be a person designated as the agent, and must write the principals name, and their own name. NY GOL 5-1501B(1)(b).

*Question: Are Powers of Attorney executed before June 13, 2021 still valid?*

*Answer: Yes, they are grandfathered in, but ALL Powers of Attorney executed after June 13, 2021 must adhere to the new form.*



## Witnessing Requirements

**Witnessing requirements.** All Powers of Attorney must be witnessed by two persons who are neither the designated Agents, nor permissible recipients of gifts. Witnessing is done in the same manner as witnesses to a will.

*Question: Can the Notary or attorney act as a witness?*

*Answer: Yes, as long as they are not an Agent or permissible recipient of gifts, in which case they should not be notarizing or acting as the attorney!*



# Potential Abuse

A Power of Attorney is a very powerful document. In the wrong hands, it can lead to fraud, financial abuse, and even destitution. The Principal should be aware of this potential for fraud, so that they can be vigilant against it.

## Common Types of abuse:

**Financial:** An obvious and common misuse of the POA, both in terms of mingling funds, monetary gifts, signing over property, and other forms of financial malfeasance. This can be a grey line area if the Agent is taking care of the bills of the Principal adequately; the Principal may sometimes know of the Agent's financial activities, but not say anything for a variety of reasons.

**Emotional:** A Principal may come to depend on the Agent in a way that can lead to emotional abuse and stress.

**Physical:** If the Principal is confined, either physically or mentally, the Agent may create an environment of physical fear to maintain control of the Principal and their assets.

# Abuse (continued)



Abuse (continued)

If you suspect that there may be a potential for abuse, you should have a frank discussion with the Principal about your concerns.

If you suspect that abuse may already be occurring, there are several organizations you can contact;

The Police;

The County District Attorney's Office

Nassau: 516 571-3800

Suffolk: 631 853-4161

Adult Protective Services

Nassau: 516 227-8405

Suffolk: 631 854-3232

If the person is over 60, the County Enhanced Multidisciplinary Team (E-MDT) may be an option: you can contact me, or look on their website: <https://aging.ny.gov/enhanced-multidisciplinary-team-initiative-e-mdts>



# In Conclusion

The Power of Attorney is a powerful document, and can be a persons most useful tool, or conversely the most harmful weapon.

As an attorney potentially drafting the Power of attorney, issues to closely examine:

The Principal and their abilities;

The reasons for the POA;

The proposed Agent;

The potential for abuse;

Proper execution of the POA.

# A Hypothetical

You receive a phone call from Ms. Y, the ex-wife of Mr. X. She tells you that Mr. X, who is 65 years old, was living independently and had his own business. He suffered a sudden stroke. Two days after the stroke, while still in the Hospital, his son and daughter (not the children of Ms. Y), have him execute a power of attorney, naming the son as the Agent. According to Ms. Y, the son/Agent opened a joint bank account on behalf of Mr. X with the daughter. The two siblings drained Mr. X's bank accounts and liquidated his property, routing the funds through the joint bank account and then into their own personal accounts. According to Ms. Y, Mr. X knew nothing of any of this until he obtained bank statements.

You ask that he come to the office so you can speak with him directly. He comes with Ms. Y, (his ex-wife), and his cousin Mr. Z. Ms. Y does all the talking. He is concerned, she says, about his finances, as his children are not communicating with him about his money, or where his possessions are. He is not interested in criminally charging his children with fraud, but he does not want them to have control of his money. They have paid all his living expenses to date, and he is not in arrears, at least not yet.

What steps do you take?





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Thank you for attending!