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ESTATE PLANNING MEMORANDUM

TO: CPAs, Clients & Associates

FROM: David L. Silverman, Esq.
Shirlee Aminoff, Esq.

DATE: April 2, 2010

RE: Revision of New York Power of Attorney Law Takes Effect

Effective 9/1/09, NY General Obligations Law §5-1501, which governs the content and execution of powers of attorney, was revised and amended. Powers executed prior this date remain valid, but are subject to the amended statute. A power of attorney grants an agent appointed by the principal the authority to make legally binding decisions on the principal's behalf. This instrument is invaluable should the principal later become incapacitated, since the appointment of a legal guardian, who can also make those decisions, requires plenary court proceedings.

The POA must now be signed, dated and acknowledged not only by the principal, but also by the agent. Under the new law, a POA is durable (i.e., not affected by later incapacity) unless it specifically provides otherwise. If a guardian is later appointed, the agent will account to the guardian rather than to the principal. The new POA contains an optional provision whereby the principal can appoint a "monitor" who may request records of transactions by the agent. The statute also provides for a special proceeding to compel an agent to produce records of receipts. Provisions relating to health care billing should allow the agent access to health care records in accordance with HIPPA privacy requirements.

A new "Statutory Major Gifts Rider" (SMGR), if executed simultaneously with the power of attorney, authorizes the agent to make legally binding major gifts on behalf of the principal. The

SMGR must be executed simultaneously with the power of attorney, and with the same formalities governing the execution of a Will. The SMGR may also authorize the agent to “create, amend, revoke, or terminate an inter vivos trust.” The authority of the agent to create joint accounts or to modify a “Totten trust” may also be included in the SMGR. Small gifts (\$500 or less) in a calendar year may be made by the agent without a SMGR. The SMGR may be modified to supplement or eliminate the default provisions provided by new law, provided they are not inconsistent with the default SMGR provisions. A conveyance of real property to a bona fide purchaser for less than adequate consideration would require a SMGR, since the conveyance would be in part a gift.

Under GOL §5-1504, acceptance of the statutory “short form” POA by banks and other third parties is now mandatory. A third party may not refuse to honor the power or SMGR without reasonable cause. The statute provides that it is unreasonable for a third party or bank to require its own form, or to object to the form because of the lapse of time between execution and acknowledgment. (Banks had sometimes insisted that their own powers be used, which created a problem where the principal had become incapacitated.) An attorney may certify that a photocopy of a duly executed power is a true copy, and banks must now accept that copy.

The statute requires that the agent, a fiduciary, observe a “prudent person standard of care,” and imposes liability for breaches of fiduciary duty. Fiduciary duties are imposed on agents appointed under all powers of attorney, including those executed prior to the effective date of the new law. The agent must maintain records and must make those records available within 15 days to a monitor, co-agent, certain governmental entities, a court evaluator, a guardian, or a representative of the principal’s estate. The statute expressly provides that the agent is entitled to compensation for his work. A mechanism is provided by which the agent may resign.