

New Rules for New York Powers of Attorney Raise Opinion Issues

A new law in New York effective September 1, 2009 establishes requirements for powers of attorney executed in New York by individuals. The new law, which revises Title 15 of Article 5 of the General Obligation Law (GOL - § 5-1501 et seq), raises issues for opinion givers.

The operative provision (§ 5-1501B) provides in relevant part as follows:¹

Section 5-1501B. Creation of a valid power of attorney; when effective. 1. To be valid, a statutory short form power of attorney, or a non-statutory power of attorney, executed in this state by an individual, must:

- (a) Be typed or printed using letters which are legible or of clear type no less than twelve point in size, or, if in writing, a reasonable equivalent thereof,
- (b) Be signed and dated by a principal with capacity, with the signature of the principal duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property,
- (c) Be signed and dated by any agent acting on behalf of the principal with the signature of the agent duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property. A power of attorney executed pursuant to this section is not invalid solely because there has been a lapse of time between the date of acknowledgment of the signature of the principal and the date of acknowledgment of the signature of the agent acting on behalf of the principal or because the principal becomes incapacitated during any such lapse of time,
- (d) Contain the exact wording of the: (1) “Caution to the Principal” in paragraph (a) of subdivision one of section 5-1513 of this title; and (2) “Important Information for the Agent” in paragraph (n) of subdivision one of section 5-1513 of this title.

Section 5-1512, on the other hand, recognizes the effectiveness of powers executed by individuals (wherever domiciled) outside New York.

Powers of attorney are often involved in transactions in which legal opinions are given. The power of attorney may be in a separate instrument or it may be embedded in a transaction agreement; it may be labeled as such or it may appear as contractual authority granted to a party. Powers of attorney can be found, for example, in limited partnership and LLC agreements, guarantees, pledges and other security agreements, and underwriting agreements.

To illustrate some of the opinion problems the new law can raise, consider two common situations:

- A new investment fund based in Massachusetts is organized as a Delaware LLC. The LLC Operating Agreement provides that the members by entering into the

¹ The term “power of attorney” is defined (Section 5-1501(10)) to be “a written document by which a principal with capacity designates an agent to act on his or her behalf.”

Operating Agreement give the Manager certain specified powers. You represent a Massachusetts partnership and its individual general partner who are each purchasing LLC interests in the fund. The general partner signs the LLC Operating Agreement when in New York on a business trip. The new law would appear to apply, at least insofar as the general partner signs individually, and if its requirements for signature and acknowledgment (both by the principal and the agent) and cautionary language are not met the powers of attorney in the Operating Agreement would not be valid.² This would create an opinion problem if New York law were covered by the opinion. Even if not covered, having just learned about the new New York law and recognizing the issue, you may need to consider whether giving the opinion is appropriate. Moreover, consider the problem for counsel for the opinion recipient, the fund, if the new law is not complied with.

- You are representing a group of selling shareholders, a number of whom are individuals, in an underwritten public offering by a Delaware corporation through a New York-based underwriter. The Underwriting Agreement, which states that it is governed by New York law, requires that separate powers of attorney be delivered by each selling shareholder at the time the Underwriting Agreement is signed and that an opinion of counsel for the selling shareholders be delivered at the closing three days later covering, among other things, due execution and enforceability of the powers of attorney. The underwriter insists on a New York opinion. You understand that all individual selling shareholders live outside New York, you receive a faxed power of attorney from one of them bearing a 212 area code origination number and you receive an electronically executed power of attorney by email from another individual selling shareholder. While the statute sanctions powers properly executed outside New York (§ 5-1512), execution in New York by some individuals may have occurred.

As these examples show, the new law's application is not confined to New York. It applies to all powers of attorney executed by individuals in New York, even though the individual may be resident or domiciled elsewhere and the agreement or instrument containing the power is governed by non-New York law. Because of its newness, there are a number of other unresolved issues under the statute that could affect opinions. For example, one question is whether powers of attorney executed by an individual granting authority to exercise powers held by that individual as a fiduciary or an officer of an entity are to be treated as powers executed by an individual under the new law.

This memo does not purport to describe all provisions of the statute or to identify all the issues. It is intended to alert you to this legislation that will be of importance in transactions and to opinions that are given in connection with them.

² While the New York statute appears to be aimed at the abuse of powers given by the elderly and in estate planning, there is no exclusion for commercial transactions. It may be arguable that the new law has narrower application than appears and that it is not intended to affect non-statutory powers that do not effect a "major gift." However, the pre-existing statute dealt only with a statutory form, while the new statute deals with powers of attorney generally. Further, § 5-1501(A)(4) states that "Nothing in this title shall be construed to bar the use of any other or different form of power of attorney desired by a person other than an individual as defined in Section 5-1501 of this title."