There's a Reason It's the POWER of Attorney

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There's a Reason It's the POWER of Attorney

By Rose Mary Bailly, Michael E. O'Connor and Jennifer N. Santaniello

The power of attorney is a powerful **life estate planning document**; as attorneys, we should treat it as such, both in the drafting, and in the counseling of our clients on its use. All clients should be advised as to the types of powers of attorney that may be employed, the powers they may delegate, the selection of an agent, and the legal and fiduciary obligations of the agent to the client. This will allow our clients to consider the various issues and decisions that must be addressed through the artful drafting of a power of attorney.

The Importance of the Power of Attorney

First, the attorney must thoroughly explain the importance of the power of attorney.[1] The client should understand that a power of attorney will allow the agent to act on the client's behalf in regard to the client's personal and financial affairs; that the client is, in essence, providing the agent with a blank check. Clients should also understand that, without such a document in place, a family member may not be able to assist them and will have no other choice but to **file for guardianship**. This is a costly, time-

consuming and administratively burdensome process where the court, as opposed to the client, determines who will have power over the client's affairs in the event the client becomes incompetent.

It is the duty of the attorney to inform the client of the importance of a power of attorney in planning for the future. It is also the duty of the attorney to inform the client that the document could potentially be used as a means of financial exploitation and to address with the client how that potential misuse may be mitigated. As many members of the New York State Bar Association are aware, the complexity of the current statutory power of attorney is, for the most part, attributable to the desire of New York State to discourage and decrease such incidences of fraud.[2]

Selecting an Agent

The careful selection of the agent is perhaps the most effective means of reducing the client's vulnerability to the potential misuse of a power of attorney. The attorney should advise the client to select only those persons in whom the client has the utmost faith, confidence and trust. This selection requires the client and attorney to anticipate how such persons would behave under certain circumstances. The attorney should be cognizant of the fact that a client's first inclination may not always be appropriate - for example, is a second spouse necessarily an appropriate choice, if there are adult children from a prior marriage? Should the power be granted to an individual with financial or personal problems that may impair their judgment?

In certain situations it may be appropriate to recommend that the client appoint more than one agent and require that such agents act together, as opposed to permitting each of the agents to act separately. The appointment of two agents who must act together provides an extra layer of protection to the client as each agent may act as a check on the other, so as to assure that no self-dealing takes place.

Preventing Misuse

Pursuant to the recent modification of New York's power of attorney statute, the client should also be counseled on the potential use of a monitor under the new form.[3] The use of a monitor, armed with the power to demand and compel an accounting from the agent, is a potentially powerful tool that may be employed to protect a client from financial exploitation and should not be overlooked. However, before most attorneys and clients become comfortable with the selection of a monitor, certain practical obstacles must be addressed. For example, as the law imposes no **fiduciary duties** on or protection for the monitor, the attorney and the client should consider utilizing the modifications section of the power of attorney to address some of the potential issues that may dissuade a monitor from exercising his or her powers. One option is for the client to provide the monitor with reasonable compensation and reimbursement of costs and expenses with the understanding that the exercise of such a power could be time consuming and may result in litigation. Moreover, the monitor should be indemnified and/or held harmless from any alleged losses to the client and/ or his or her beneficiaries as long as the monitor has acted in good faith.

Another potentially effective means of preventing misuse that should be considered, is limiting the agent's access to the power of attorney after it is executed. A common method has been for the drafting attorney to hold the power until advised that the

client is under a disability. In determining whether this method is to be utilized, consider the obligation of the attorney to the client in verifying the client's purported disability prior to the release of the document.

The use of a springing power may also be presented to the client as an alternative to limiting the agent's access to the power of attorney. A springing power typically provides that an agent's authority to act exists only if a client's physician verifies the client's incapacity. Springing powers, however, are not looked on favorably by financial institutions. Notwithstanding the requirement that a valid power of attorney be honored, the lack of a sanction makes it doubtful that the springing power will be any more agreeable to financial institutions in the future than it has been in the past. The privacy rules of the Health Insurance Portability and Accountability Act (HIPAA) further compound the problems faced by an agent in establishing authority under a springing power.

As some of the most damaging transgressions occur under the gift-giving authority, determining whether the agent should be provided with such power, and to what extent, is an issue that also requires the careful attention of the attorney and client. Providing this power to the agent may be important, as it is commonly used in estate planning to reduce prospective transfer taxes and in Medicaid planning to protect assets from impending long-term health care costs. The potential need for such planning should be evaluated in determining if the gifting power is appropriate and if so, how it should be structured. For example, if the client has an estate of significant value, it may be appropriate to limit gifting to the annual exclusion amount as the potential for Medicaid planning and hence, unlimited gifting would be unlikely. In contrast, if a client is elderly and has limited assets, a broad gifting power may be necessary as this client may need to engage in **Medicaid planning**.

To ensure that the client does not unknowingly provide the agent with the power to make gifts inconsistent with the client's wishes, the client and attorney should consider placing some limitations on the agent's gift-giving powers. For example, the power of attorney may provide that if a gift is to be made to one of the client's descendants, then every member of the particular class to which that descendant belongs must also be provided with a gift of equal value. Another option may be to provide that gifts may only be made if they conform to the disposition of the client's property as provided in the client's last will and testament (or other testamentary substitute).

The client should also understand the fiduciary obligations of the agent to the client and the remedies available to the client should these obligations be breached. New York's guardianship courts, for example, have seen numerous cases where the alleged improper actions of an attorney-in-fact were at issue.[4]

Conclusion

The power of attorney has been, and continues to be a key element of a client's estate plan. It should be discussed fully with the client, drafted carefully, and reviewed periodically to be sure that this powerful document accurately reflects the client's current objectives. The client should understand its importance and not decide hastily on the details. Clearly, the attorney should proactively seek to protect the client from any potential misdeeds and fully counsel the client on the benefits and risks attendant upon its design and use. As Milton Friedman once said, "[t]he power to do good is also the power to do harm."

•1. See, e.g., David Goldfarb, New York State Power of Attorney Law and Proposed Amendments, NYSBA Elder Law Attorney (Summer 2010), p. 7; Rose Mary Bailly & Barbara S. Hancock, Changes for Powers of Attorney in New York, N.Y. St. B.J. (Mar./Apr. 2009). p. 41; Michael M. Mariani, Planning Ahead - Power of Attorney: An Important Estate Planning Document, N.Y. St. B.J. (Oct. 2008). p. 47; Anthony J. Enea, Have You DRA Proofed Your Power of Attorney?, NYSBA Elder Law Attorney (Fall 2007), p. 30.

•2. See N.Y. General Obligations Law §§ 5-1501-5-1514 (GOL). On March 1, 2009, New York adopted comprehensive amendments to New York's power of attorney statute. On August 13, 2010, additional amendments were made to address technical issues and to clarify the ambiguities of the 2009 amendments.

•3. GOL § 5-1509.

•4. See N.Y. Mental Hygiene Law § 81.29(d); M.R v. H.R, N.Y.L.J. (2008); In re Guardian & Prop. of Sally A.M., 19 Misc. 3d 1124(A) (Sup. Ct., Rensselaer Co. 2008); In re Wingate, 169 Misc. 2d 701 (Sup. Ct., Queens Co. 1996); In re Rochester Hosp. (Levin), 158 Misc. 2d 522 (Sup. Ct., Monroe Co. 1993).

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