Determine When Clients' Powers of Attorney Need Recharging

Practitioners should consider five different developments when evaluating whether a client needs an updated power of attorney.

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Over the past decade, several changes to federal and state statutes have dramatically limited the effectiveness of the documents through which clients have conferred powers of attorney. Due to fiduciaries misusing powers of attorney (and subsequent litigation that follows), the adoption of part or all of uniform acts, and the advent of strict privacy laws, multiple states have increased regulation for both medical and financial powers of attorney. Yet, many clients continue to believe that medical and financial powers of attorney drafted ten or even 20 years ago are still effective. These clients are unaware of the potential frustration and cost that will result from having outdated documents. To better service these clients, practitioners must keep abreast of the events that affect powers of attorney and advise their clients accordingly.

Five matters to consider when performing an initial review of a client's existing power of attorney are as follows:

1. Passage of the federal Health Insurance Portability and Accountability Act (HIPAA) in 1996.
2. Adoption by a client's state of the Uniform Health Care Decisions Act (UHCDA).
3. Adoption by a client's state of the Uniform Power of Attorney Act (UPOAA).
4. A named agent's death, incapacity, or relocation too far away to be helpful.
5. Marital separation or divorce if the current power of attorney names the principal's spouse as agent.

When reviewing a client's medical or financial power of attorney, it is crucial for practitioners to check the execution date and look for key provisions in the text of the document affected by such events.

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HIPAA compliance

A health care power of attorney executed prior to 1996 should immediately be updated to account for changes in federal medical record privacy laws. Traditional powers of attorney granted the individual's agent full authority to conduct an individual's affairs as if the agent stood in the place of the individual. As such, health care providers readily accepted the comprehensive, albeit typically short, powers as authorization for the agent to direct the medical affairs of the individual. HIPAA was adopted in 1996, in part, to prevent "fraud and abuse" and to delegate and require regulation and reporting of health matters by the states.[1] The adoption of HIPAA dramatically curtailed the ability of health care providers to release

protected health information to anyone—even an agent named in a power of attorney. Failure to abide by the regulations could result in civil penalties and criminal fines or imprisonment.[2]

The impact of HIPAA is that, to qualify as a representative agent for an individual subject to medical treatment, a health care power of attorney must include specific language in accordance with privacy rules, as may be further addressed by the states. HIPAA should be reviewed in conjunction with each state's health regulations. However, absent a state-by-state review, a conclusion can be drawn that, to be effective, a power of attorney must expressly grant the agent the power to request and receive protected health information,[3] to enter into agreements for medical care, and to authorize the execution of medical procedures. Without these express provisions, an agent holding traditional powers of attorney may be legally prohibited from the information necessary to exercise such power.

Case in point. A New York case, *Mougiannis v. North Shore-Long Island Jewish Health System*,[4] illustrates the danger and frustration that can arise from having an insufficiently updated power of attorney. In 1997, Johanna Mougiannis executed a durable general power of attorney and a health care proxy appointing her daughter as her health care agent in the event that she became "unable to make her own health care decisions."[5] In 2002 and 2003, Mougiannis was hospitalized for bedsores and a fractured hip. The hospital declared Mougiannis "unable to render a reasoned decision concerning her own health care" and granted her daughter access to Mougiannis' medical records during the mother's lengthy hospital stay.

On Mougiannis' discharge from the hospital, her daughter requested a copy of her medical records so that her mother's new caregivers could appropriately treat her. The hospital denied the request, claiming that the daughter's health care agency ended on her mother's discharge from the hospital and that the daughter was not qualified to receive medical records according to New York state law. The daughter sued and petitioned the court to compel release of Mougiannis' medical records.

The documents should be updated with language specifically tailored to address HIPAA requirements.

At trial, the hospital further claimed that HIPAA privacy regulations, which took effect prior to Mougiannis' discharge, prohibited the release of medical records without a signed written authorization from the patient, and federal regulations pre-empted state law. The court, however, found that HIPAA had provided "no clear and definitive mechanism for access to [a patient's] medical records when the patient is not competent to provide [the requisite] consent." Absent issues of federal preemption, the court looked to state law and found clear support for entitling the daughter access to her mother's health records by virtue of being Mougiannis' health care agent.[6]

In its analysis, the court added a cautionary word for practitioners, encouraging the inclusion of HIPAA-specific language: "Despite [the state statute's] plain language, there may be practical reasons for inclusion of language in the [health care power of attorney] expressly authorizing the agent to receive medical information under HIPAA."[7] Likewise, in considering the force of the power of attorney, the court was emphatic: "Clearly a general power of attorney executed prior to enactment of HIPAA is not specific enough to satisfy the strict standards of the law, and attorneys in this field of law must address the heightened requirements in preparing such documents to comply with HIPAA standards."

Planning tip. Estate planning practitioners and clients would do well to follow this advice. Whether a person has executed a broad-based, but simple, general power of attorney or a power of attorney in coordination with a health care proxy or similar document to an agent prior to 1996, the documents should be updated with language specifically tailored to address HIPAA requirements. The cost of revising an outdated power of attorney is minimal compared to the frustration of being denied access to medical records of a loved one in need or the cost of potential litigation that could have been easily avoided.

1 Health Insurance Portability and Accountability Act (HIPAA), Pub. L. No. 104-191, section 1177.

2 *Id.* at section 1176-77.

3 HIPAA defines protected health information to include any "individually identifiable health information" that "is created or received by a health care provider, health plan, employer or health care clearinghouse; and [that] relates to the past, present, or future physical or mental health or condition of an individual...." HIPAA section 1171(6).

4 25 A.D.3d 230 (N.Y., 2005), *aff'g* 2004 N.Y. Misc. LEXIS 3196 (N.Y. Sup. Ct., 5/6/2004) [hereinafter Mougiannis II and Mougiannis I, respectively].

5 Mougiannis II, *supra* note 4 (internal brackets omitted).

6 Citing N.Y. Consolidated Law Service, Public Health § 2982(3) (2003))

7 Quoting Fish, "The 'Schiavo' Case: An Object Lesson for the Health Care Proxy," N.Y.L.J., 12/19/2003, page 3; see also 2-20 Matthew Bender & Company, Inc., *Drafting New York Wills and Related Documents* § 20.06 (4th ed., 2012).

Greater flexibility under the UHCDA

To keep current, clients need to be educated on the provisions adopted in many states to provide individuals with greater flexibility in creating advance health care directives. Over time, state legislatures acted to address growing public concerns for various classes of individuals for whom advance health care planning was a challenge. The problem was that the new laws typically addressed the broader issue of consent to treatment or the narrower issue of terminally ill and dying patients, but not both.[8] The solution to this challenge for most states has been adoption of the UHCDA.

Created in 1993, the UHCDA was promulgated by the Uniform Law Commission (ULC) to engender uniformity among states' laws and to provide a more comprehensive approach to decisions regarding administration or withdrawal of treatment under an individual's health care power of attorney. Under the UHCDA, there are four manners in which health care decisions can be made for a patient:[9]

1. *Individual.* Any adult with capacity or an emancipated minor may give an oral or written instruction to a health care provider, which remains in force even after the individual loses capacity.
2. *Agent.* The individual may also execute a written power of attorney for health care that authorizes an agent to make any health care decision that the principal could make while having capacity.
3. *Guardian.* If the individual becomes incapacitated and did not grant power to an agent, a court may appoint a guardian to make health care decisions on the individual's behalf.
4. *Surrogate.* An individual with capacity may orally designate a surrogate by simply communicating the selection to a supervising health care provider. If the individual does not appoint an agent or surrogate and no guardian is appointed, upon the individual's incapacity, a surrogate may assume the authority to make health care decisions in the same manner as an agent under a power of attorney, subject to a statutory priority list.

As of 2010, 26 states had comprehensive or combined advance directive statutes, which at a minimum combined living wills and proxies in the same law.[10] While only 15 states recognize some form of oral directive,[11] other states, like Missouri and Virginia, have adopted innovative legislation that allows greater flexibility for written directives. In Missouri, individuals can direct treatment decisions with great specificity, including whether to use or withhold antibiotics from their medical care.

Effect of state law. In Virginia, it used to be common for many clients to state their wishes to avoid the application of artificial life support in case of a terminal illness if it would serve only to prolong the dying process. Since adoption of the Virginia Health Care Decisions Act in 2009, many clients now opt to include a proviso that allows the agent to request artificial life support for any purpose during a pre-specified period. Clients often like this buffer of three to 14 days, for example, because among other things it provides (1) time to ensure there is truly no hope of recovery; (2) time for a grown child studying abroad to return to the bedside; or (3) time for family members to grieve.

Additionally, under its Health Care Decisions Act, Virginia permits an individual to grant his or her agent authority to involuntarily admit the individual to a health care facility for treatment of a mental illness.[12]

8 Uniform Law Commission, "Health Care Decisions Act Summary," http://www.uniformlaws.org/ActSummary.aspx?title=Health-Care%20Decisions%20Act (last visited 10/11/2012).

9 *Id.*

10 Sabatino, "The Evolution of Health Care Advance Planning Law and Policy," 88 Milbank Quarterly 211 (June 2010), available at http://www.ohsu.edu/polst/news/documents/TheMilbankQuarterly.pdf (last visited 8/2/2012); Commission on Law and Aging, "Health Care Power of Attorney and Combined Advance Directive Legislation: Selected Features Compared—December 2009" (ABA, 2010), available at http://www.americanbar.org/content/dam/aba/uncategorized/2012_aging_chrt_hcpa_09.authcheckdam.pdf (last visited 10/11/2012).

11 Sabatino, *supra* note 10.

12 Va. Code Ann. § 54.1-2986.2 (2010).

This has become an increasingly valuable tool as complex mental disorders grow in frequency.

Conditions like bipolar disorder are distinctively challenging. Because the disorder is sometimes marked by wild mood swings, it is often difficult to obtain the individual's consent to treatment after the onset of the disorder. Persons suffering from bipolar disorder are also prone to delusions of grandeur and unsustainable spending sprees, for example. Without advance authorization to admit such an individual for mental health treatment, the individual and his or her family may be in danger of irreparable financial ruin.

Proper planning can help to avoid such negative consequences. The UHCDA, supplies a set of default rules that provide a comprehensive approach to determining who can make health care decisions for an incapacitated person and in what manner. Health care powers of attorney executed prior to adoption of the Act by one's state will continue to operate as drafted; however, with the added degree of flexibility and reduced confusion afforded under respective state law, practitioners should encourage their clients to revisit their documents and update them accordingly.

Portability and protection under the UPOAA

The most recent legislation to affect powers of attorney is the adoption by several states of the UPOAA. Practitioners should consider the changes to their state's laws when evaluating clients' planning documents. Drafted in 2006, the UPOAA sought to enhance protections afforded to principals, agents, and those who are asked to rely on an agent's authority as well as to create greater assurance that third parties would accept powers of attorney across state lines.[13] As of the writing of this article, 13 states have adopted the UPOAA:

1. Alabama.
2. Arkansas.
3. Colorado.
4. Idaho.
5. Maine.
6. Montana.
7. Nebraska.
8. Nevada.
9. New Mexico.
10. Ohio.
11. Virginia.
12. West Virginia.
13. Wisconsin.[14]

The UPOAA facilitates greater acceptability of powers of attorney across state lines by recognizing the portability of powers of attorney drafted in other states.

As a first step, the UPOAA makes all powers of attorney durable if drafted under the Act.[15] This means that unless the document specifically states otherwise, the power of attorney remains effective after the incapacity of the principal. It also updates the areas in which an agent may be authorized to act, but requires specific language authorization by the principal where certain authority could dissipate the principal's property or alter the principal's estate plan.[16] These powers are often called "hot powers" and include, in part, the power to amend inter vivos trusts, to make gifts, and to designate beneficiaries of various insurance policies.[17]

Secondly, the UPOAA clarifies the rights and duties of agents. On occasion, since they are often family members, agents can be faced with making choices in which the agent has conflicting interests, or by which the agent may stand to benefit alongside the principal.[18] Recognizing this, the UPOAA permits the principal to include in the power of attorney a clause that relieves an agent of liability for breach of duty, so long as the agent acts honestly and in the best interest of the principal.[19] To reinforce this, a principal is also permitted to include an exoneration clause in the power of attorney for the benefit of the agent.

Lastly, the UPOAA facilitates greater acceptability of powers of attorney across state lines by recognizing the portability of powers of attorney drafted in other states and by offering broad protections for the good faith acceptance or refusal of an acknowledged power of attorney.[20] For example, third parties like banks are allowed to accept photocopies of powers of attorney as valid.[21] A third party may also refuse an otherwise valid power of attorney if it suspects that "the principal may be subject to physical or financial abuse, neglect, exploitation or abandonment by the Agent."[22]

13 Uniform Law Commission, "Why States Should Adopt UPOAA," http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UPOAA (last visited 10/11/2012).

14 Uniform Law Commission, "Uniform Power of Attorney Act: Legislative Fact Sheet," http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Power%20of%20Attorney (last visited 10/11/2012).

15 Uniform Power of Attorney Act (UPOAA) § 104 (2006).

16 Uniform Law Commission, *supra* note 13.

17 UPOAA § 201(a) (2006).

18 Uniform Law Commission, *supra* note 13.

19 UPOAA § 115 (2006).

20 Uniform Law Commission, *supra* note 13.

21 UPOAA § 106(d) (2006).

22 UPOAA § 120(b)(6) (2006).

23 Bird, "What Happens With a Power of Attorney if Someone Gets Divorced?," http://info.legalzoom.com/happens-power-attorney-someone-gets-divorced-21082.html (last visited 10/11/2012).

24 *Id.*

25 *Id.*

As with the UHCDA, the UPOAA does not make existing powers of attorney obsolete; however, clients may benefit from a document update to reflect the increased portability and selection of provisions afforded by the UPOAA as adopted by their state.

Death, disability, or distance of an agent

Legislative enactments are not the only events that alter the effectiveness of one's powers of attorney. Sometimes the personal lives of the document's principals and agents change in such a way as to warrant an update, particularly when the change involves the principal's agent. It is fairly apparent that if an agent dies or becomes incapacitated by a medical or mental condition, the agent would not be able to function as intended in the event of the principal's own absence or incapacity. If the power of attorney is governed by a state's Health Care Decisions Act, the default rules would allow for a court-appointed guardian or other subrogate to fill the role of the incapacitated agent. The principal may find it more favorable, however, to revise the power of attorney and select a new agent.

In similar fashion, if the agent moves far enough away so as to make it impossible or impractical to act on behalf of the principal—in making ongoing health care decisions, for example—it may be more desirable to appoint a new agent that lives closer to the principal. Practitioners who make a habit of inquiring not only as to changes in the lives of their clients, but also the lives of their clients' agents, will be better able to provide value to those who rely on their legal advice.

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Divorce or marital separation

A final set of life changes that can affect the operation of a client's power of attorney is divorce or marital separation. Because the grant of power of attorney enables the agent to acquire and dispose of property and make other legal commitments on behalf of the principal, the power of attorney in the hands of a disgruntled spouse can have disastrous results.[23] Only a handful of states provide for automatic termination of spousal agency upon divorce. It is a good idea, however, for a principal proactively to revoke the agency of his or her spouse upon separation or notice of divorce because the spouse retains agency up until the date of the divorce decree and can wreak financial havoc along the way.[24]

Additionally, third parties with whom the spouse is authorized to transact will be relieved of liability for transacting with an agent in good faith without notice of revocation, especially in states that have adopted the UPOAA.[25] For this reason, principals should immediately apprise such parties of the change in agency status so that they will know to refuse acceptance of the power of attorney if approached by the spouse.

Conclusion

Changes in law and life circumstances can have a significant impact on the effectiveness of clients' planning documents. The following powers of attorney should receive special attention:

1. All durable general powers of attorney or health care powers of attorney executed before enactment of the federal HIPAA in 1996.
2. Health care powers of attorney executed before a state's adoption of the UHCDA, if the client would benefit from added flexibility.
3. Non-medical powers of attorney executed before a state's adoption of the UPOAA to ensure greater protection of agents and greater acceptance by third parties.
4. All powers of attorney executed in which a designated agent has died, become incapacitated, or moved too far away to be helpful.
5. All powers of attorney executed but affected by a marital separation or divorce, and where the current power of attorney names the principal's spouse as agent.

Through methodical and periodic review, practitioners can ensure that their client's documents function as intended and avoid the cost and frustration of too little, too late. ■