MORE POWER TO THE POWER-OF-ATTORNEY

By Joseph A. Bollhofer, Esq.

Almost everyone has at least heard of a Power-of-Attorney, and many people have them.

A Power-of-Attorney ("POA") is simply the written authority to act on someone else's behalf. The concept has been around for a long time. Ancient writings show that they were in use by Babylonian and Persian rulers during the fifth and sixth centuries B.C. Along with a Last Will and Testament, Health Care Proxy and Living Will (instructions to withdraw life support), a POA is part of a basic estate plan.

Under POAs signed before September, 2009, the person authorized to act is known as an "attorney-in-fact." This person does not have to be an attorney, and often is not. The law in New York and the statutory form POA were dramatically changed effective September 1, 2009. The person authorized is now known as an "agent." The person giving the POA is known as the "principal." The law was fine-tuned effective September 12, 2010 and, of course, a new form was created. If the correct form was signed and notarized during the applicable period, it is still valid. This is true no matter how old the POA is. However, you may have a problem convincing third parties to honor a POA that is many years old because they might not believe it is still valid, and they might not believe that it was the correct form in existence when it was signed. The statutory form has changed several times in the past 20 years.

POAs are often used for convenience, such as when one person is acting on behalf of another at a house closing. However, a comprehensive POA, which provides additional powers beyond those listed in the statute, can be worth more than its weight in gold if the need arises.

A good POA is "durable," that is, it is still valid if the principal is incapacitated. In fact, the statutory POA forms in existence since September 1, 2009 contain a presumption that they are durable unless they state otherwise. A comprehensive POA, together with a Health Care Proxy, can avoid the need for the appointment of a guardian by the Court on behalf of an incapacitated person. Guardianship proceedings are expensive, time consuming and often emotionally draining. A comprehensive POA will permit an agent to act on behalf of a principal to do virtually everything that the principal could do.

The following should go without saying, but I'll say it anyway: The agent has a legal, ethical and moral obligation to act in the best interests of the principal. Although a POA can be written to authorize the agent to make gifts of the principal's property, including gifts to the agent himself, the agent always has an undivided obligation to the principal. This is a concept that, unfortunately, more than a few agents do not understand, or refuse to recognize. A glaring abuse of authority by an agent who essentially stole his uncle's money inspired New York's legislature to dramatically change the law and the basic form in 2009.

Under the new statute, if the principal desires to give to his agent authority to make gifts of any type in excess of $500.00 in the aggregate per year, that authority must be spelled out in a separate Gift Rider to the POA. There are other optional safeguards in the POA, such as the right to appoint a third party to monitor the agent's actions. All in all, under the new statute, the POA has become a considerably more complex document. These complexities are designed to make people think more carefully about the authority that they give.

The standard statutory form POA contains a list of categories under which the agent can act. The law allows the POA to be modified in various ways. The most common modifications provide for the addition of various powers to suit a particular person's circumstances. For instance, in a comprehensive POA, commonly certain powers are added, such as the authority to create trusts, both revocable and irrevocable, and to transfer assets into those trusts. Also, the power to modify or revoke trusts often becomes important, as does the power to make applications for benefits to various agencies, such as the Social Security Administration, Veterans Administration and Department of Social Services.

Some important limitations to remember:

1. The agent under a POA does not have the authority to act until he or she signs the document.
2. The authority automatically ends when the principal dies.
3. The principal may revoke the authority at any time.
4. The agent under a POA has no authority over property of the principal held in a trust. That authority belongs to the named trustee.

The potential importance of a POA can not be overstressed, especially the usefulness and flexibility of a POA with expanded powers. Of course, the trustworthiness of the agent, and his or her willingness to get proper advice, are absolutely necessary. I could list many circumstances under which POAs are needed, but just one probably will suffice: If two persons, even husband and wife, own real property together, and one is incapacitated (that is, can not convince a notary public that he knows he is signing a

deed) the house can not be sold without a POA or the appointment by a court of a guardian. At that point, it is too late to sign a POA. A properly written POA is, at the very least, cheap insurance.

Editor's Note:

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