Federal HIPAA law now recommends new Power of Attorney- Special Report

By Kenneth A. Vercammen

A federal regulation known as the Health Insurance Portability and Accountability Act (HIPAA) was recently adopted regarding disclosure of individually identifiable health information. This necessitated the addition of a special release and consent authority to all healthcare providers before medical information will be released to agents and interested persons of the patients. The effects of HIPAA are far reaching, and can render previously executed estate planning documents useless, without properly executed amendments, specifically addressing these issues. As HIPAA affects not only new documents, any previously executed documents are affected as well. Any previously executed Powers of Attorney, Living Wills, Revocable Living Trusts, and certainly all Medical Directives now require HIPAA amendments.

As average Americans, we work 80,000 hours in a lifetime, or 45 to 55 years. In spite of all the resources and assets we earn, the vast majority do not take the time to create a Power of Attorney.

National statistics indicate that 80% of Americans die without leaving a Will. Even more do not have a Power of Attorney. There are several reasons for this: fear of death or disability; procrastination; and misinformation (people presume that only the rich or married with children need to have Wills or Power of Attorney). Whatever the excuse, it is clear that people would benefit from having a Power of Attorney.

In the absence of a Power of Attorney or other legal arrangement to distribute property if you become disabled, your family or partner cannot pay your bills or handle your assets. The result can be lengthy delays.

Reasons to have a Power of Attorney

What are these powers of attorney?

A Power of Attorney is a **written** document in which a competent adult individual (the "principal") appoints another competent adult individual (the "attorney-in-fact") to act on the principal's behalf. In general, an attorney-in-fact may perform any legal function or task which the principal has a legal right to do for him/herself. You may wish to sign a Power of Attorney giving your partner the power to handle your affairs if you become ill or disabled.

The term "**durable**" in reference to a power of attorney means that the power remains in force for the lifetime of the principal, even if he/she becomes mentally incapacitated. A principal may cancel a power of attorney at any time for any reason. Powers granted on a power of attorney document can be very broad or very narrow in accordance with the needs of the principal.

Why is Power of Attorney so important?

Every adult has day-to-day affairs to manage, such as paying the bills. Many people are under the impression that, in the event of catastrophic illness or injury, a live-in partner, or child can automatically act for them. Unfortunately, this is often wrong, even when joint ownership situations exist. A Power of Attorney allows your partner or another person to administer your assets during your lifetime, either upon disability or now.

The lack of a properly prepared and executed Power of Attorney can cause extreme difficulties when an individual is stricken with severe illness or injury rendering him/her unable to make decisions or manage financial and medical affairs. New Jersey has a detailed, expensive legal procedures, called Guardianships or conservatorships, to provide for appointment of a Guardian. These normally require lengthy, formal proceedings and are expensive in court. This means involvement of lawyers to prepare and file the necessary papers and doctors to provide medical testimony regarding the mental incapacity of the subject of the action. The procedures also require the involvement of a temporary guardian to investigate, even intercede, in surrogate proceedings. This can be slow, costly, and very frustrating. In addition, the domestic partner can be challenged in a guardianship by the incapacitated person's family members.

Advance preparation of the Power of Attorney could avoid the inconvenience and expense of guardianship proceedings. This needs to be done while the principal is competent, alert and aware of the consequences of his / her decision. Once a serious problem occurs, it is usually too late.

The Power of Attorney can be effective immediately upon signing or only upon disability. Some examples of legal powers contained in the Power of Attorney are the following:

1. **REAL ESTATE:** To execute all contracts, deeds, bonds, mortgages, notes, checks, drafts, money orders, and to lease, collect rents, grant, bargain, sell, or borrow and mortgage, and to manage, compromise, settle, and adjust all matters pertaining to any real estate or lands in which I have an interest. This includes the power to sell all land I own, including any interest I have in my address above.

2. **ENDORSEMENT AND PAYMENT OF NOTES, ETC.:** To make, execute, endorse, accept, and deliver any and all bills of exchange, checks, drafts, notes and trade acceptances. To pay all sums of money, at any time, or times, that may hereafter be owing by me upon any bill of exchange, check, draft, note, or trade acceptance, made, executed, endorsed, accepted, and delivered by me, or for me, and in my name, by my Agent.

3. **MEDICAL RECORDS ACCESS:** To be able to access my medical and hospital records under Federal Law HIPAA. Healthcare providers shall release medical information to my Agent. This authorization expires upon my death or upon my written revocation.

4. **STOCKS, BONDS, AND SECURITIES:** To sell any and all shares of stocks, bonds, or other securities now or hereafter, belonging to me, that may be issued by an association, trust, or corporation whether private or public, and to make, execute,

and deliver any assignment, or assignments, of any such shares of stock, bonds, or other securities.

5. **CONTRACTS, AGREEMENTS, ETC.:** To enter into safe deposit boxes, and to make, sign, execute, and deliver, acknowledge, and perform any contract, agreement, writing, or thing that may, in the opinion of my Agent, be necessary or proper to be entered into, made or signed, sealed, executed, delivered, acknowledged or performed.

6. **BANK ACCOUNTS, CERTIFICATES OF DEPOSIT, MONEY MARKET ACCOUNTS, ETC.:** To add to or withdraw any amounts from any of my bank accounts, Certificates of Deposit, Money Market Accounts, etc. on my behalf or for my benefit. To make, execute, endorse, accept and deliver any and all checks and drafts, deposit and withdraw funds, acquire and redeem certificates of deposit, in banks, savings and loan associations and other institutions, execute or release such deeds of trust or other security agreements as may be necessary or proper in the exercise of the rights and powers herein granted; Without in any way being limited by or limiting the foregoing, to conduct banking transactions as set forth in section 2 of P.L. 1991, c. 95 (c. 46:2B-11).

7. **TAX RETURNS, INSURANCE AND OTHER DOCUMENTS:** To sign all Federal, State, and municipal tax returns, insurance forms and any other documents and to represent me in all matters concerning the foregoing.

8. **GIFT GIVING POWERS:** To make gifts in amounts which my Agent in his sole, absolute and unfettered discretion shall deem appropriate in any given year on my behalf.

You should contact your attorney to have a Power of Attorney Prepared, together with a Will, Living Will and other vital Estate Planning documents.

A Power of Attorney is an appointment of another person as one's agent. A Power of Attorney creates a principal-agent relationship. You, the grantor of the Power of Attorney, are the principal. The person to whom you grant the Power of Attorney is your agent. The agent is normally called an "attorney-in-fact." The attorney-in-fact does not become the owner of your property, but is merely permitted to deal with it within the terms set out in the Power of Attorney. Since an attorney-in-fact has the power to deal with your property, you, naturally, must be careful to give such a power only to a trustworthy person. You have entrusted to your attorney-in-fact those powers which are stated in your Power of Attorney.

The Power of Attorney if effective upon signing is a "durable power." This means that if you should become incompetent and be unable physically or mentally to handle your own affairs, the Power of Attorney, nevertheless, will continue to be as good as it was on the day that you signed it. If you become incompetent, the Power of Attorney will terminate only upon 1) a Court's declaring you to be incompetent or 2) upon your death. The attorney-in-fact may continue to use the Power of Attorney and acts performed under the Power of Attorney will be valid until either of those two events occurs, after which time acts performed by the attorney-in-fact will no longer be valid.

Consequently, even if you become incompetent but no Court declares you to be so the Power of Attorney will still be effective.

Most people who give a Power of Attorney to someone else do it with the thought that if they should become ill or incapacitated or if they should travel, the Power of Attorney will permit the holder of it to pay their bills and to handle all of their affairs for them as limited in the Power of Attorney. This is what your attorney-in-fact may do for you under the Power of Attorney which I have prepared for you.

The granting of a Power of Attorney is not like the creation of a joint tenancy in property. Under a joint tenancy, each of the joint tenants has a property interest in the property so held, whereas, a person holding a Power of Attorney, while having the power to deal with the property, does not own any part of it nor can that person become the owner of it under the Power of Attorney by virtue of the Power of Attorney itself. This, however, does not prevent the holder of the Power of Attorney from transferring the property to himself or herself. This is another reason for giving such a power only to one whom you can trust.

Whenever your attorney-in-fact exercises any of the powers granted under the Power of Attorney, your attorney-in-fact must be prepared to show the Power of Attorney to anyone who questions the right to use it. If your attorney-in-fact deals with the title to real estate, it will be necessary for the Power of Attorney to be recorded. I see no reason to record the Power of Attorney until such time as property may be conveyed unless there is fear that the document might be lost.

Occasionally when real estate is dealt with by an attorney-in-fact, an abstractor or a title insurance company will raise a question regarding the use of the Power of Attorney. Unfortunately, there is no way that we can control this. This is indeed unfortunate, but you have no other inexpensive recourse when you use a Power of Attorney.

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