

## THE NEED FOR POWER OF ATTORNEY

*With more Americans living into fragility, POAs and other advanced directives are becoming more important.*

Presented by Barry S. Laban, CPA

**The point of the POA.** A Power of Attorney is a legal instrument that delegates an individual's legal authority to another person. If an individual is incapacitated or mentally incompetent, the POA assigns a trusted party to make decisions on his or her behalf.

There are *nondurable*, *springing* and *durable* Powers of Attorney. A nondurable Power of Attorney often comes into play in real estate transactions, or when someone elects to delegate their financial affairs to an assignee during an extended absence. A springing Power of Attorney "springs" into effect when a specific event occurs (usually an illness or disability affecting an individual).<sup>1</sup>

A "durable" Power of Attorney allows an assignee, or Agent, to act on behalf of a second party, or Principal, even after the Principal is not mentally competent or physically able to make decisions. Once a Principal signs (executes) a durable Power of Attorney, it may be used immediately, until it is either revoked by the Principal or the Principal dies.

Of course, even after a POA goes into effect, the Principal can still make financial and legal decisions on his or her own. The Principal can also elect to have the POA take effect immediately, not just at a point in the future when they lose the ability to make these decisions. You can also appoint multiple Agents.

**What the POA allows in financial terms.** Financially, a Power of Attorney is a tremendously useful instrument. An Agent can pay bills, write checks, make investment decisions, buy or sell real estate or other hard assets, sign contracts, file taxes, even arrange the distribution of retirement benefits.

Of course, a POA can stipulate what an Agent can and can't do financially. There are some things that are expressly forbidden, no matter what you stipulate. For example, your Agent can't use your assets on his or her behalf (which often constitutes elder abuse) or change or write a will. But he or she can establish a trust.

**Advanced healthcare directives: HCPOAs and Living Wills.** Alzheimer's Disease, Parkinson's Disease, ALS and other maladies can eventually rob people of the ability to articulate their wishes, and this is a major reason why people opt for a Health Care Power of Attorney or a Living Will. There are differences between the two.

A Health Care Power of Attorney (also called a "healthcare proxy") allows an Agent to make medical decisions for a Principal, should that loved one become incapacitated or mentally incompetent. A person does not have to be facing death for a HCPOA to be put into effect.

A Living Will gives an assignee similar powers of decision, but this advanced directive only applies when someone faces certain death. It may articulate whether the loved one wants to be hospitalized at the end of life, or have surgery, blood transfusions, resuscitation, or other medical procedures administered. The assignee has the authority to carry out the wishes of the incapacitated party.

It is a wise move to draft these documents and have them in place before a diagnosis of some degenerative or crippling disease, or at least immediately after one. A HCPOA or Living Will must comply with state laws.

**Who should have copies of these healthcare directives?** You, your attorney, any doctors treating your loved one, and any hospital, assisted living facility, or nursing home involved in his or her care. Assuming you are the assignee, another copy should be in the hands of a family member or friend you trust in case anything debilitating happens to you.

**A hitch: the HIPAA Privacy Rule.** In 2003, the Health Insurance Portability and Accountability Act (HIPAA) became law, and it stated that an employee's confidential health records must be protected from unauthorized dissemination. So today, a Health Care Power of Attorney should include an "Authorization for Disclosure of Protected Health Information". This permits a health care provider to transmit PHI to doctors and hospitals under the HIPAA Privacy Rule. Without it, you could have a problem in a medical emergency, because most health care providers won't provide PHI without the express written authorization of the patient (a HIPAA medical release form). In fact, doctors and hospitals can face fines and sanctions for violating the HIPAA Privacy Rule.

**No power without a signature.** Please remember: no Power of Attorney, HCPOA, or Living Will is valid unless it is signed and notarized and/or properly witnessed. It seems unthinkable that some people would draft these documents and never sign them ... but to borrow an analogy, some smoke detectors are bought but never installed.

**Would you like to learn more?** Then meet with an eldercare or estate planning attorney. You can find one with the help of an insurance advisor knowledgeable about long term care and eldercare issues, or with the help of a qualified financial advisor who has assisted families with legacy planning. Now is the best time to understand these options.

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