

# THE GRODBERG LAW FIRM, LLC

*Legal Solutions to Keep Your Golden Years Golden*

Volume XXIV, Number 4

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Winter 2009

## IS YOUR POWER OF ATTORNEY WORTH THE PAPER IT'S PRINTED ON?

### *Four Details To Know Before You Sign*

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This article deals specifically with Powers of Attorney. It is the second in a series of articles that address the value of your legal documents.

The following may be used as a checklist to determine whether or not your Power of Attorney is really worth the paper it is printed on.

#### **A. What a Power of Attorney Is and Does:**

As citizens in America, we enjoy the right to choose. We wake up in the morning and decide what to eat, what to wear, and what to do with the day. We pick where we are going to live. We select how to invest our assets and how to spend those assets. Clearly, the most vital possessions we have are the freedoms to direct the activities that make up our everyday lives. When a person composes a Power of Attorney, they are electing to give someone else control of many of these very same freedoms.

A Power of Attorney is a legal document through which a person, known as the Principal, gives another person, the Agent, the right to take certain specific actions on his/her behalf.

Unfortunately, some clients and attorneys treat a Power of Attorney as a relatively insignificant document; while in fact, a Power of Attorney may actually be the

most important contract a person can sign during his/her life. The reason it is so important a document is because, in it, the Principal is ultimately giving her individual right to choose to someone else. However, this does not mean the Principal gives up the right to act for herself.

A Power of Attorney can immediately give powers to the Agent in what is called a Durable Power of Attorney. Some Powers of Attorney only allow the Agent to act if the Principal is incapacitated – this type is known as a Springing Power of Attorney. Moreover, Powers of Attorney can give many or few powers.

#### **B. Specific Powers:**

Even though many lawyers fail to treat a Power of Attorney with the importance it deserves, the Law does the opposite. In fact, when a Judge reviews a Power of Attorney, there is a legal rule that says if a power is not specifically contained in a Power of Attorney, then it is treated as if the Principal did not intend to give the power.

**Powers of Attorney must contain specific, detailed powers, and multiple paragraphs outlining the powers given from the Principal to the Agent.**

If your Power of Attorney has a paragraph reflecting the following, as a result of the way the powers have been interpreted, your Power of Attorney may potentially be useless:

***"I the Principal give you the Agent the power to do any and all things I can do during my life."***

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Because of the way courts interpret Powers of Attorney, a general statement like that quoted above, gives NO power to the Agent. Most experienced Elder Law attorneys have begun to make separate Powers of Attorney for specific purposes. So generally, a Client will receive a "General" Power of Attorney, which contains over twenty separate paragraphs identifying the powers conveyed to the Agent. In addition, a Real Estate Power of Attorney is helpful for real property transactions.

Probably the most important type of Power of Attorney is the Health Care Power of Attorney. Many Clients are familiar with Living Wills, or financial powers, but they do not make a Health Care Power of Attorney. As a direct result of the Health Care Privacy Act, a Health Care Power of Attorney has become vitally important. Consider the following example:

*Mrs. Green is in a hospital. Mrs. Green's daughter, Fran, receives a phone call that Mrs. Green is being sent to a nursing facility for rehabilitation. Fran objects, but the Hospital ignores her pleas because she does not have the specific power to prevent the facility transfer. As odd as it sounds, Fran should be happy that she was called in advance of the discharge. Without a release of her mother's health care information, permitted by Mrs. Brown's Health Care Power of Attorney, the Hospital did not have to notify Fran that her mother is being discharged.*



### C. Duties of the Agent

Many clients are lead to believe that they will have personal liability as an Agent for their actions on behalf of their Principal. Potential Agents often ask: "If I am the power of attorney, will I have to use my money for my mother (the Principal)?"

The answer is no – unless the Agent acts outside his or her powers. Otherwise, the Agent, in essence, has stepped into the shoes of the Principal. Only the Principal can be held accountable for the actions of the Agent that are enabled by the powers given in the Power of Attorney. The following further illustrate this idea:

*Mrs. Brown is in a nursing home. Her son, Marvin, uses a Power of Attorney to give himself \$50,000. Unless the Power of Attorney specifically says that Marvin can make a gift to himself **as the Agent**, then by making the gift Marvin would be violating his duty to Mrs. Green. Mrs. Green could sue her son to reverse the gift, if she so desires.*

### D. Proper Execution Checklist

- \_\_\_ A Power of Attorney must be signed by the Principal.
- \_\_\_ A Power of Attorney can name one agent, or two or more agents. The Agents can be required to act together or allowed to act alone.
- \_\_\_ A Power of Attorney should name contingent Agents in case the original Agent dies, resigns, or is unable to act.
- \_\_\_ A Power of Attorney should specifically make reference to a New Jersey statute in the paragraph granting banking powers.
- \_\_\_ In New Jersey a Power of Attorney requires one witness. However, other States require two witnesses, so it makes sense to have two witnesses on

the Power of Attorney if it is to be used outside New Jersey.

- The Witness cannot be an Agent or a contingent Agent.
- A Power of Attorney must be notarized and if it is going to be used to transfer real property there must be an “Acknowledgement” at the end (more than just the normal “notary” language).
- A Power of Attorney which will be used to transfer stock must also be stamped with a Medallion Guarantee.

### **Conclusion**

When preparing a Power of Attorney, make sure to weigh all your values and options. For example, consider what is more important, buying a house or giving someone the right to arrange for your home health care? Taking a job, or giving someone the right to access your bank account? Renting a car, or giving someone the right to sell your house?

Be certain to ensure the Agent that you choose is ideal and prepared to handle the challenging task. Remember, a Power of Attorney is one of the most important decisions to make. It is essential to take caution with it and to be prepared for everything. If you feel it is too much to handle on your own, do not hesitate to contact an experienced Elder Law attorney.

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